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NORTH CAROLINA REPORTS
VOL. 184

CASES ARGUED AND DETERMINED

IN THF

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1922

REPORTED BY
ROBERT C. STRONG

RALEIGH
MITCHELL PRINTING COMPANY
STATE PRINTERS
1922

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5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1922

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
WILLIAM A. HOKE,
W. P. STACY,
W. J. ADAMS.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

*JOSEPH L. SEAWELL.

OFFICE CLERK:

EDWARD C. SEAWELL.

MARSHAL AND LIBRARIAN:

MARSHALL DeLANCEY HAYWOOD.

*Succeeded by Edward C. Seawell, office clerk, January 12, 1923.

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.
J. Loyd Horton	Fifth	Pitt.
[1]O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
[2]C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
[3]W. E. Brock	Thirteenth	Anson.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

[1]Succeeded by Henry A. Grady, Clinton.
[2]Succeeded by N. A. Sinclair, Fayetteville.
[3]Succeeded by A. M. Stack, Monroe.

SOLICITORS

EASTERN DIVISION

[1]J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
[2]Walter D. Siler	Fourth	Chatham.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
[3]H. E. Norris	Seventh	Wake.
Woodus Kellum	Eighth	New Hanover.
[4]S. B. McLean	Ninth	Robeson.
[5]S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
[6]John C. Bower	Twelfth	Davidson.
[7]M. W. Nash	Thirteenth	Richmond.
[8]G. W. Wilson	Fourteenth	Gaston.
[9]Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
[10]G. D. Bailey	Eighteenth	Transylvania.
[11]Geo. M. Pritchard	Nineteenth	Madison.
[12]Gilmer A. Jones	Twentieth	Macon.

[1]Succeeded by Walter L. Small, Washington.
[2]Succeeded by Clawson L. Williams, Sanford.
[3]Succeeded by William F. Evans, Raleigh.
[4]Succeeded by T. A. McNeill, Lumberton.
[5]Succeeded by L. P. McLendon, Durham.
[6]Succeeded by J. F. Spruill, Lexington.
[7]Succeeded by F. D. Phillips, Rockingham.
[8]Succeeded by John G. Carpenter, Gastonia.
[9]Succeeded by Zeb V. Long, Statesville.
[10]Succeeded by James M. Carson, Rutherfordton.
[11]Succeeded by J. E. Swain, Asheville.
[12]Succeeded by George C. Davis, Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1922

The following were licensed to practice law by the Supreme Court, Fall Term, 1922:

ALLEN, WILLIAM MARION	Elkin.
BINKLEY, WILLIAM GWYN	Lewisville.
BOYETTE, MOSELEY GRAHAM	Warsaw.
BRASWELL, MARION ASTOR	Whitakers.
CASEY, ANDREW HARRISON	New Castle.
COBURN, ROBERT LEE	Plymouth.
COOPER, WILLIAM ARTHUR	Burlington.
CROUSE, RUSH FLOYD	Sparta.
CROWDER, AVA ELMIRA	Raleigh.
CUMMINGS, ALFRED BEN	Winston-Salem.
DIXON, RICHARD DILLARD	Edenton.
DOWNING, DENNIS GARLAND	Fayetteville.
EATON, THOMAS RENFROE	Henderson.
ERVIN, JOSEPH WILSON	Morganton.
FLEMING, ALDEN LAURIMER	Raleigh.
GARDNER, ERNEST ALVAH	Shelby.
GOODE, HENRY GRADY	Maiden.
GLOVER, MILEY COLUMBUS	Bailey.
GUNTER, GERTRUDE	Raleigh.
GUNTER, LAUGHTON BRUCE	Holly Springs.
HAMILTON, ALVAH LAWRENCE	Atlantic.
HARRIS, CLYDE PEEBLES	Louisburg.
HAWKINS, THOMAS WILLIAMS, JR.	Charlotte.
HENRY, RAYMOND LEROY	Raleigh.
HICKS, OSCAR VERNAN	Goldsboro.
HILL, BARRINGTON TAYLOR	Wadesboro.
HOBBS, WALTER SCOTT	Clinton.
HOGE, JAMES FULTON	Beckley, W. Va.
HORTON, PHINEAS EDGAR, JR.	Winston-Salem.
HORTON, HUGH GLENN	Williamston.
INGLE, JOHN JACKSON	New York.
JENKINS, KELLY	Roanoke Rapids
JOHNSON, CAMPBELL CARRINGTON	Raleigh.
KINDLEY, KENNETH JOHN	Mt. Pleasant.
KITTRELL, THOMAS SKINNER	Henderson.
KOHLOSS, GLADSTONE LEIGHTON	Salisbury.
LEWELLYN, HENRY HARRISON	Mount Airy.
LIIPFERT, FRANCIS JULIUS, JR.	Winston-Salem.
LLOYD, JOSEPH THOMAS	Summerfield.
LOFTIN, MADRID B.	Mount Olive.
LOVE, JOHN WESLEY	Raleigh.
LUMPKIN, WILLIE LEE	Youngsville.
MCARTHUR, GLENN TYRE	Durham.
MCCALL, FREDERICK BAYS	Charlotte.
MCCULLOUGH, JOSEPH EGGLESTON	Washington, D. C.
MCLEOD, BERNARD FRANKLIN	Buie's Creek.
MCLEOD, MARTIN CLIFTON	Red Springs.
MCPHERSON, THOMAS JAMES	Raleigh.

MOORE, THOMAS OWEN	New Bern.
MOORE, WILLIAM	Raleigh.
MOREAU, ALBERT JUBERTIE, JR.	Washington. D. C.
MOSELEY, ROBERT FRANKLIN	Clinton.
MURRAY, JOHN LOWE	Durham.
NANCE, HENRY LESLIE	Winston-Salem.
NEWMAN, ISAAC BEAR	Wilmington.
OLIVER, CHARLES HAMPTON	Henderson.
PEEL, JULIUS SLADE	Williamston.
PERRY, DAVID WOLFE	Nashville.
POWELL, GILBERT EGERTON	Durham.
PLATT, ARTHUR CHESTER	Spartanburg, S. C.
RAY, J. FRANK, JR.	Franklin.
RENDLEMAN, JOHN LUTHER, JR.	Salisbury.
ROSE, HERSCHELL VAUGHAN	Smithfield.
ROSS, ROBERT MARION	Charlotte.
RUCKER, RICHMOND	Winston-Salem.
SHAW, EUGENE GUILFORD	Greensboro.
SMALL, JOHN HUMPHREY, JR.	Washington.
SMITH, NATHANIEL MCNAIR	Raeford.
SPRUILL, FRANK SHEPHERD, JR.	Rocky Mount.
STEWART, JACK EDWIN	Winston-Salem.
STEVENS, HENRY DAVID	Asheville.
STOKES, THOMAS DODDS	Ruffin.
SWOPE, LESLIE MILLER	High Point.
SULLIVAN, WILLIAM ADDISON	Asheville.
TAYLOR, FLOYD HERBERT	Buie's Creek.
THAMES, JOHN ALLAN	Washington, D. C.
THORP, ISAAC DAVENPORT	Rocky Mount.
TRON, ROBERT AUGUSTUS	Valdese.
WALKER, CHARLES MURCHISON	Fayetteville.
WALTON, KESTER LOWELL	Biltmore.
WATTS, CHARLES CECIL	Raleigh.
WEATHERS, CARROLL WAYLAND	Raleigh.
WILLIFORD, DAVID MCHENRY	Dunn.

The following were granted license under chapter 44, Public Laws, Extra Session 1920:

DOUGHTON, DADE TWIGGS	Georgia.
WALKER, CLARENCE NEWTON	Georgia.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1923

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, 1923
First District	February 6
Second District	February 13
Third and Fourth Districts	February 20
Fifth District	February 27
Sixth District	March 6
Seventh District	March 13
Eighth and Ninth Districts	March 20
Tenth District	March 27
Eleventh District	April 3
Twelfth District	April 10
Thirteenth District	April 17
Fourteenth District	April 24
Fifteenth and Sixteenth Districts	May 1
Seventeenth and Eighteenth Districts	May 8
Nineteenth District	May 15
Twentieth District	May 22

SUPERIOR COURTS, SPRING TERM, 1923

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 does not include changes made by the Legislature of 1923.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Connor.*

Camden—Mar. 12.
Beaufort—Jan. 15*; Feb. 19† (2); April 9†; May 7; May 14†.
Gates—Mar. 26.
Tyrrell—Jan. 29†; April 23; June 4†.
Currituck—Mar. 5; April 30†.
Chowan—April 2.
Pasquotank—Jan. 1† (2); Feb. 12†; Mar. 19.
Hyde—May 21.
Dare—May 28.
Perquimans—Jan. 22; April 16.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Kerr.*

Washington—Jan. 8 (2); April 16†.
Nash—Jan. 29†; Feb. 26†; Mar. 12; April 30*; May 7†; May 28†.
Wilson—Feb. 5*; Feb. 12†; May 14*; May 21†; June 25†.
Edgecombe—Jan. 22; Mar. 5; April 2† (2); June 4 (2).
Martin—Mar. 19 (2); June 18.

THIRD JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Daniels.*

Northampton—April 2 (2).
Hertford—Feb. 26; April 16 (2).
Halifax—Jan. 29 (2); Mar. 19 (2); June 4 (2).
Bertie—Feb. 12 (2); May 7 (2).
Warren—Jan. 15 (2); May 21 (2).
Vance—Mar. 5 (2); June 18 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Horton.*

Lee—Mar. 26 (2); May 7.
Chatham—Jan. 15; Mar. 19†; May 14.
Johnston—Feb. 19† (2); Mar. 12; April 23 (2).
Wayne—Jan. 22 (2); April 9† (2); May 28 (2).
Harnett—Jan. 8; Feb. 5† (2); May 21.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Grady.*

Pitt—Jan. 15†; Jan. 22; Feb. 19†; Mar. 19 (2); April 16 (2); May 21† (2).
Craven—Jan. 8*; Feb. 5† (2); April 9†; May 14†; June 4*.
Carteret—Jan. 29; Mar. 12; June 11. (2)
Pamlico—April 30 (2).
Jones—April 2.
Greene—Feb. 26 (2); June 25.

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Calvert.*

Onslow—Mar. 5; April 16† (2).
Duplin—Jan. 8† (2); Jan. 29*; Mar. 26† (2).
Sampson—Feb. 5 (2); Mar. 12† (2); April 30 (2).
Lenoir—Jan. 22*; Feb. 19† (2); April 9; May 21*; June 11†. (2)

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Cranmer.*

Wake—Jan. 8*; Jan. 29†; Feb. 5*; Feb. 12†; Mar. 5*; Mar. 12† (2); Mar. 26† (2); April 9*; April 16† (2); April 30†; May 7*; May 21† (2); June 4*; June 11† (2).
Franklin—Jan. 15 (2); Feb. 19† (2); May 14.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Sinclair.*

New Hanover—Jan. 15*; Feb. 5† (2); Mar. 5† (2); Mar. 19*; April 16† (2); May 14*; May 28† (2); June 11*.
Pender—Jan. 22; Mar. 26† (2); May 21.
Columbus—Jan. 29; Feb. 19† (2); April 30 (2).
Brunswick—Jan. 8†; April 9; June 18†.

NINTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Devin.*

Robeson—Jan. 29*; Feb. 5†; Feb. 26† (2); April 2 (2); May 14† (2).
Bladen—Jan. 8‡; Mar. 12*; April 23†.
Hoke—Jan. 22; April 16.
Cumberland—Jan. 15*; Feb. 12† (2); Mar. 19† (2); April 30† (2); May 28*.

TENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Bond.*

Alamance—Feb. 26*; April 2†; May 7†; May 28† (2); June 18*.
Durham—Jan. 8† (2); Feb. 19*; Mar. 5† (2); April 30†; May 21*.
Granville—Feb. 5 (2); April 9 (2).
Orange—Mar. 19; May 14†.
Person—Jan. 29; April 23.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Shaw.*

Ashe—April 9 (2).
Forsyth—Jan. 8 (2); Feb. 12† (2); Mar. 12† (2); Mar. 26*; May 21† (3).
Rockingham—Jan. 22* Feb. 26† (2); May 14; June 18† (2).
Caswell—April 2.
Alleghany—May 7.
Surry—Feb. 5; April 23 (2); June 25† (2).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Stack.*

Davidson—Feb. 26 (2); May 7†; May 28 (2).
Guilford—Jan. 15*; Jan. 22† (2); Feb. 12† (2); Mar. 12*; Mar. 19† (2); April 16† (2); April 30*; May 14† (2); June 11†; June 18*.
Stokes—April 2*; April 9†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Harding.*

Stanly—Feb. 5†; April 2; May 14†.
Richmond—Jan. 8*; Mar. 19†; April 9*; May 28†; June 18†.
Union—Jan. 29*; Feb. 19† (2); Mar. 26; May 7†.
Anson—Jan. 15*; Mar. 5†; June 25 (2).
Moore—Jan. 22*; Feb. 12†; May 21†.
Scotland—Mar. 12†; April 30; June 4.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Long.*

Mecklenburg—Jan. 8*; Feb. 5† (3); Feb. 26*; Mar. 5† (2); April 2† (2); April 30† (2); May 14*; May 21† (2); June 11*; June 18†.
Gaston—Jan. 15*; Jan. 22† (2); Mar. 19† (2); April 16*; June 4*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Webb.*

Montgomery—Jan. 22*; April 9† (2).
Randolph—Mar. 19† (2); April 2*.
Iredell—Jan. 29 (2); May 14 (2).
Cabarrus—Jan. 8 (2); Feb. 26†; April 23 (2).
Rowan—Feb. 12 (2); Mar. 5† (2); May 7.

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Finley.*

Catawba—Feb. 5 (2); May 7† (2).
Lincoln—Jan. 29.
Cleveland—Mar. 26 (2).
Burke—Mar. 12 (2).
Caldwell—Feb. 26 (2); May 21† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Ray.*

Alexander—Feb. 19.
Yadkin—Mar. 5.
Wilkes—Mar. 12; June 4†.
Davie—Mar. 19; May 28† (2).
Watauga—Mar. 26 (2).
Mitchell—April 9 (2).
Avery—April 23 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge McElroy.*

Transylvania—April 9 (2).
Henderson—Mar. 5 (3); May 28† (2).
Rutherford—Feb. 5† (2); May 14 (2).
McDowell—Jan. 22† (2); Feb. 19 (2).
Yancey—Mar. 26 (2).
Polk—April 23 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Bryson.*

Buncombe—Jan. 8 (3); Feb. 5† (3); Mar. 5 (3); April 2† (3); May 7 (3); June 4† (3).
Madison—Feb. 26; Mar. 26; April 23; May 28.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1923—*Judge Lane.*

Haywood—Jan. 8† (2); Feb. 5 (2); May 7† (2).
Cherokee—Jan. 22 (2); April 2 (2).
Jackson—Feb. 19 (2); May 21† (2).
Swain—Mar. 5 (2).
Graham—Mar. 19 (2); June 4† (2).
Clay—April 16.
Macon—April 23 (2).

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

Compiled from the Court Calendar of A. B. Andrews, Esq., of the Raleigh Bar: as amended by the Extra Session of 1921.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

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. ALBERT T. WILLIS, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. C. M. SYMMES, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

IRVIN B. TUCKER, United States District Attorney, Whiteville.
J. D. PARKER, Assistant United States District Attorney, Smithfield.
WILLIS G. BRIGGS, Assistant United States District Attorney, Raleigh.
R. W. WARD, United States Marshal, Raleigh.
S. A. ASHE, Clerk United States District Court, Raleigh.

WESTERN DISTRICT

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

Greensboro, first Monday in June and December. R. L. BLAYLOCK, Clerk; H. M. CAUSEY, Chief Deputy; MYRTLE DWIGGINS, Deputy.

Statesville, third Monday in April and October. J. B. GILL, Deputy Clerk.

Asheville, first Monday in May and November. J. Y. JORDAN and O. L. MCLURD, Deputy Clerks.

Charlotte, first Monday in April and October. E. S. WILLIAMS, Deputy Clerk.

Wilkesboro, fourth Monday in May and November. MILTON MCNEILL, Deputy Clerk.

Salisbury, fourth Monday in April and October. J. B. GILL, Deputy Clerk, Statesville.

OFFICERS

FRANK A. LINNEY, United States District Attorney, Charlotte.
CHAS. A. JONAS, Assistant United States Attorney, Lincolnton.
THOS. J. HARKINS, Assistant United States Attorney, Asheville.
BROWNLOW JACKSON, United States Marshal, Asheville.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1922

J. L. BAKER v. J. D. WINSLOW.

(Filed 13 September, 1922.)

1. **Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.**

Only the exceptions mentioned and discussed in the appellant's brief are considered in the Supreme Court on appeal.

2. **Slander—Damages—Mental Suffering.**

In an action for slander, general damages, when recoverable, include actual or compensatory damages, embracing compensation for those injuries which the law will presume must naturally and proximately result from the utterance of words which are actionable *per se*, and may include injury to the feelings and mental suffering endured in consequence.

3. **Same—Actionable Per Se—Pleadings—Proof.**

Where the words spoken and published in an action for slander are actionable *per se*, general damages need not be pleaded or proved.

4. **Slander—Evidence—Punitive Damages.**

In an action for slander, words falsely charging the plaintiff, the defendant's tenant or cropper, with stealing a part of the defendant's crop raised by the plaintiff upon his lands, are actionable *per se*, when the words are spoken in the presence of others.

5. **Slander—Malice—Damages—Compensatory Damages—Justification.**

Where the words spoken by the defendant of and concerning the plaintiff in an action for slander are actionable *per se*, the law will imply malice on the part of the defendant, which entitles the plaintiff to compensatory or actual damages; this kind of malice does not necessarily mean personal ill-will, but a wrongful act knowingly and intentionally done the plaintiff without just cause or excuse.

6. Same—Punitive Damages.

Where the words uttered of and concerning the plaintiff in an action for slander are actionable *per se*, the finding of malice upon the issue does not alone establish the right of the jury to award punitive damages, unless there is actual malice, in the sense of personal ill-will, or there are features of aggravation, as when the wrong is done the plaintiff wantonly or under circumstances of rudeness or oppression, or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights.

7. Appeal and Error—Instructions—Slander—Actual Damages—Punitive Damages.

A charge of the court in an action for slander is not objectionable in failing to repeat the distinction between implied malice, for which punitive damages may not be awarded, and actual malice, in the sense of personal ill-will, etc., upon which the jury may award punitive damages in their discretion, when it appears, upon considering the entire charge, that the judge has once, at least, clearly distinguished the implied malice that would alone entitle the plaintiff to actual or compensatory damages, from actual or express malice, or personal ill-will, which would permit the addition of punitive damages, under the evidence in the case.

8. Same—Harmless Error—Requests for Instruction—Burden of Proof.

Where three issues in an action for slander have been submitted to the jury upon the pleadings and evidence, as to whether the defendant spoke the words defamatory of the plaintiff's character; as to their falsity and the amount of the damages, exception of defendant that the court failed to put the burden of proof of the third issue upon the plaintiff, is untenable, where it clearly appears from the charge that the burden of the first two issues was expressly placed upon the plaintiff, and that of the third by clear implication, so that the jury, acting with intelligence, must have so understood it, it being for the defendant to ask for more explicit instructions, should he have so desired.

9. Verdict—Impeachment—Jurors—Clerks of Court—Evidence—Hearsay Evidence.

Jurors may not impeach, by direct testimony, their verdict after it has been rendered; nor may this be done indirectly upon testimony of the clerk, or another, of a conversation he had overheard between some of the jurors, after the verdict was rendered, the latter being further objectionable as hearsay; and where the trial judge has found the facts to be as set out in the clerk's affidavit, and overrules the motion as a matter of law, it is, in effect, a conclusion that evidence of this character was not admissible for the purpose, and would not, therefore, be considered by him.

10. Slander—Damages—Punitive Damages—Evidence—Worth of Defendant.

Where the matter published, in an action for slander, is actionable *per se*, and the verdict has been found against the defendant on the issue as to justification, upon further evidence tending to show actual malice, personal ill-will, or such aggravation of circumstances permitting the recovery of punitive damages, evidence concerning the defendant's worth or financial standing upon this element of damages is competent. The proper issues in actions for slander with or without the plea of justification, and the verdicts thereon, discussed by WALKER, J.

BAKER *v.* WINSLOW.

APPEAL by defendant from *Allen, J.*, at January Term, 1922, of PASQUOTANK.

This is an action of slander.

Plaintiff alleged in his complaint that he resides in Pasquotank County, and has lived there since he was twelve years of age, he now being fifty-two years old, and that he has always borne a good character and reputation among his neighbors and in the community where he made his home, and that he deserved the same.

That the defendant resides in Elizabeth City, North Carolina, and has for a number of years.

That in December of the year 1920 the defendant came to the home of the plaintiff and, in the presence of John Baker and divers other persons, spoke of and concerning the plaintiff in the following language: "You are stealing my corn and carrying it away"; and defendant asked the plaintiff didn't he (plaintiff) promise not to move any of the crops before he had settled up with him (defendant), and plaintiff replied: "I have not removed an ear of corn, Mr. Winslow." Defendant replied: "You are the lyingest and most vicious old devil I ever met up with—you have been stealing my rent corn all the year and attending your crop on it, and lying about it. You are a damn old lying, thievish rascal." The plaintiff ordered the defendant to go into the road, and he left and went into the road, and then returned and said, "I hate to say so, but you are a damned old lying son of a bitch."

That the defendant intended to charge, and did charge, this plaintiff as being a thief, and guilty of the high crime of larceny.

That the defendant intended to charge, and did charge, the plaintiff with the crime of larceny, to humiliate and defame and ruin his good name and character among his fellow-men.

That the charges made by the defendant were false and malicious, and were made for the purpose of humiliating and degrading the plaintiff, and to ruin his good name and fame in the community in which he lives.

That by reason of the defendant's malicious, slanderous, and false charges made against this plaintiff, he has been greatly damaged.

Plaintiff further alleges that he has suffered damages in a large sum for which he prays judgment.

The charge relating to stealing the crops grew out of the relations between the parties, the defendant being the landlord, or principal, and the plaintiff his tenant, or cropper, the charge being that plaintiff had stolen a part of the crop which belonged to the defendant.

Defendant answered and denied the alleged slander. He admitted that the plaintiff now resides in Pasquotank County, North Carolina; that the defendant had not sufficient knowledge or information to form

a belief of the other allegations set out in the complaint, as to the plaintiff's former character and reputation, and therefore denies the same.

Defendant then answers further that, again insisting that he had made no such charges against the plaintiff as outlined and set forth in the complaint, this defendant insists that each and every utterance he has made of and concerning the plaintiff at any time has been only of such character as is consistent with the truth, and was true in every particular.

That plaintiff, while a tenant of defendant, without paying his rent and advancements, and without notifying defendant, and against defendant's express orders, and in violation of his agreement, had removed, or caused or permitted to be removed, a part of the crops. All of which this defendant pleads in mitigation, and pleads, as well, the truth of any utterances made by him in justification and bar of plaintiff's right of recovery.

There was evidence tending to support the allegations and denials of the respective parties. The jury returned the following verdict:

"1. Did defendant, in substance, speak of the plaintiff the language alleged in the complaint? Answer: 'Yes.'

"2. If so, was same false? Answer: 'Yes.'

"3. What damages, if any, is plaintiff entitled to recover? Answer: '$1,925.'"

Judgment was entered upon the verdict, and the defendant appealed, after assigning errors.

Aydlett & Simpson for plaintiff.
Ehringhaus & Small for defendant.

WALKER, J., after stating the case: We will consider only the exceptions mentioned and discussed in the appellant's brief, the others being abandoned either expressly or by the terms of our rule. Rule 34 (174 N. C., 837); *S. v. Coble,* 177 N. C., 588; *S. v. Henderson,* 180 N. C., 735.

The defendant's first exception, as stated in the record and his brief, was taken to that part of the charge of the court as to the damages, the particular ground of the objection being that the court, in its instructions, permitted the jury to include in the damages, those of the plaintiff's mental anguish or suffering. The charge is clearly sustained by the authorities. In *Fields v. Bynum,* 156 N. C., 413, it being an action for slander, we held that general damages include actual or compensatory damages, and embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se,* such as the charge made in this case. Such damages include injury to the feelings

and mental suffering endured in consequence. General damages need not be pleaded or proved. 18 A. & E., 1081, 1082, 1083, and cases cited in notes. That case was approved in *Barringer v. Deal,* 164 N. C., 246, which also was an action for slander. In our case the verdict finds that the words, which in law are actionable *per se,* were uttered by the defendant, and that they were false. The law, therefore, implies malice, which entitles the plaintiff to actual or compensatory damages. Malice, in this connection, and within the scope of the issues, does not necessarily mean personal ill-will, but a wrongful act, knowingly and intentionally done the plaintiff without just cause or excuse, and the law implies this kind of malice in actions for slander when the words falsely spoken of and concerning the plaintiff are actionable *per se.* But punitive or exemplary damages also may be awarded, in the sound discretion of the jury, and within reasonable limits, but the right to punitive damages does not attach, however, as a conclusion of law, because the jury have found the issue of malice in such action against the defendant. The right under certain circumstances to recover damages of this character is well established with us. But they are not to be allowed unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury. *Holmes v. R. R.,* 94 N. C., 318. They are not to be included in the damages by the jury as a matter of course simply because of the slander, but only when there are some features of aggravation, as when the wrong is done willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Ammons v. R. R.,* 140 N. C., 200 (majority opinion by *Justice Hoke*); *Stanford v. Grocery Co.,* 143 N. C., 419, 427. The rule as to compensatory damages is also stated there. As said by the *Chief Justice* in *Osborn v. Leach,* 135 N. C., 628: "Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering." And again: "Compensatory damages include all other damages than punitive, thus embracing not only special damages as direct pecuniary loss, but injury to feelings, mental anguish, etc.," citing 18 A. & E., (2 ed.), 1082; Hale on Damages, pp. 99, 106. And, as directly pertinent to the charge upon this question to which exception was taken, we may conveniently and appropriately refer now to the *Holmes case, supra,* where it was held that if there is rudeness or insult or "aggravating circumstances calculated to humiliate or disgrace the plaintiff, or party injured, punitive damages may be added to those which are merely actual or compensatory." *Rose v. R. R.,* 106 N. C., 170; *Knowles v. R. R.,* 102 N. C., 66. Other cases to the same effect upon the questions of compensatory and vindictive or punitive damages in actions, and especially in slander, are *Hamilton v. Nance,*

159 N. C., 56; *Cobb v. R. R.*, 175 N. C., 132; *Hayes v. R. R.*, 141 N. C., 199; *Smithwick v. Ward*, 52 N. C., 64; *Bowden v. Bailes*, 101 N. C., 612; *Cotton v. Fisheries Products Co.*, 181 N. C., 151. The Court, by *Justice Stacy*, in the recent case of *Cotton v. Fisheries Products Co., supra*, said: "The defendants' eighth and last exception relates to the charge on punitive damages. The basis of this assignment is that there is no evidence from which the jury would be justified in awarding such damages, and that it was, therefore, error to instruct them upon the subject. We think his Honor properly submitted this phase of the case to the jury for their consideration. Not only did the language of defendant's employees amount to a charge of larceny, actionable *per se* under our law, but the accompanying acts in causing plaintiff's goods to be opened publicly and searched in the presence of divers persons gave such pronounced color and tone to the entire setting of the case as to warrant the jury in assessing exemplary damages. Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendants' conduct must have been actually malicious or wanton, displaying a spirit of mischief towards plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. In a proper case, like the one at bar, both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury," referring to several of the cases we have cited above. So that it follows from the settled principles of the law we have shown to be applicable here that we cannot sustain the defendant's first assignment of error. The two cases cited by his counsel in his brief (*Wilkie v. R. R.*, 128 N. C., 113, and *Smith v. R. R.*, 126 N. C., 712), as to damages for mental suffering, do not support the exception and relate to a different principle than the one involved here. The learned judge correctly charged the jury as to compensatory damages, allowing them to include therein those for mental anguish.

The next exception is equally untenable. This exception, as stated by plaintiff's counsel, was taken to that portion of the charge of the court which permits a recovery of punitive damages if the jury should find defendant, in uttering the words, "was actuated by malice." The ground of objection to the charge being the failure of the court to distinguish between implied malice (for which punitive damages are not recoverable) and actual malice, upon which alone such damages may be predicated. For this he cites *Stanford v. Grocery Co.*, 143 N. C., 428. But

that case does not uphold his contention, and is irrelevant to it. There the judge failed to distinguish between implied malice and actual malice, in the sense of personal ill-will, when charging the jury upon the question of punitive damages, but left the jury to infer that imputed malice, necessary only to fix responsibility, was sufficient to justify an award of punitive damages. The Court said in that case that the term "malice" as used here, in reference to the question of punitive damages, unlike its meaning in the issue fixing responsibility, means actual malice in the sense of personal ill-will, and the jury should be instructed that if they find the issue fixing responsibility in favor of the plaintiff, they shall award him compensatory damages, and if they further find that the wrongful act was done from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness, or oppression, or in a manner which showed a reckless and wanton disregard of the plaintiff's rights, they may, in addition to compensatory, award punitive damages, citing *Holmes v. R. R., supra; Ammons v. R. R., supra; Bowden v. Bailes,* 101 N. C., 612; *Kelly v. Traction Co.,* 132 N. C., 369; *S. c.,* 133 N. C., 418; 1 Joyce on Damages, sec. 442, citing numerous authorities; 19 A. & E., 704. But the presiding judge (Hon. O. H. Allen) made no such mistake in this case. He had clearly defined the kind of malice that would fix liability in law and entitle the plaintiff to actual or compensatory damages, and he did so substantially, at least, in accordance with correct principles. It is said in 25 Cyc., pp. 536, 537, 538: "In most jurisdictions, exemplary, punitive, or vindictive damages are recoverable in actions for defamation of character. In some jurisdictions, however, recovery is limited to actual or compensatory damages, and no punitive or exemplary damages are recoverable. In no case are such damages allowed as a matter of right, but their recovery rests in the sound discretion of the jury. If express malice on the part of defendant is shown, exemplary or punitive damages are proper. So, if the defamation was recklessly or carelessly published, punitive damages may properly be awarded as well as where the defamation was induced by the personal ill-will of defendant. On the other hand, there are many authorities to the effect that if express malice or recklessness equivalent thereto is not shown on the part of defendant, exemplary damages cannot be awarded. In some other jurisdictions it is held that where malice exists exemplary damages may be given, and that it is immaterial whether the malice is actual or implied in law." But in this jurisdiction, where there is actual malice (as *contra* distinguished from imputed malice, or malice implied by the law from intentionally doing that which in its natural tendency is injurious), the jury may award punitive damages. This has long since been settled by numerous of our decisions. *Gilreath v. Allen,* 32 N. C., 67; *Bowden v. Bailes,* 101 N. C., 612;

Upchurch v. Robertson, 127 N. C., 127; *Stanford v. Grocery Co., supra;* 17 R. C. L., sec. 202. The following instruction of the court (Hoke, J., presiding), in *Upchurch v. Robertson, supra,* was approved by this Court, when it said: "The instruction was also correct when the court refused to charge the jury that there was no evidence of actual damage to the plaintiff, and therefore the jury could not award to the plaintiff vindictive damages. He properly instructed them that 'the damages were very much in the discretion of the jury. If the first issue was answered "Yes," they could award the plaintiff what in their judgment was a full compensation for injury; and, if satisfied by the greater weight of evidence that the charge was made by defendant from personal malice, with a design and purpose to injure the plaintiff, or if in the judgment of the jury the charge was made in such manner that it showed a reckless and wanton disregard for plaintiff's rights, the jury might increase the amount awarded in compensation by exemplary or punitive damages.'" 127 N. C., at p. 129. In his charge to the jury in this case, the court, after explaining malice in law which entitles the plaintiff to actual or compensatory damages, referred to the question of punitive damages, and, while the judge did say to the jury that the plaintiff could recover only compensatory damages, and not punitive damages, "unless they find that the defendant was actuated by malice," this meant more than malice in law, and manifestly referred to express or actual malice, or malice in fact. The judge had already defined very fully the term "implied malice," as entitling the plaintiff to compensatory damages, and in further charging the jury, he could not have referred to anything but express malice, as being that which actuated, which means "incited" or "instigated," defendant to commit the wrong. Besides, the judge afterwards made his meaning perfectly clear, when he said to the jury, if they found that the circumstances showed aggravation and malice, exemplary damages could also be awarded. While, perhaps, the difference between the two kinds of malice could have been more sharply and distinctly drawn, it was sufficiently done to prevent misunderstanding.

The next exception is taken to that supposed failure of the court to place the burden of proof as to the third issue upon the plaintiff. Reading and interpreting the charge as a whole, it is clearly to be inferred that this was done, expressly as to the first two issues, and, by clear implication, as to the third. An intelligent jury could not have concluded, under the charge, that the burden was on the defendant to prove the damages, but that it rested upon the plaintiff himself. If the defendant desired more specific instructions, he should have asked for them. *Simmons v. Davenport,* 140 N. C., 407; *S. v. Jones,* 182 N. C., 785.

The next exception was taken to the refusal of the court to set aside the verdict because it was what is called a "quotient verdict." The

motion was based on the affidavit of the clerk of the court that R. L. Griffin and two other jurors said in his presence and hearing that each of the jurors stated in writing what he was willing to give, the several amounts being then added together and the result divided by twelve, and that the jury returned as their verdict the amount so found. The affidavit of the clerk, the record states, was admitted and considered by the court over the objection of the plaintiff. The judge declined to hear or consider the affidavits of jurors upon this question, and made this entry in the minutes of the court: "The court heard and considered the affidavit of the clerk, and found the facts to be true as therein stated, and that the verdict was arrived at in the manner described. Upon this finding of fact, the court declined, as a matter of law, to set aside the verdict. The court found as a fact that there was no influence brought upon the jury, or misconduct on the part of the jury in arriving at their verdict, other than as set out in the above findings." The affidavit of the clerk as to what the jurors said was incompetent, and should not have been heard, or considered by the judge. If the jurors could not be heard to impeach their own verdict directly by affidavits, we are unable to understand how it could be done indirectly by affidavit as to what three of them had said in the hearing of the clerk. This is rank hearsay, and the court will not listen to what they thus say when, if they had been under oath, and their evidence subjected to the ordinary tests, they would not be heard. It is familiar learning that jurors cannot be heard to impeach their verdict. If that were allowed, law-suits would seldom be determined. *Coxe v. Singleton,* 139 N. C., 361-363. A juror cannot be heard to impeach the verdict returned into court after its record. The principle, succinctly stated in *Bishop v. State,* 9 Ga., 121 (4), that "the affidavit of a juror will not be received to impeach his verdict," has been reiterated too often to permit of space for citations. *Redfearn v. Thompson,* 10 Ga. App., 550, at p. 558. There are many cases in this and other jurisdictions, decided with substantial uniformity, to the same effect.

The record states that the court declined, as a matter of law, to set aside the verdict. By this the judge meant that while he had found the affidavit of the clerk to be true, it was not competent for him to consider it, on the motion to set aside the verdict, because otherwise it would, in effect, allow jurors to impeach their own verdict, which they cannot do. As thus understood, the ruling was correct. *Purcell v. R. R.,* 119 N. C., 732; *McDonald v. Pless,* 268 U. S., 264 (59 L. Ed., 1300). The judge should have refused to consider the affidavit at all, and he practically did so.

The last exception is to the admission of testimony concerning the wealth of the defendant. This was competent for the jury to consider on the question of punitive damages. 17 R. C. L., sec. 201; *Reeves v.*

Winn, 97 N. C., 246 (2 Am. St. Rep., 287); *Bowden v. Bailes,* 101 N. C., 612; *Tucker v. Winders,* 130 N. C., 147; *Cotton v. Fisheries Products Co.,* 181 N. C., 152; *Harman v. Cundiff,* 82 Va., 239; *Dandall v. Evening News Asso.,* 97 Mich., 136; *Holmes v. Holmes,* 64 Ill., 294. "Whenever punitive damages may be awarded, evidence of the financial condition of the defendant is admissible in behalf of the plaintiff," per *Allen, J.,* in *Arthur v. Henry,* 157 N. C., 393, 404, citing *Tucker v. Winders, supra.*

We have held that the correct issues in actions to recover damages for slander, where the words alleged are actionable *per se,* and in which justification is not pleaded and privilege is not claimed, are:

1. Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint?

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

If the first issue is answered "No," the case is at an end. If answered "Yes," the law, in the absence of justification, says that the charge is false and malicious, and it is then the duty of the jury to award compensatory damages, and they may, in addition, award punitive damages if there is actual malice, which may be inferred by the jury in some cases from the circumstances. *Stanford v. Grocery Co.,* 143 N. C., 419.

If justification is pleaded, the issues are:

1. Did the defendant speak of and concerning the plaintiff the words in substance, as alleged in the complaint?

2. If so, were they true?

3. What damages, if any, is plaintiff entitled to recover?

If the first issue is answered "No," or the second "Yes," there can be no recovery; and if the first is answered "Yes" and the second "No," the jury may award damages. This is true because the utterance of words actionable *per se* implies malice, and in the absence of a plea of justification, or when the plea is entered and the issue is answered against the defendant, the law says the words are false. *Hamilton v. Nance,* 159 N. C., 59. This correctly summarizes the questions to be determined in such cases, where both compensatory and punitive damages are claimed. The jury in this case have found that there was no justification for the slander uttered by the defendant of and concerning the plaintiff, so that under our formula as to the issues, he was entitled to recover compensatory damages, and if he showed actual malice, he was also entitled to have the question of punitive damages submitted to the jury, and they may consider the wealth of the defendant upon the question of punitive damages. It was held in *Harman v. Cundiff, supra:* "If they find from the evidence that the defendant spoke of and about the plaintiff the defamatory words charged in the declaration, with actual malice

towards the plaintiff, they may give exemplary damages, and in ascertaining the damages they shall consider the plaintiff's standing and that of the defendant, and the wealth of the defendant is only to be considered so far as it tends to show the defendant's rank and influence in society, but not as showing his ability to pay."

The case was hotly contested throughout, but those considered by us embrace all of the material exceptions upon which reliance appears to have been placed by the defendant, and we find that none of them is tenable, for the reasons we have stated.

The words of the defendant, used by him in the presence of others, which it was intended they should, and which they did hear, the jury said were not only not justified but false, and, besides being unjustifiable and false, they were uttered maliciously about the plaintiff before bystanders, and to humiliate and degrade him among his friends and neighbors there, and they no doubt had the intended effect. It is no wonder that the jury awarded the plaintiff a full verdict. He appears to have deserved it.

There is no error in the case, or record, and it will be so certified.

No error.

ADA V. WHITEHURST ET AL. V. R. L. HINTON.

(Filed 13 September, 1922.)

Discovery—Evidence—Examination of Parties—Statutes—Appeal and Error—Parties.

An affidavit in support of a motion in the cause, to allow the plaintiffs to examine the defendant adversely under the provisions of C. S., 900, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law, under a paper-writing purporting to be a will, but which had been set aside by the court upon *caveat* entered, and that this was the only available way in which certain information necessary in the action could be obtained, etc., *is held* sufficient to sustain the order of examination allowed by the clerk and approved by the judge of the Superior Court, and defendant's appeal is accordingly dismissed in the Supreme Court. *Jones v. Guano Co.*, 180 N. C., 319, cited and distinguished.

APPEAL by defendant from *Bond, J.*, at March Term, 1922, of PASQUOTANK.

Motion in a civil action, pending in the Superior Court of Pasquotank County, for an order to examine the defendant adversely, as provided

by C. S., 900 *et seq.* From an order of the clerk allowing the motion, the defendant appealed to the judge in term, who, upon a hearing, approved the order and judgment of the clerk, and remanded the cause for further proceedings in accordance therewith. Defendant appealed.

Meekins & McMullan and Ehringhaus & Small for plaintiffs.
W. I. Halstead and W. A. Worth for defendant.

STACY, J. Appellant admits that the present appeal must be dismissed as premature, under authority of *Monroe v. Holder,* 182 N. C., 79, unless, as alleged, the order for the examination was made upon an insufficient affidavit. In support of this position, defendant relies upon the recent case of *Jones v. Guano Co.,* 180 N. C., 319, and authorities there cited. Hence, the single question presented for decision is the sufficiency of the affidavit filed by the plaintiffs and upon which the instant order was granted.

It appears from the petition, which was duly verified and used as an affidavit herein, that the plaintiffs are the grandchildren of John L. Hinton, deceased; and, as such, are entitled to be numbered among his heirs at law; that in 1910 the defendant, acting under a paper-writing purporting to be the last will and testament of said decedent, took charge of his entire estate, both real and personal, and exercised complete control, supervision, and management of the same, collecting and using all the rents and profits derived therefrom, and occupying the lands and premises to the exclusion of the plaintiffs and those under whom they claim; that the plaintiffs were minors at the time of the death of their grandfather, the said John L. Hinton, and were not then fully aware of their rights, or capable of understanding the real value of their interest in his estate; that in 1918 the plaintiffs, after reaching their majority, filed a *caveat* to the alleged will of their ancestor, which was sustained upon the ground of undue influence—the defendant having participated therein—and the said will was thereupon adjudged to be invalid; that the plaintiffs have brought this action to impeach the accounts filed by the defendant, while acting in a fiduciary capacity as executor under the paper-writing above mentioned, and to require a full and accurate accounting of all the properties which have come into his hands as such executor, and which rightfully belong to the plaintiffs. It is further alleged in the petition that the defendant has in his possession certain books and papers, and also possesses exclusive knowledge of matters and things connected with said estate which the plaintiffs deem necessary and essential to an intelligent drawing of their complaint. They further aver that, in no other way, is said information accessible to or obtainable by them, and that this application is made honestly, in

good faith, and not maliciously or for any ulterior motive or purpose, such as was condemned by this Court in *Bailey v. Matthews,* 156 N. C., 81.

It would seem that the foregoing allegations of the petition, taken in connection with the relation of the parties, ought to be sufficient to warrant the court in granting the instant order. We are of opinion that the provisions of the statute have been met, and that the present appeal is premature. *Holt v. Warehouse Co.,* 116 N. C., 480.

Appeal dismissed.

N. PIERCE HAMPTON v. R. A. GRIGGS.

(Filed 13 September, 1922.)

1. Rule in Shelley's Case.

Shelley's case gives a rule of property as well as of law, and obtains in the courts of this State, subject only to be changed or repealed by statute.

2. Same—Interpretation.

The perplexity in construing the rule in *Shelley's case* results in a measure from the want of appreciation of the full meaning and significance of some of the terms employed, and in the expression "the word heirs is a word of limitation of the estate, and not a word of purchase," the word "limitation" is used in the sense of marking out the bounds or describing the extent or quality of the estate conveyed to the ancestor, or the first taker; and the words "not as a word of purchase" to refer to an estate acquired by the heirs, as such, in the ordinary course of descent, as distinguished from a class of persons to take the estate in remainder as the beginning of a new inheritance or the stock of a new descent.

3. Same—Requisites.

In order to the application of the rule in *Shelley's case,* there are five requisites: there must be a grant of an estate in freehold in the ancestor or first taker; the ancestor must acquire this prior estate by, through, or in consequence of the same instrument which contains the limitation to his heirs; the words "heirs" or "heirs of the body" must be used in their technical sense as taking indefinitely under the canons of descent; the interest acquired by the ancestor and that limited to his heirs must be of the same quality, either both of them legal or equitable; the limitation to the heirs must be of an inheritance, in fee or in tail, by way of remainder.

4. Same—Intent—Heirs—Heirs of the Body—Technical Words.

In construing a conveyance with reference to the application of the rule in *Shelley's case,* the general or paramount intent of the donor or grantor, in the use of the technical words "heirs" or "heirs of the body" should be first ascertained by construing the instrument as a whole, and should his intent, so found, be that these words should be taken with their

technical or legal meaning, this meaning will control any particular intent he may have otherwise expressed; but should they be ascertained to have been used as denoting a particular class of persons, to take in remainder, as distinguished from those who would take in indefinite succession under the rules of descent, that meaning will prevail, and the first taker will acquire only an estate for life, and the rule in *Shelley's case* will not apply.

5. Same—Children.

An estate to the lawful heirs of the testator's son after the death of the testator's wife, and should the son "die without a bodily heir then to the testator's family": *Held*, the words "lawful heirs of my son" should not be taken in their technical significance as heirs general, but in the sense of issue or children, and the limitation over to the testator's family was to designate certain persons of the testator's blood who should take to the exclusion of his general heirs, upon the happening of the contingency, directly from the testator, as the root of a new inheritance or the stock of a new descent, and the rule in *Shelley's case* does not apply.

6. Wills—Devises—Land.

The word "lend" used in the will construed in this case is held to have been used in the sense of the word "devise."

APPEAL by defendant from *Bond, J.*, at April Term, 1922, of CURRITUCK.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff, being under contract to convey certain lands to the defendant, executed and tendered a deed therefor and demanded payment of the purchase price, as agreed. The defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

Upon the facts agreed, the court, being of opinion that the deed tendered would convey a good title, gave judgment for the plaintiff; whereupon the defendant excepted and appealed.

Aydlett & Simpson for plaintiff.
No counsel for defendant.

STACY, J. The plaintiff derives title to the lands in question by devise from his father, John T. Hampton, and, on the facts agreed, the title offered was properly made to depend upon the construction of the following items in the will of John T. Hampton:

"Item Five: I lend unto my son Nathaniel Pierce Hampton the farm whereon he now lives, lying at the north end of Churches Island, also Piney Island land, and my right in Cedar Island, and also my right in the marshes, all of the above named lands and marshes I lend at my death, and also lend all of my lands at the death of my wife, Nancy, and I also give all of my tools to N. P. Hampton for life.

"Item Six: I give unto the lawful heirs of my son Nathaniel Pierce Hampton all of the lands and chattel property that belongs to me at the death of me and my wife, Nancy, and if my son should die without a bodily heir, then my property to go back into the Hampton family."

The case states that the wife of the testator has been dead for a number of years; that the plaintiff has one daughter, his only child, who married the defendant, R. A. Griggs; that plaintiff's daughter is still living, and is now the mother of three children, all living.

Plaintiff contends that under the foregoing provisions of his father's will, he holds a fee-simple title to the lands sought to be conveyed; while the defendant contends that under said provisions the plaintiff took only a life estate in the property so devised. The merits of these respective contentions depend upon the applicability or nonapplicability of the rule in *Shelley's case.*

Whatever reasons, *pro* and *con,* may have been advanced originally in support of the wisdom or impolicy of following the rule in *Shelley's case,* so far as the courts of North Carolina are concerned, this is no longer an open question. *Starnes v. Hill,* 112 N. C., 1. Much has been said in support of its adoption, and something in criticism; but, with us, it is a rule of property as well as a rule of law, and we must observe it wherever the facts call for its application. The Legislature alone may change it if it is thought to be unsuited to the needs of our day or to the industrial life of our times. It is one of the ancient landmarks, which the fathers have set in the law, as it relates to the subject of real property, and we should be slow to remove it. Prov., 22:28.

The rule itself is simple enough; but, in applying it to the variant facts of numerous cases, seemingly with some lack of uniformity, it has become a subject of much perplexity. This may be due, in a measure, to a want of appreciation of the full meaning and significance of some of the terms employed. When it is said "the word heirs is a word of limitation of the estate, and not a word of purchase," within the meaning of the rule in *Shelley's case,* it is to be understood that the word "limitation" is used in the sense of marking out the bounds or describing the extent or quality of the estate conveyed to the ancestor or to the first taker; and the word "purchase" is to be understood as referring to an estate acquired in such a manner as to take it out of the ordinary course of descent, or as designating certain persons to take the estate who are themselves to become the root of a new inheritance or the stock of a new descent. As thus understood and construed, *Lord Coke's* definition of the rule would be substantially as follows:

When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word "heirs"

is a word marking out the bounds or describing the extent or quality of the estate conveyed to the ancestor, and not a word designating the persons who are to take the estate, other than by descent and as the beginners of a new inheritance.

It is generally held that, as prerequisites to the application of the rule, there must be, in the first instance, an estate of freehold in the ancestor or the first taker; and (2) the ancestor must acquire this prior estate by, through, or in consequence of the same instrument which contains the limitation to his heirs; (3) the words "heirs" or "heirs of the body" must be used in their technical sense as importing a class of persons to take indefinitely in succession, from generation to generation, in the course marked out by the canons of descent; (4) the interest acquired by the ancestor and that limited to his heirs must be of the same character or quality; that is to say, both must be legal, or both must be equitable, else the two would not coalesce; and (5) the limitation to the heirs must be of an inheritance, in fee or in tail, and this must be made by way of remainder. See note, 29 L. R. A. (N. S.), 963; 24 R. C. L., 887.

It is further conceded by practically all the authorities that the rule in question is one of law and not one of construction, and that at times it overrides even the expressed intention of the grantor, or that of the testator, as the case may be. But when this is said, it should be understood as meaning that only the particular intent is sacrificed to the general or paramount intent. It is not the estate which the ancestor takes that is to be considered so much as it is the estate intended to be given to the heirs. As said in *Baker v. Scott,* 62 Ill., 88: "It has frequently been adjudged that though an estate be devised to a man for his life, or for his life *et non aliter,* or with any other restrictive expressions, yet if there be afterward added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former, and make him tenant in tail or in fee. The true question of intent would turn not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body." The first question, then, to be decided is whether the words "heirs" or "heirs of the body" are used in their technical sense; and this is a preliminary question to be determined, in the first instance, under the ordinary principles of construction without regard to the rule in *Shelley's case.* Not until this has been ascertained by first viewing the instrument from its four corners (*Triplett v. Williams,* 149 N. C., 394), and determining whether the heirs take as descendants or purchasers, can it be known in a given case whether the facts presented call for an application of the rule. "In determining whether the rule in

Shelley's case shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate that they would take as heirs or as heirs of his body, the rule applies"; otherwise not. *Crockett v. Robinson,* 46 N. H., 454. The meaning or sense in which the words "heirs" or "heirs of the body" are employed, whether technical or other, is denominated the general or paramount intent, and this is to be the controlling factor. As against this dominant purpose the lesser or particular intent must give way; for having once determined that the second devise was intended to be given to the heirs of the first taker *qua* heirs, or in the strict and technical sense of heirs, the rule is inexorable. Hence, it appears that the effect of the rule is not to thwart, but to effectuate, the main intention and purpose of the grantor or donor. *Yarnell's Appeal,* 70 Pa. St., 335. See, also, the clear and instructive opinion by *Montgomery, J.,* in *Nichols v. Gladden,* 117 N. C., 497.

Thus, in *Nobles v. Nobles,* 177 N. C., 243, it was held that a devise in a mother's will "to my son, Osborne C. Nobles, the home and buildings and one-half the land for his lifetime, and then to his legal representatives" conferred upon the devisee a fee-simple estate in the property under the rule in *Shelley's case.* Here, it will be observed, in searching for the dominant purpose and intent of the testator, the words "legal representatives" were held to be equivalent to or synonymous with "heirs" or "heirs of the body," giving rise to the application of the rule. In *Lord Coke's* definition, the word "heirs" is used, but it is generally held that equivalent expressions will suffice where it is patent from the context that such expressions were evidently intended to be used in the sense of heirs. Conversely, where the words "heirs" or "heirs of the body" are not used in a technical sense, the rule does not apply.

Again, in the case of *Tyson v. Sinclair,* 138 N. C., 24, there was a devise 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 in fee," which was held to be a proper case for the application of the rule, as the limitation over to the right heirs did not change the course of descent, but showed that the words "lawful heirs of his body" were used in their technical meaning. To like effect, among others, is the case of *Radford v. Rose,* 178 N. C., 288.

The foregoing decisions are representative of those cases which may be said to be in the twilight zone, and in which the rule has been held to be applicable; but there is another line of cases, of seeming similarity

and likeness to those above, in which the rule has been held to be non-applicable, and this has given rise to some difficulty in differentiating the two classes of cases.

In *Puckett v. Morgan,* 158 N. C., 344, the following devise was held to be outside the operation of the rule in *Shelley's case:* "I leave to Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachel tract, on the east side, during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." Here, it will be observed, the ulterior devise, upon the happening of the given contingency, provided that the estate should be taken out of the first line of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker. Looking at the instrument from its four corners, and using this provision, among others, as one of the guides for ascertaining the paramount intent or the dominant purpose of the testator, it was held that the words "then to her bodily heirs, if any," were not used in their technical sense as importing a class of persons to take indefinitely in succession, generation after generation, but as meaning issue or children living at her death. Note this ulterior limitation did not undertake to substitute the root of a new and independent inheritance, under the contingency stated, for that of the first stock, as was the case in *Morrisett v. Stevens,* 136 N. C., 160. This distinction was clearly pointed out by *Hoke, J.,* in *Jones v. Whichard,* 163 N. C., 241, from which we copy without quoting literally: In *Morrisett's case* the ulterior disposition of the property was not, and was not intended as, a limitation on the estate conveyed to the first taker, but was a provision whereby one stock of inheritance, on a certain contingency, was substituted for another, the second to hold as purchaser direct from the grantor or original owner. *Sessoms v. Sessoms,* 144 N. C., 121.

The decisions rendered in *Puckett v. Morgan, supra,* supported, among other cases, by *Rollins v. Keel,* 115 N. C., 68, was followed in *Jones v. Whichard,* 163 N. C., 241; *Pugh v. Allen,* 179 N. C., 307; *Blackledge v. Simmons,* 180 N. C., 535; *Wallace v. Wallace,* 181 N. C., 158, and *Reid v. Neal,* 182 N. C., 192.

In *Pugh v. Allen, supra,* p. 309, *Mr. Justice Hoke,* speaking of the line of demarcation which separates these two classes of cases, said: "Applying the principle, it has been held in several of our decisions construing deeds of similar import that in case of a limitation over on the death of a grantee or first taker without heir or heirs, and the second or ultimate taker is presumptively or potentially one of the heirs general of the first, the term 'dying without heir or heirs' on the part of the grantee will be construed to mean, not his heirs general, but his issue

in the sense of children and grandchildren, etc., living at his death," citing *Sain v. Baker,* 128 N. C., 256; *Francks v. Whitaker,* 116 N. C., 518, and *Rollins v. Keel,* 115 N. C., 68.

Applying the above principles to the case at bar, we think it is clear that the words "lawful heirs of my son," appearing in item six of the will, were not used in their technical sense, but in the sense of issue or children, and that the plaintiff took only a life estate in the property with remainder to his children and grandchildren living at his death, in default of which, it is provided that the property shall go back into the Hampton family. Members of the Hampton family, of course, are potentially among the heirs general of the first taker, but they are not all, and this ulterior limitation would exclude others among his heirs who were not of the blood of the original stock. Hence, under this construction of the dominent intent of John T. Hampton, the testator, as expressed in his will, we think the rule in *Shelley's case* is non-applicable.

The word "lend" in the will before us was manifestly intended to be used in the sense of give or devise. *Cohoon v. Upton,* 174 N. C., 88.

Reversed.

GEORGE J. LACEY v. IDEAL HOSIERY COMPANY.

(Filed 13 September, 1922.)

1. Employer and Employee—Master and Servant—Duty of Employer—Safe Appliances—Negligence—Evidence.

The plaintiff was employed in the defendant's knitting mill, among other things, to place stockings, after they had been dyed, into a basket or receptacle for drying, and which he was to revolve for that purpose, at great speed, with power-driven machinery; that there was an opening in this basket through which the ends or parts of the stocking would fly from the revolving basket, importing menace to the operator, and which was closed in more improved devices of this sort, and which, in the present case, could have been closed at small expense without diminishing the usefulness of the basket; that while operating the machine the plaintiff's arm was caught by the flying ends of the stockings and thus drawn into the machinery and severely injured: *Held,* sufficient to take the case to the jury upon the issue of the defendant's actionable negligence in proximately causing the plaintiff's injury by its failure to exercise reasonable care in the selection of the appliance with which the plaintiff was required to work.

2. Same—Rule of the Prudent Man—Appliances Known and Approved—Unnecessary Dangers.

The duty of an employer to furnish an employee, in the observance of ordinary care in the selection of power-driven appliances at which the

employee is required to work in the performance of his duties, is not fully met when he furnishes like appliances to those known and approved and in general use in plants of the same character, for it is also required of him, under the rule of the prudent man, not to subject his employee to obvious and unnecessary dangers, which could be readily removed without destroying or seriously impairing the efficacy of the implement, and of which he knew, or should have known under the circumstances, in the exercise of ordinary care.

APPEAL by defendant from *Daniels, J.*, at February Term, 1922, of PASQUOTANK.

The action is instituted by plaintiff, an employee of defendant company, to recover damages for physical injuries caused by the alleged negligence of defendant company in failing to provide a proper machine with which to do plaintiff's work, and in negligent failure to keep said machine in proper repair. There was denial of liability by defendant company, and plea of contributory negligence on part of plaintiff. On issues submitted there was verdict for plaintiff, assessing damages. Judgment, and defendant excepted and appealed.

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

HOKE, J. The evidence on the part of the defendant tended to show that in July, 1919, he was employed by defendant company in its hosiery mill, his duties being to fire the boiler, to dye stockings and operate a hydro-extractor, a machine designed as its terms import, to wring the water from the stockings as they were taken from the dyeing vat situated near. That this machine, driven by a belt and pulley connected with the motive power, consists of a perforated metallic basket about 24 inches in diameter, revolving on a spindle or shaft running through, and which worked in a bearing overhead, and this basket was set in an iron casing in which it revolved, and had a rim or flange of three or four inches at the top, but leaving an opening from which the stockings would not infrequently fly out when the basket was in rapid motion. That the machine was started by the operator giving the basket a "twirl" and letting on the power gradually till a speed of sixteen or seventeen hundred revolutions a minute was attained. That it was a part of plaintiff's duties to carry the stockings from the dye vat and pack them in this basket, start the machine and let on the power. That owing to the opening at the top of this basket, the stockings, as stated, would frequently fly out, and with such force as to threaten serious injury to the operator, or any one standing very near the machine. That on the occasion in question plaintiff had packed the basket with the wet stockings and let on the power, standing in the proper position for the pur-

pose when some of the wet stockings were thrown partly out of the opening in the top of the machine, one end being fastened therein, and the other caught witness around the wrist, dragged his arm into the basket, around the shafting, broke the bones of the arm in several places, taking off all the flesh. Witness stopped the machine with the left hand, when it was found that there were stockings around plaintiff's right wrist and other end being around the spindle, the arm broken and lacerated so that it had to be amputated.

There was further evidence for plaintiff to the effect that these baskets for the past five or six years had not been made with an opening, but were closed over with a steel or heavy tin covering, which afforded full protection to the operator, and that in the older machines like this a covering could be affixed at a very small cost and without at all impairing its efficiency or usefulness. Plaintiff testified further that in this particular machine, now antiquated, the bearings on which the spindle or shaft worked were old and worn, causing the basket to "jerk and wobble," thereby increasing the liability of injury by stockings flying out of the same; that plaintiff had called this to the attention of his supervising foreman, who had said he would have it fixed; that the machine was properly packed on this occasion, and with proper weight of stockings according to plaintiff's best judgment, the only guide given him to determine it.

There was testimony for defendant to the effect that while these recent machines had the covering referred to, those without such covering were also very much used, and there was no probability of injury therefrom when properly packed and operated. There was evidence, also, that this plaintiff had been in the habit of putting his hand in or over the opening in the basket when the same was in motion, and had been cautioned about it by his boss a half dozen or more times; and further, he had been very carefully trained and instructed as to the proper packing of the basket, and when these instructions were followed there was no reasonable probability of harm. That after the occurrence, the machine was examined and found to be overloaded and improperly packed, etc.

In a full and well considered charge these opposing positions were submitted to the jury, who have, as stated, rendered their verdict in plaintiff's favor, assessing his damages at $7,131.66, and we can find no valid reason for disturbing the result. The only objection seriously insisted on by appellant is to a portion of the charge, in which the learned judge instructed the jury, in effect, that though the machine in question here was one "approved and in general use, yet if in the practical operation it had been disclosed that there was menace of serious injury to employees engaged in running the same, which could have been readily removed, and without impairing its efficiency, and this was

known to the employer or should have been discovered by him in the exercise of reasonable care, a failure to remedy such a defect might constitute a breach of the dominant duty incumbent on the employer in the exercise of reasonable care to supply the employee with machinery that was reasonably safe and suitable for the work in which he was engaged." And if the jury were satisfied by the greater weight of the evidence that in the present instance there was such breach of duty, and the same was the proximate cause of plaintiff's injury, they would answer the issue as to defendant's negligence "Yes."

The principle here laid down by his Honor was carefully considered and upheld by this Court in *Ainsley v. Lumber Co.*, 165 N. C., 122, and the position has been repeatedly approved in our decisions on the subject. *Sutton v. Melton,* 183 N. C., 369; *Cook v. Mfg. Co.,* 182 N. C., 205-206; *Taylor v. Lumber Co.,* 173 N. C., 112; *Dunn v. Lumber Co.,* 172 N. C., 122.

In *Ainsley's case, supra,* the intestate of plaintiff had been killed while operating a lathing machine as employee of defendant, and there was evidence to the effect that the machine was one known, approved, and in general use, and there was evidence to the effect further that the machine in question consisted chiefly of two circular saws, which in their operation not infrequently projected pieces of lumber with great force towards the operator, thereby putting him in serious danger, and that without impairing the efficiency of the machine and at comparatively small cost, by annexing to the machine a small iron shield four or five inches wide, complete protection would have been afforded, and it was held that the full measure of an employer's duty was not always or necessarily met by supplying a machine that was known, approved, and in general use.

And the Court, in its opinion, said: "Speaking, then, further to this rule that an employer must furnish implements, etc., which are known, approved, and in general use, a fuller statement of the requirement is that where machinery is more or less complicated, and especially when driven by mechanical power, there must be supplied for employees machinery, implements, and appliances which are 'known, approved, and in general use by prudent and skillful employers, and in well regulated concerns.' From this we think it follows that an employer is not protected, as a conclusion of law, because he is operating a machine which is 'known, approved, and in general use,' but, although such a machine or appliance may have been procured, if its practical operation should disclose that employees are thereby subjected, not to the ordinary risks and dangers incident to their employment, but to obvious and unnecessary dangers which could be readily removed without destroying or seriously injuring the efficiency of the implement, such conditions, if

known, or if allowed to continue, might permit the inference of culpable negligence against the employer; that he had not, in the particular instance, measured up to the standard of care imposed upon him by the law; a position upheld by many authoritative cases and by text-writers of approved excellence."

And in *Cook's case, supra,* the opinion by the *Chief Justice,* it was held, among other things: "It is not alone sufficient that the master has furnished his servant such machinery, tools, and appliances as are usually furnished for doing the work under dangerous conditions similar to those in which the servant is required to work, that are known, approved, and in general use, but he must further take such precautions for his servant's safety as an ordinarily prudent person charged with a like duty should and ought to have foreseen were necessary and proper under the circumstances."

The charge of his Honor, therefore, is in full accord with our rulings on the subject, and the judgment for plaintiff must be affirmed.

No error.

THOMAS F. BENBURY ET AL. v. E. BUTTS.

(Filed 13 September, 1922.)

Estates—Wills—Devise—Tenants in Common—Deeds and Conveyances.

An estate devised to the step-daughter of the testator "to her and to her children and children's children," possession to be given after the death of the testator and his wife, the testator and his wife being dead, leaving the devisee alive with two living children without children: *Held,* the title to the estate vested in the step-daughter and her two children, as tenants in common, and the deed of the daughter and her husband was alone insufficient to convey a full and complete title to the lands.

APPEAL by plaintiffs from *Bond, J.,* at Spring Term, 1922, of CHOWAN.

Controversy without action, submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey certain lands to the defendant, executed and tendered a deed therefor, and demanded payment of the purchase price, as agreed. The defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

His Honor, being of opinion that the deed tendered was insufficient to convey a full and complete fee-simple title to the lands in question, gave judgment for the defendant; whereupon the plaintiffs excepted and appealed.

Vann & Holland for plaintiffs.
No counsel for defendant.

STACY, J. On the facts agreed, the title offered was properly made to depend upon the construction of the following clause in the will of Noah Bess:

"I give and bequeath to Dora Benbury, my wife's daughter, the house and lot (if there is a house on it) where I lived before it was burned down, situated on east end of Church Street, in the town of Edenton, N. C., to her and her children, and to their children's children, measuring 160 feet deep and 30 feet wide, also all my household furniture, possession to be given after the death of myself and wife, Ellen."

The case states that Ellen Bess is dead; that Dora Benbury had two children, and no grandchildren or great grandchildren, living at the time of the testator's death; and that said children are still living.

We think it is clear that under the foregoing devise the title to the lot in question vested in Dora Benbury and her two children, living at the time, as tenants in common. *Cole v. Thornton,* 180 N. C., 90; *Cullens v. Cullens,* 161 N. C., 344; *Condor v. Secrest,* 149 N. C., 205.

The children being entitled to share with their mother in the estate devised, it follows that the deed of Dora Benbury and her husband—the two children not joining—was insufficient to convey a full and complete fee-simple title to the property described in the complaint.

Affirmed.

W. C. SAMPLE v. T. N. GRAY.

(Filed 13 September, 1922.)

Contracts, Written—Warranty—Parol Evidence—Receipts.

Damages for breach of warranty on sale of cattle, as to number and disposition resting in parol, are recoverable in the warrantee's action, and a receipt for the purchase price thereof, in the ordinary form, not purporting to contain the full contract between the parties, does not exclude the admission of parol evidence of the warranty by its failure to contain the same.

APPEAL by defendant from *Bond, J.,* at April Term, 1922, of CHOWAN.

The action is to recover damages for breach of warranty by defendant in the sale of a herd of cattle of said defendant, which were at the time running in the range in Alligator Township, Tyrrell County. There

were also allegations in the complaint that said warranty was false and fraudulent on the part of defendant. There was denial of liability by defendant, and on issues submitted the jury rendered the following verdict:

"1. Did the defendant warrant that the cattle sold to plaintiff numbered 62 head or more, and that they were gentle and easy to control, as alleged in the complaint? Answer: 'Yes.'

"2. Was said warranty false and untrue, as alleged in the complaint? Answer: 'Yes.'

"3. Did the defendant falsely and fraudulently represent to plaintiff that said cattle numbered 62 head or more, and that they were gentle and easy to control, as alleged in the complaint? Answer: 'Yes.'

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

Judgment on the verdict for the sum awarded and costs, and defendant excepted and appealed.

Meekins & McMullan for plaintiff.
W. L. Whitley for defendant.

HOKE, J. Accepting plaintiff's version of the transaction, the jury have established liability of defendant for breach of contract of warranty that was false and fraudulent, assessing the damage. There is ample evidence to support the verdict, and we find no exception noted that would justify the Court in disturbing the results of the trial.

It is objected chiefly for appellant that the contract was in writing, and that same not containing any warranty, the claim of a warranty and the testimony offered to support it is not available to plaintiff, but the evidence of plaintiff is to the effect that the contract of sale, including the warranty, was in parol, and that the alleged written agreement was nothing more than a receipt for the purchase price of the cattle after the trade was made, and this, as stated, the jury have accepted as true.

And the evidence offered by defendant on this question does not seem to support his position. According to the testimony of his witness, Sheriff Cohoon, the alleged written contract was in terms as follows: "Received of W. C. Sample the sum of $1,200 in full payment for all my cattle in Great Neck, Tyrrell County. (Signed) T. N. Gray."

This, as a matter of form, might well be construed as a mere receipt for the purchase price. It does not purport to embody the entire terms of the agreement, and there is nothing in it that necessarily shuts off parol evidence as to further terms of the sale. It is only where the written contract in terms or from its nature embodies the entire agree-

ment that parol evidence of additional terms are necessarily excluded. *Faust v. Rohr,* 167 N. C., 360; *Kernodle v. Williams,* 153 N. C., 475; *Braswell v. Pope,* 82 N. C., 57.

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

No error.

E. COPPERSMITH v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 13 September, 1922.)

1. Carriers of Freight—Railroads—Damages.

Where a railroad company has received for shipment a lot of "log chains," and has negligently failed to deliver a part of them, and the consignee is under contract with third parties to do certain work for the consignor with them, and had promised the latter to return them, or their value if lost, after the work had been done: *Held*, the carrier is responsible in damages to the consignee for the loss of the chains.

2. Same — Negligence—Consequential Damages—Notice—Instructions—Special Circumstances.

Where the railroad company is liable in damages for such consignee's loss caused by its negligence, and the consignee also sues for consequential damages arising from an additional expense or a particular loss caused by being able to use only a part of the shipment of "log chains," in performing his contract with the third parties, it is reversible error for the trial judge to submit only one issue as to damages, and charge the jury, in effect, that the carrier would be liable for the consequential damages, if sustained by the plaintiff and caused by the carrier's negligence without more.

3. Carriers of Goods—Railroads—Negligence—Contracts—Special Damages—Burden of Proof.

Where the consignee sues the railroad company for the value of certain "log chains" lost by the negligence of the defendant, and as consequential or additional damages, for the extra cost of performing a contract he had made with others, as resulting from this loss, it is required that the plaintiff show that the defendant had express notice of the particular use for which the chains were required; or notice implied from the nature of the shipment or the circumstances indicating their use, which does not appear under the facts of this case.

APPEAL by defendant from *Lyon, J.*, at May Special Term, 1922, of PASQUOTANK.

This action was brought to recover the value of thirteen "log chains" shipped by J. A. Reynolds & Brothers from Norfolk, Va., over the defendant's line of railway, to plaintiff at Elizabeth City, N. C. Nine-

teen of the log chains were delivered to plaintiff at Elizabeth City, but the defendant failed to deliver the other thirteen chains, and for them the suit was brought.

Plaintiff alleged, and there was evidence to show, that in consequence of the failure to deliver the thirteen chains, he had to pay 25 cents more for each piling on the contract he had with others for hauling and rafting the pilings, there being 400 and odd of such pilings. Plaintiff was conducting a logging operation in Pasquotank County, shipping the logs, when rafted, to Reynolds Bros., Norfolk, Virginia, the purchasers thereof, who furnished the gear for rafting the logs. This gear was shipped only when needed, and when so shipped was charged to plaintiff, who, in turn, was given credit for such gear as was returned—this being the custom in such operations. In August, 1920, Reynolds Bros. shipped to plaintiff a certain lot of gear, including 32 log chains of the value of $15 each. The plaintiff, upon inquiry, having been informed that the gear was at defendant's station in Elizabeth City, went to said station in a truck for the purpose of receiving said gear. At this time there was delivered to plaintiff 19 of the log chains aforesaid, together with certain other gear, composing the shipment—leaving 13 log chains, presumably, at the station, which plaintiff was unable to take away at that time. The gear was delivered to plaintiff by a colored man, and plaintiff was required to sign a receipt calling for 32 log chains. On the next day a son of one of the plaintiffs was sent back for the other 13 chains, and was told at the station by the colored man to go out to the pile of gear and get 13 chains; that the sun was so hot that he was not going to bother with it; and the boy need not look particularly for the chains, if any, marked to plaintiffs, but he could take the first 13 log chains he found—"that chains were chains." The boy thereupon selected 13 log chains and carried them home, where it was discovered that they were marked, not to plaintiffs, but to one D. P. White, to whom they belonged, and who, on the same day, called at plaintiff's place of business for the chains and took the same away. One of the plaintiffs then returned to defendant's station and reported the occurrence to Mr. Johnson, defendant's agent, who told the plaintiff that they would make the loss good. The loss was never made good, and plaintiffs were compelled to pay to Reynolds Bros. $195, representing the value of the 13 log chains not returned. In the meantime, by reason of the nondelivery of the chains, the plaintiffs were put to an additional expense, representing an additional cost of 25 cents each in rafting the logs.

The court charged the jury that if defendant negligently failed to deliver the chains, and plaintiff was compelled to pay Reynolds Bros. for them, he would be entitled to recover the fair and reasonable value

of the chains, and if the plaintiff was compelled to pay an additional amount, in addition to that fixed by plaintiff's contract with the person who was hauling the rafting for him, he would be entitled to recover that amount; but, if the jury did not so find, he could not recover the additional amount.

It appeared in the evidence that the chains were sent by Reynolds Bros. to plaintiff for rafting the piles, or logs, which were to be sent to Reynolds Bros. at Norfolk, and when this was done, the chains were to be returned to Reynolds Bros., the plaintiff to be charged by them with the value of those not sent back to Reynolds Bros.

The jury returned the following verdict:

"Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: 'Yes, $297.75.'"

Judgment was entered upon the verdict, and defendant appealed.

J. B. Leigh and Meekins & McMullan for plaintiff.
Thompson & Wilson for defendant.

WALKER, J. We do not see any objection to the charge of the court as to the right of the plaintiff to recover the value of the chains not delivered by the defendant, though there does appear to be exceptions to rulings upon some questions of evidence, which it is not necessary to state more definitely and consider, as they may not occur at the next trial, and it is not necessary to do so, for there is a serious error as to the measure of damages, for which a new trial will be granted, which will cover the entire case as submitted to the jury, there being but one issue, and one answer, and one indivisible amount awarded for all damages, thereby covering both questions in the case.

There was substantial error in the instruction as to the consequential damages, that is, those arising by reason of the additional amount paid by the plaintiff on his contract for piling and rafting. There was nothing in the case to show that the defendant had been notified that plaintiff had a contract for piling and rafting with another, which would require the immediate, or even early, use of the chains. They were sent to him by Reynolds & Bros. for a particular purpose, which was not disclosed to the defendant at the time of the shipment, nor do we think there was anything in the circumstances, or the nature of the goods, to put them on notice of the plaintiff's contract with another for piling and rafting. But if there had been evidence that defendant knew, or should have known, that its negligent failure to ship and deliver the chains in due time to the plaintiff would cause the damage now claimed, the court should have submitted the question to the jury, so that they could find the facts, and not decide the question of liability for them

upon the mere evidence that the plaintiff was compelled to pay the additional amount. It was not solely a question of law, but one of fact and law. And, besides, there was nothing in the nature of the shipment, the character or name of the consignee, the manner of shipment or the destination, from which the law would impute notice to the defendant that the plaintiff was at that time engaged in logging operations, which required the immediate use of the material, or that any special damages would be suffered. It was as reasonable to infer that the chains had already been used and were being returned to the plaintiff as that they were to be used for the benefit of Reynolds Bros. in rafting logs.

The case falls within the principle stated by us in *Development Co. v. R. R.*, 147 N. C., 503, where it is said, at pp. 507 and 508: "Damages of the kind claimed in this action, *i. e.*, consequential damages, are only recoverable when they are the natural and probable consequence of the carrier's default. Hale on Damages, 256. And ordinarily such damages are only considered natural and probable when they may be reasonably supposed to have been in contemplation of the parties at the time the contract was made. Wood's Mayne on Damages, 18." And again, if the plaintiff seeks to recover more than is allowable under the general rule as to shipments of goods and failure of the carrier to deliver, that is, "other and additional damages by reason of special circumstances, a knowledge of these circumstances must be brought home to the other party."

It was held in *Tillinghast v. Cotton Mills,* 143 N. C., 274, that "If the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages." *Matthews v. Express Co.,* 138 Mass., 55; *Railway v. Ragsdale,* 46 Miss., 458; *Horne v. Railroad, L. R. C.,* pp. 71, 72, and 583. See, also, *Mfg. Co. v. R. R.,* 149 N. C., 261; *Lee v. R. R.,* 136 N. C., 533; *C. R. I. & P. Railroad Co. v. Newhouse Mill & L. Co.,* 119 S. W., 646; *Ill. Cent. Railroad Co. v. Canning Co.,* 116 S. W., 755; *Williams v. A. C. L. Rwy. Co.,* 56 Fla., 735, which cases seem to be very much in point.

There was no evidence in this case that if the chains were not delivered the plaintiff would be put to extra expense in performing his contract with some other party, nor was the character of that contract disclosed beforehand to defendant. The case is not governed by the authorities cited by the plaintiff. It does not present the same kind of facts. It may be that the plaintiff may hereafter supply the testimony which is now lacking.

While we send the case back for another trial, it may be proper to state that there now appears to be some evidence, if accepted as true, by which the plaintiff may show such an interest in the chains as will enable him to maintain this action and recover some damages for the negligence of the carrier if finally established.

New trial.

DR. W. A. PETERS ET AL. v. PASQUOTANK HIGHWAY COMMISSION.

(Filed 13 September, 1922.)

1. Injunction—Evidence—Highways—Discretion of Commissioners.

The exercise of a sound discretion by a county highway commission is a legislative power delegated to it, with which the courts will not interfere by injunction or otherwise upon the mere allegation that the commissioners were acting for the private benefit of some of them, and not in the public interest, without evidence or proof thereof.

2. Appeal and Error—Injunction—Evidence—Review.

On appeal from an order of the judge of the Superior Court dissolving an injunction, the Supreme Court may review the evidence thereon.

APPEAL by plaintiffs from *Bond, J.*, at chambers in Elizabeth City, 28 July, 1922, dissolving the restraining order theretofore granted. From PASQUOTANK.

C. R. Pugh and Aydlett & Simpson for plaintiffs.
J. B. Leigh, A. D. MacLean, and Meekins & McMullan for defendants.

CLARK, C. J. This is an action for a permanent injunction instituted by certain residents and taxpayers of Pasquotank against the highway commission of that county to enjoin them from hard-surfacing the road from Blackhead Signpost through the Foreman stockyard to Bundy's gate. Upon allegations and affidavits that the old route was for the general good of Mt. Hermon Township, and that the new route is for the special benefit of two members of the highway commission (which was denied), a temporary restraining order was granted, returnable 28 July, and at the hearing it was dissolved.

Without going into the matter in detail, we think that the refusal to continue the temporary restraining order was proper.

In *Brodnax v. Groom*, 64 N. C., 244, *Pearson, C. J.*, said, in denying an injunction as to the location of a bridge: "This Court is not capable of controlling the exercise of power on the part of the General Assembly,

or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities, and erecting a despotism of five men, which is opposed to the fundamental principles of our Government and the usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution, upon the legislative department of the Government, or upon the county authorities."

In *Newton v. School Committee,* 158 N. C., 186, it is said: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. In some of the opinions decided intimation is given that insofar as the courts are concerned, the action of these administrative boards must stand, unless so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of persons affected. It is undesirable and utterly impracticable for the courts to act on any other principle."

In *Supervisors v. Comrs.,* 169 N. C., 548, we said: "We find nothing in this evidence which justified an injunction upon the ground of fraud or misappropriation of funds by the county commissioners. It may or may not be that the county commissioners are using the very best judgment in selecting the roads to be worked in Pactolus Township. The road supervisors of the township certainly disagree with them as to that; but as has been said in *Brodnax v. Groom, supra,* and many other cases, we are not authorized to supervise such matters. The greatest and most infallible of all judges disclaimed jurisdiction in a matter not committed to him. In the language of Scripture, Who made us judges over such matters? Luke xii, v. 14. In this case, as Virgil puts it, *'Non nostrum tantas componere lites.'* However gratifying it might be to the judiciary to be deemed competent, by reason of any supposed superior wisdom, to decide and settle controversies over local differences of opinion in administering the affairs of a county, the judiciary have no special qualifications which make them better fitted than our fellow-citizens who have been chosen by the people to administer such matters which are purely administrative matters, about which good men may differ, and the decision whereof rests with the local officials elected by and responsible to the electors of the locality. The courts can only interfere when there is such fraud or malversation as calls for an indictment, or such fraud

or oppression is attempted as clearly requires that the further action of the administrative board shall be stayed to prevent the misappropriation of public funds. The courts are not empowered to supervise the action of administrative boards because of a difference of opinion as to the action taken or contemplated by the officials charged with the duties of administration. The restraining order should have been dissolved."

Newton v. School Committee, supra, and *Supervisors v. Comrs., supra,* are both cited with approval in *Edwards v. Comrs.,* 170 N. C., 448, in which case, as in this, there was allegation, and nothing more, that the commissioners were acting for private gain, and in which we sustained the judge below in the dissolution of a similar restraining order, saying: "In the exercise of their powers and in the absence of express legislative direction to the contrary, they (the county commissioners) are not to be controlled by a vote of the localities affected, either informal or otherwise, and whenever it is shown that they have officially dealt with a question lawfully submitted to their judgment, their action may not be controlled nor interfered with by the court unless it is established that there has been a gross and manifest abuse of their discretion, or it is clearly made to appear that they have acted, not for the public interest, but in promotion of personal or private ends. We were referred, on the argument, to *Stratford v. Greensboro,* 124 N. C., 127, in support of the position that, on the present record, the action of the commissioners could well be made the subject of judicial scrutiny and control, but in that case there was specific allegation with uncontradicted evidence tending to show that the action of the city authorities was in pursuance of a contract admittedly entered into with the individual defendant, and making it, upon all the evidence, entirely probable, if not certain, that the measure complained of was in promotion of a personal and private scheme, in favor of the individual defendant and not in furtherance of the public interests. In that case the allegations were specific and definite of issuable facts tending to establish official default, and bear very little resemblance to allegations appearing in the present appeal." To the same effect, *Davenport v. Board of Education,* 183 N. C., 570.

"It is true that when the injunctive relief sought is not merely ancillary to the relief demanded, but is itself the principal relief sought, the courts will generally continue the injunction to the hearing upon the making out of a *prima facie* case. But this rule does not hold good in cases where important public works and improvements are sought to be stopped. In such matters, in the interest of the public good, the courts will let the facts be found by a jury before interfering by injunction." *Jones v. Lassiter,* 169 N. C., 750.

The rule stated above as to denying injunctions against public works and administrative boards is absolute, and admits but two exceptions,

one allowing an injunction where the undertaking sought to be enjoined is unconstitutional and contrary to law, as in *Smith v. School Trustees,* 141 N. C., 143, and the other being where the action sought to be enjoined is "so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of the persons affected," or "when there is such fraud or malversation as calls for an indictment, or such fraud or oppression is attempted as clearly requires that the further action of the administrative board shall be stayed to prevent the misappropriation of public funds," as in *Stratford v. Greensboro, supra.*

In *Cobb v. R. R.,* 172 N. C., 58, the injunction was sustained upon allegation and proof that the action enjoined was an attempt by way of condemnation to take private property for a private use under the guise of a public use, which the Court said raised a judicial question, and if it turned out that the proposed taking was for a private use only, as alleged, the right of condemnation would be denied. Further, there was plenary evidence to show that the change in location of the road was for the private benefit of the defendant railroad company, to permit it to blast rock in a manner dangerous to the lives and property of plaintiff and his family, and that *no public interest* was subserved. In this case there is no question of condemnation involved, nor any taking of private property under false pretenses, nor allegations to that effect, as in *Stratford v. Greensboro, supra,* and *Cobb v. R. R., supra,* while on the other hand the public benefit from the road is practically conceded.

In injunction proceedings we can review the evidence, and on such review we think the judgment in this case should be

Affirmed.

BESSIE THIGPEN, ADMINISTRATRIX, v. EAST CAROLINA RAILWAY.

(Filed 13 September, 1922.)

1. Carriers of Goods—Railroads—Bills of Lading—Stipulations.

The reasonableness of the stipulations of an interstate bill of lading is to be determined by the Federal law and decisions.

2. Same—Contracts.

The stipulation in an interstate bill of lading that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery (by the carrier) of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed," is upheld as a reasonable one.

3. Same—Limitation of Actions—Statutes.

A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by our State statute, C. S., 412, providing that "in case a person dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative after the expiration of that time, and within one year from his death.

CLARK, C. J., dissenting.

APPEAL by defendant from *Horton, J.*, at June Term, 1922, of EDGECOMBE.

Civil action to recover damages for loss and failure to deliver a shipment of goods.

From a verdict and judgment in favor of plaintiff, the defendant appealed.

O. D. Ingram and Lyn Bond for plaintiff.
John L. Bridgers for defendant.

STACY, J. The shipment in question, consisting of three packages of household furniture, was delivered to the Seaboard Air Line Railway Company at Franklin, Va., on 18 September, 1919, and consigned to plaintiff's late husband at Hookerton, N. C., the property of said consignee. The same has never been delivered. It was agreed that ten days was a reasonable time within which said shipment should have reached its destination. Plaintiff's husband died 27 February, 1921; letters of administration were duly issued (time not stated), and this suit was instituted 27 December, 1921. There was a clause in the contract of shipment reading as follows: "Suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

It is conceded that the present suit was not instituted within the time limited in the bill of lading; but plaintiff contends that, by reason of the death of her husband within the time limited in the contract, she had one year from his death within which to bring suit under the following provisions of C. S., 412: "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death."

His Honor adopted the plaintiff's view of the law in respect to this statute, and instructed the jury accordingly.

There are only two questions presented for our consideration: first, the validity of the restrictive clause limiting the time for the institution of the suit; and second, whether C. S., 412, extends this time for a period of one year after the death of plaintiff's husband.

It is established by the clear weight of authority that the parties to a contract of shipment may fix a given time, shorter than that allowed by the general statute of limitations, within which suit for a breach of the contract shall be brought, and, in the absence of any unusual or extraordinary circumstance, such a stipulation will be enforced, if not unreasonable. *Gulf, etc., Ry. Co. v. Clarke* (Tex.), 24 S. W., 355; *Texas & P. Ry. Co. v. Hawkins,* 30 S. W., 1113; *St. Louis, etc., R. Co. v. Pearce* (Ark.), 101 S. W., 763; *Hafer v. St. Louis, etc., Ry. Co.* (Ark.), 142 S. W., 176; *Ingram v. Weir,* 166 Fed., 328; *The Turrett Crown,* 275 Fed., 961; *Cox. v. Cent. Vt. R. Co.,* 170 Mass., 129; 4 Elliott on Railroads, sec. 1512; *Taft v. R. R.,* 174 N. C., 211; *Phillips v. R. R.,* 172 N. C., 86; *Heilig v. Ins. Co.,* 152 N. C., 358; 4 R. C. L., 798.

Speaking to a similar question, in *Riddlesbarger v. Hartford Ins. Co.,* 7 Wall., 389, *Mr. Justice Field* said: "The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims."

This being an interstate contract of shipment, the reasonableness of the stipulation is to be determined by the Federal law. *Adams Express Co. v. Croninger,* 226 U. S., 491. In two cases recently decided the United States Supreme Court has upheld the validity of similar provisions requiring suits to be brought within six months—a much shorter time than that mentioned in the present contract. *Texas & P. R. Co. v.*

Leatherwood, 250 U. S., 478, and *Missouri K. & T. R. Co. v. Harriman,* 227 U. S., 657. In the last case just cited it was said: "Such limitations in bills of lading are very customary and have been upheld in a multitude of cases," citing a number of authorities.

From the foregoing it follows that the stipulation here in question, limiting the time within which suit may be brought to two years and a day, is reasonable and valid.

This being a valid contractual limitation in an interstate bill of lading, we think it must be held to be outside the purview and operation of C. S., 412, which is but an extension of or exception to our general statute of limitations. If the stipulation in question be valid as against the general law, it would seem to follow, as a necessary corollary, that it is equally unaffected by a statute extending that law on condition. The rights of the parties flow from the contract. It relieves them from the limitations of the general statute, and, as a consequence, from its exceptions also. Against both statutes the parties have specifically contracted. "Only within two years and one day" shall suits be instituted, is the provision of the contract. This stipulation is expressly made an integral part of the agreement, and it is attached as a condition thereto. The time limit having been made, as it is, of the essence of the right to institute suit, it follows that this right must be exercised before the expiration of the time fixed, or else it will ordinarily be lost. *Vaught v. V. & S. W. R. R.,* 132 Tenn., 679. See, also, *Belch v. R. R.,* 176 N. C., 22, and cases there cited.

There is no provision made for any exception in the event of death, and the Court cannot insert one without changing the terms of the contract. *Riddlesbarger v. Hartford Ins. Co., supra,* and *Morrison v. B. & O. R. Co.,* 33 Ann. Cas., 1026. "The contract constitutes the law between the parties, and, if it contain no exception, none will be presumed." *Gaston, J.,* in *Clancy v. Overman,* 18 N. C., 405.

Under the facts of the instant case, we do not think the plaintiff has shown any equitable excuse, certainly none has been seasonably pleaded, for failing to bring her suit within the time limited in the bill of lading. The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

CLARK, C. J., dissenting: Conceding that the stipulation limiting the time in which this action could be brought to "two years and a day" is reasonable, and is a valid contractual limitation in an interstate bill of lading, the plaintiff has not had the time agreed upon in which to bring suit. Upon the death of her intestate, opportunity to bring action ceased, until a personal representative was appointed.

C. S., 412, provides a relief in such cases as follows: "If a person entitled to *bring an action* dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death."

This statute is general and gives relief whenever the time limited has not expired when the person entitled to bring the action dies before the time has expired. It does not matter whether the time was limited by statute or the time substituted by contract, but the statute applies in all cases where the "time limited" had not expired at the death of the party entitled to suit. A restriction cannot be inserted in the statute by any reasonable rule of construction.

This principle has been expressly declared in *Meekins v. R. R.*, 131 N. C., 2; and been often affirmed since, among other cases, in *Trull v. R. R.*, 151 N. C., 545, and in many other cases. C. S., 159, provides: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator, or collector of his estate."

On the death of the plaintiff's intestate, his right of action not having expired, the plaintiff as his personal representative, was entitled under the words of the statute (which are not restricted to statutory causes of action) to prosecute this action and was entitled to the time allowed by the general act, C. S., 412, or at least to reasonable time under general principles of equity, in which to take out letters of administration; otherwise death would cut off in many cases the remedy given by C. S., 159, of prosecuting the cause of action which has not been destroyed by the lapse of time at such death, and which under that section survived to his personal representative.

But if there should be interpolated in the statute by judicial construction a restriction to those cases in which the original limitation was imposed by statute, still upon well known equitable principles applying to all contracts, when the performance of the contract has been prevented, without any fault on the part of the person entitled to enforce the contract, there should be a reasonable extension so that the party may not be deprived of opportunity to sue within the length of time prescribed by the agreement. Upon that principle, irrespective of our statute, the death of the intestate within two years and a day would not repeal the contract as to the time in which he might have brought the action, and his personal representative should be entitled to a reasonable time to take out letters of administration and bring the action. This principle is so well settled and so reasonable and just that there should be no doubt of its application in this case.

The validity of the stipulation restricting the right to sue to two years and one day depends upon the reasonableness of that stipulation, and certainly when the plaintiff was deprived of opportunity to bring action within that time without any default on his part, a reasonable time should be allowed in which to bring the action.

The time provided by the statute, C. S., 412, is not restricted to any particular class of cases, and should apply in all cases, but if words are interpolated into the statute restricting its terms to statutory limitations, then where the contractual limitation is substituted for a statutory limitation, certainly it is in accordance with all equitable principles that a reasonable time should be allowed in which to bring the action, since by act of God the plaintiff was disabled to bring this action within the two years and a day. Certainly in such case "equity should follow the law"—otherwise it would be inequitable.

BENJAMIN FORBES ET AL. V. J. C. LONG ET AL.

(Filed 20 September, 1922.)

1. Mortgages—Contract to Convey—Equity of Redemption—Dower.

The grantee in possession of land under a contract to convey holds in the nature of an equity of redemption by mortgage, in which his wife, after his death, is entitled to dower.

2. Same—Possession—Widows—Limitation of Actions—Heirs.

The dower interest of the wife in the equity of redemption of lands formerly belonging to her deceased husband, held by her in continued possession after his death, is superior to the right of the husband's heirs at law, but not adverse in the sense that it would start the running of the statute of limitations against them.

3. Same—Children of First Marriage—Evidence.

The husband was in the possession of land in the nature of a mortgagor, and after his death his wife by a second marriage continued thereon. The mortgage was canceled out of the estate of the deceased husband, after his death, and the mortgagee conveyed the land to his children as heirs at law, some of them by the first and some by the second marriage: *Held*, the possession of the wife after the death of her husband did not start the running of the statute of limitations, or ripen the title in her by adverse possession as against the children of the husband by the first marriage. The character of the wife's possession under the evidence in this case at least raised a question for the jury.

4. Trials—Argument of Counsel—Depositions Withdrawn—Approval of Court—Orders.

A party to an action may not withdraw depositions he has had taken from the files of the court without leave and an order from the court,

and upon his so doing, the counsel for the adverse party may argue to the jury that the depositions were unsatisfactory to the party at whose instance they had been taken.

APPEAL by defendants from *Allen, J.*, at January Term, 1922, of PASQUOTANK.

This was a special proceeding, the petitioners alleging that they were tenants in common, each owning one-eighth of an undivided interest, and that the defendants owned the other three-fourths of the land in question. From a verdict and judgment in favor of the plaintiffs, the defendants appealed.

W. I. Halstead and Ehringhaus & Small for plaintiffs.
Aydlett & Simpson for defendants.

CLARK, C. J. The land in question admittedly belonged to one Buffkins, who made a deed in March, 1875, "conveying it to John, Virginia, Cordelia, James, Ambrose, and Edgar L. Forbes, children and heirs at law of Isaac Forbes." Before his death, said Isaac had gone into possession of these lands under a contract to convey. The plaintiffs are two of the grandchildren of said Isaac Forbes, being the children and heirs of John Forbes, son of Isaac, named in the deed. The defendants have admittedly acquired the interest of the other heirs at law of Isaac Forbes, named in the deed.

After the death of Isaac Forbes, his widow, Mary (afterwards Mrs. Boyce) remained on said lands with a part of the children, who gradually moved away, she remaining there with one of the sons, Edgar, an imbecile, until he was carried to the county home. She also paid some taxes on the lands and collected rents. The plaintiffs' ancestor was not on the land, and lived in another part of the county.

These plaintiffs left their step-grandmother unmolested as long as she lived, but after her death, when they undertook to assert their claim for their undivided interest, the defendants, who had then acquired all the other interest, denied the plaintiffs' right to a share in the land, alleging that Mrs. Boyce, the grandmother, by adverse possession, had acquired title.

Upon the face of the deed from Buffkins, and the recitals therein, Isaac Forbes was a mortgagor in possession prior to his death for the retention of title by Buffkins, as set out in the deed made the bargainee a mortgagee, and Isaac Forbes was the possessor, therefore, of an equity of redemption in the premises. The possession by his widow after his death was rightful, and not adverse to his heirs. She was entitled to dower in the lands, and therefore the period of her possession cannot be counted against the plaintiffs or their father, heirs at law of her hus-

band. Besides, nearly all the time some of the heirs at law were living with her on the land. There is no scintilla of evidence of a denial of their right at any time by their step-grandmother. The possession of the widow is not adverse to the heir. *Everett v. Newton,* 118 N. C., 919; *Malloy v. Bruden,* 86 N. C., 251; *Melvin v. Waddell,* 75 N. C., 361. Her estate was an elongation of her husband's estate, and, as widow, she held in *priority* with, not adversely to, the heirs and those claiming under them. *In re Gorham,* 177 N. C., 277; *Love v. McClure,* 99 N. C., 295.

The court properly refused the defendants' motion for a nonsuit. Upon the face of the record the plaintiffs and defendants were tenants in common, and the character of Mrs. Boyce's possession would have been in any view for the jury to determine.

The defendants, several months before the case was called for trial, had taken certain depositions out of the State, which were sealed and sent to the clerk of the court, but the defendants withdrew them from the files without any order of the court or consent of the plaintiffs. When the case was called, the plaintiffs moved the court to compel the depositions to be returned. The court so ordered, and the defendants excepted. The defendants had no right to remove them from the files without leave, and the order of the court for their return was proper. During the argument the attorneys for the plaintiff referred to the depositions, which were still unopened, and argued to the jury that they were unsatisfactory to the defendants; otherwise, they would have given the jury the benefit of their contents. We do not see that this was an unreasonable inference or an unfair argument, and, indeed, it does not appear in the record that there was any exception on this ground.

No error.

ROSA WILSON AND HUSBAND v. SINGER SEWING MACHINE COMPANY AND J. A. LIVERMAN.

(Filed 20 September, 1922.)

1. Trespass—Evidence—Verdict.

Upon the trial of an action for assault upon the person and trespass upon the property of the *feme* plaintiff, there was evidence that the agent of the defendant called at the house to collect a deferred payment under a vendor's lien upon a sewing machine, refused to wait therefor until the return of the plaintiff's husband, and resisted her efforts in opposition: *Held,* sufficient to sustain a verdict awarding damages to the plaintiff.

2. Principal and Agent—Trespass—Torts of Agent—Damages.

Where the defendant's agent authorized to collect deferred payment under a vendor's lien in the sale of a sewing machine, uses force in taking the machine away upon the nonpayment of the amount due, it is a tort performed in the course of the agent's employment for which the principal is answerable in damages.

3. Instructions—Statutes—Expression of Opinion of Judge—Prejudice—Racial Distinctions.

Where the presiding judge instructs the jury, who are all white men, of their duty to give exact justice between a colored plaintiff and a white defendant, without considering the color line, but specifically and clearly disclaims any opinion of his own upon the facts in evidence, it is not objectionable, as an expression of an opinion by the judge, forbidden by the statute.

APPEAL by defendants from *Bond, J.,* at February Term, 1922, of BEAUFORT.

This action is for assault upon the person and trespass upon the property of the *feme* plaintiff. She had purchased upon conditional sale, on the installment plan, from the defendant sewing machine company, a machine on which she had made sundry payments to divers agents of the sewing machine company during a period of four years. The defendant had its office in Washington, N. C., with an agent, its co-defendant, J. E. Liverman, in charge, and the plaintiff testified that she had seen Garris in their office and paid him three or four times on the machine. That in June, 1919, this Garris, with whom she had dealt at the sewing machine company's office, came to her bedroom while she was cleaning up and knocked at the door, and she found him standing there. That he asked her if she had any money for him, to which she replied that she did not have any that day, but if he would come that night when her husband was at home she would get some money from him, to which Garris replied: "No, I will have to have my money or the machine."

She testified that Garris then proceeded with vile words to curse and abuse her; that she begged him not to do it, but he kept on; she says that she then left him and proceeded to clean up her room. She heard him move the machine and throw her Bible on the floor. She again begged him not to take the machine away, but he cursed her some more, and then took hold of one end of the machine, whereupon she took hold of the other, she pulling one way and he the other. Finally Mr. Cox came over to stop Garris from cursing and using profane language in the hearing of his wife, and then Garris wanted to fight Cox. She testified that under the violent threats and conduct of said Garris she became faint and had an attack like heart trouble; that she had to have a doctor that night, and all the next week, and after that was confined for a time

to her bed. There was evidence in corroboration of the plaintiff as to what occurred. Verdict and judgment for plaintiff: appeal by defendants.

Wiley C. Rodman for plaintiff.
E. A. Daniel and F. S. Spruill for defendants.

CLARK, C. J. The agency of Garris and his misconduct the jury found in favor of the plaintiff. The acts complained of were in the scope of his employment. In 2 C. J., 848, sec. 533, it is said: "The liability of the principal for torts committed by him is not limited to torts which he has expressly authorized or directed; he is liable for all the torts which his agent commits in the course of employment; and if he commits a tort in the course of his employment, the principal is liable therefor even though he was ignorant thereof, and the agent in committing it exceeded his actual authority or disobeyed the express instruction of his principal."

In 2 C. J., 849, sec. 534, it is further said: "In accordance with the above rule, a principal may be held civilly liable to a third person where his agent, while acting within the course or scope of his real or apparent authority, is guilty of assault and battery, conversion, trespass, etc., or wrongful levy"; and *ibid.*, sec. 536: "In order to render the principal liable for his agent's torts, they must have been committed while carrying out the principal's business; and it may be stated broadly that the tort of an agent is within the course of his employment where the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose."

There was evidence which justified the finding of the jury that Garris was the agent of the defendant, pursuing his regular business of collecting money from the plaintiff, and that he committed an assault upon the plaintiff and trespass upon her premises, and the misconduct alleged on this occasion, and that the defendant was liable. *Jackson v. Tel. Co.*, 139 N. C., 347.

The defendant relied earnestly and chiefly, indeed, upon the following language in the charge: "Now, it appears that the plaintiff is a colored woman. Her rights are being passed upon by a jury with twelve white men on it, and a white man on the bench. Notwithstanding this fact, it is a matter of serious responsibility to us, because I firmly believe in the fact that this is a white man's government, that he alone ought to hold its offices, run its courts, sit in its legislatures, and make the laws and enforce the laws for the benefit of all the people. Notwithstanding that fact, it is a matter of serious responsibility to us that when the

rights of property and personal liberty of colored people are being passed on in the courthouse with no representative of their race and color on the jury, or on the bench, it is a matter of most serious responsibility that we should be absolutely fair to them in passing on their rights, and forget for the time being that the color of their faces is different from yours and mine. Anything else than that would make a farce of the so-called administration of justice. The courthouse is no place for race prejudice in passing on their rights. There are only thirteen men in this courthouse who are, gentlemen, tied by a very solemn oath, and upon these men alone rests the adjustment of the rights of the people who are litigating the matters in the court, the twelve are the jurors, and the thirteenth man is the judge. I don't mean to say that this woman is entitled to win this case; that is absolutely foreign to my thoughts, but I have simply laid down some of the general propositions to commit us to an appreciation of this fact, that is, that there ought to be no color question in the courthouse. The case ought to be tried exactly as if all of us were of the same color. If the woman has sustained the burden of proof, which is upon her, and has shown that she has a right to recover, she ought to recover without regard to the color of her skin. Nothing is further from my thoughts than meaning to say that a colored person has any more right to recover than a white person, and the verdict should be found according to the facts, as the facts are found to be."

Whether or not this language was desirable, or necessary, to impress upon the jury the requirement of absolute impartiality is a matter that was committed to the discretion of the judge. It could be objectionable only as a matter of law if it was calculated to bias the jury in favor of the plaintiff, but as the record states, the judge expressly cautioned the jury that he was not intending to indicate any opinion in favor of the plaintiff. He said, "Nothing is further from my thoughts than meaning to say that a colored person has any more right to recover than a white person, and the verdict should be found according to the facts, as the facts are found to be." This a jury of ordinary intelligence could not possibly misunderstand, and we cannot find that they were prejudiced by the charge.

A similar exception to the charge of the same judge that on a trial where one party is white and the other is colored the jury should be fair and just and give them a fair and impartial hearing, regardless of the color of the litigants, was held to be no ground for error in *McLaurin v. Williams,* 175 N. C., 293.

Unless there is error of law in the charge prejudicial to the appellant, he cannot assign as error merely the language of the judge's charge, nor

can we review him. That is a matter left to his judgment. As Sheridan said, in the House of Commons—a demurrer cannot be entered to a trope nor a special pleading to a figure of speech.

A very similar case to this was *S. v. Goode,* 130 N. C., 651, where the white agent attempted by violence to take furniture which had been sold to a colored woman on the instalment plan. In that case, as in this, the woman asked the agent to return when her husband got back that night and she would pay, but in that case, as in this, he demanded immediate payment and attempted to take the property by force. The woman resisted and a tussle ensued. There was this difference, that the agent in that case got the worst of the contest, as the woman used a baseball bat on his head, and the agent indicted the woman for assault and battery. The facts as set out in that case are amusing and interesting. Upon them the presiding judge at the trial told the jury that the defendant was upon her own testimony guilty of using excessive force on the prosecuting witness, and instructed the jury to find the defendant guilty. This Court gave a new trial, for that whether there was excessive force was a question for the jury and not for the court; and in the opinion discusses practically the same questions that arise here, though the position of the parties was reversed, the agent there having received more pummeling than pence, and the woman being indicted instead of, as in this case, bringing her action for assault and battery and trespass.

No error.

L. S. HOGE AND WIFE, MARGARET M. HOGE, v. GUION LEE.

(Filed 20 September, 1922.)

1. Deeds and Conveyances—Boundaries—Natural Boundaries—Evidence.

In order to the application of the rule that where natural objects or muniments of title are called for as the boundaries described in grants or deeds, they generally control or prevail over courses and distances, it is essential that the muniments or objects relied on be identified, or their location admitted or established beyond controversy, and in this event the location may become a matter of legal interpretation.

2. Same—Trials—Admissions—Questions of Law.

Where muniments of title or natural objects are called for in a grant or deed to lands, the subject of the action, concerning the location of which there is a dispute between the parties upon conflicting evidence, or where the evidence tends to show two or more natural objects that may answer the description, the question of the location of the boundaries dependent thereon must be determined by the jury under the instructions of the court.

3. Deeds and Conveyances—Boundaries—Natural Boundaries—Natural Reputation—Evidence.

Where the location of the lands in dispute is dependent upon the true location of a natural boundary called for in a grant or deed under which a party to the action claims title, in this case, the location of "the head of Juniper Swamp," and there is evidence to sustain the contentions of both the plaintiff and the defendant, testimony of a witness that he had known the point, or had it pointed out to him five or seven years ago, is not competent.

4. Same—Hearsay Evidence.

Testimony as to common reputation of the location of a natural object in the description in a deed or grant of land should have its origin at a time comparatively remote, should be *ante litem motam*, and it should attach itself to some boundary or natural object, or be fortified by evidence of occupation or acquiescence tending to give the land some fixed and definite location; and evidence of such reputation extending over a period of only five or seven years, is insufficient.

5. Same—Rule of Evidence.

The restrictions on the declarations of an individual concerning private boundary are that such declarations be made *ante litem motam*, that the declarant be dead when they were offered, and that the declarant be disinterested when they were made.

6. Same—Instructions—Admissions.

The descriptions and calls in a junior grant may not be received as evidence of the boundaries of a senior grant, but a reference in a later deed to the location of land described in an older deed may, in connection with other evidence, become competent as an admission of the grantee named in the deed containing such reference.

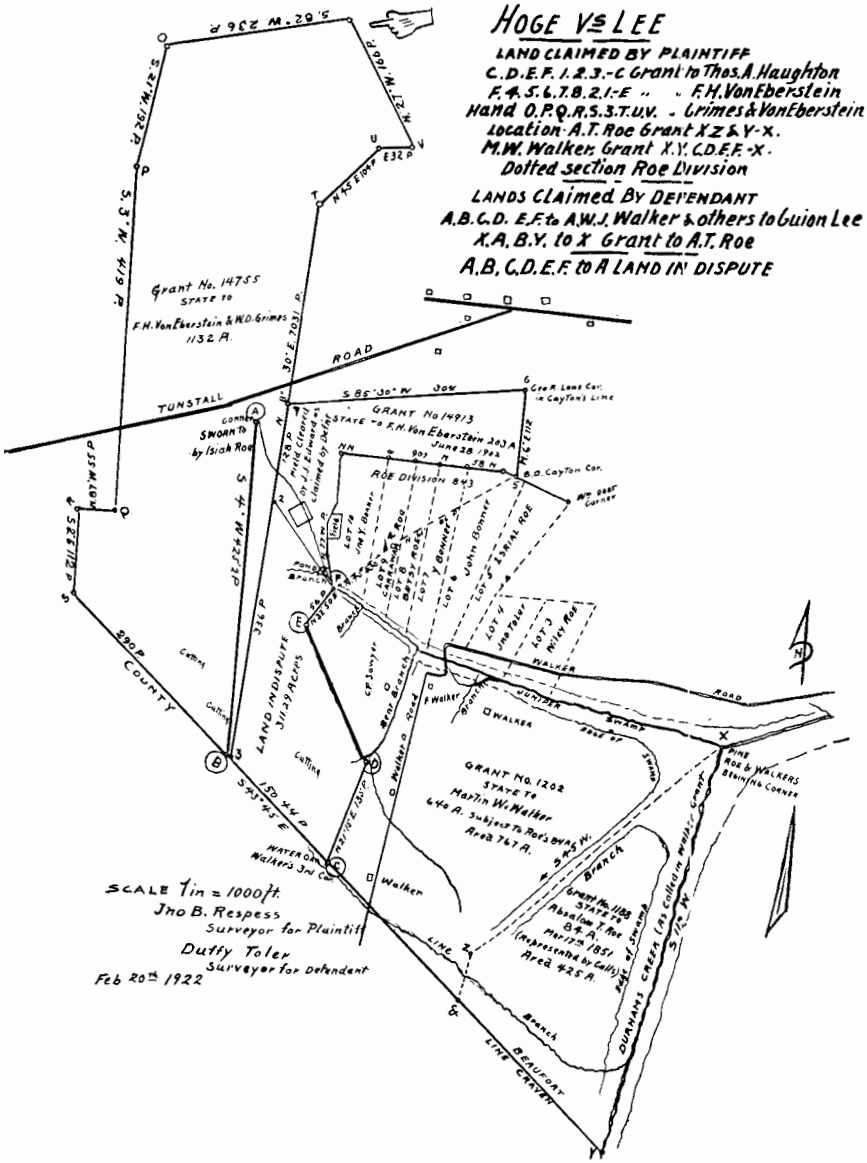
7. Trespass—Principal and Agent—Damages—Employer and Employee—Master and Servant.

Where one has employed another to cut the timber from his own land, and the one so employed cuts timber from lands outside his employer's boundaries, ordinarily an action may be maintained against the employer for the trespass of his agent, especially when he has knowingly received a part of the consideration for the timber, or there is other evidence of his ratification of his employee's acts.

APPEAL by both parties from *Bond, J.*, at February Term, 1922, of BEAUFORT.

Civil action for the recovery of damages for alleged trespass on land.

The land in controversy is represented on the plat by the letters A, B, C, D, E, F, A. The plaintiffs contend that this land is covered by the following grants, under which they claim title: (1) a grant to Thomas A. Haughton, dated 28 June, 1902, represented by the letters C, D, E, F, 1, 2, 3, C; (2) a grant to F. H. Von Eberstein, dated 28 June, 1902, represented by F, 4, 5, 6, 7, 8, 2, 1, F; (3) a grant to Grimes and Von


HOGE VS LEE
LAND CLAIMED BY PLAINTIFF
C.D.E.F. 1.2.3.-C Grant to Thos. A. Haughton
F.4.5.6.7.8.2.1.-E " " F.H. VonEberstein
Hand O.P.Q.R.S.3.T.U.V. " Grimes & VonEberstein
Location A.T. Roe Grant X.Z & Y-X.
M.W. Walker Grant X.Y. C.D.E.F.-X.
Dotted section Roe Division
LANDS Claimed By DEFENDANT
A.B.C.D. E.F. to A.W.J. Walker & others to Guion Lee
X.A.B.Y. to X Grant to A.T. Roe
A.B.C.D.E.F. to A LAND IN DISPUTE
Grant No. 14755 STATE TO F.H. Von Eberstein & W.D. Grimes 1132 A.
ROAD
TUNSTALL
GRANT No 14913 STATE to F.H. Von Eberstein 303 A June 28 1922
ROE DIVISION 843
LAND IN DISPUTE 31½ ACRES
GRANT No. 1202 STATE TO Martin W. Walker 446 A. Subject To Roe's 843 A. Held 767 A.
GRANT No. 1185 STATE TO Absalom T. Roe 84 A. Mar 17th 1851 (represented by Calls) Held 425 A.
DURHAMS CREEK (AS Called in Walker's Grant)
BEAUFORT LINE CRAVEN
SCALE 1 in = 1000 ft.
Jno B. Respess Surveyor for Plaintiff
Duffy Toler Surveyor for Defendant
Feb 20th 1922

Eberstein, dated 9 January, 1902, represented by index O, P, Q, R, S, 3, T, U, V. Plaintiffs introduced a deed from the State Board of Education to W. H. Whitley and S. R. Fowle & Son, dated 1 May, 1917, for the land described in these grants, and *mesne* conveyances which need not be set out.

The defendant offered the following: (1) a grant to A. T. Roe for 84 acres, dated 17 March, 1851; (2) a deed from A. T. Roe to Martin W. Walker for 200 acres, dated 19 October, 1851; (3) a deed from W. J. Walker and others, heirs of Martin W. Walker, to the defendant, dated 25 June, 1916. Defendant also claimed possession under color of title for the requisite length of time.

Plaintiffs introduced a certified copy of the original entry (dated 12 April, 1852), map, and grant to Martin W. Walker, dated 17 June, 1853. For the purpose of aiding the location, other record evidence was introduced by the parties. The grants and deeds were admitted to have been properly drafted and executed for the conveyance of the lands therein described. The following are the issues and answers:

"1. Has the defendant Guion Lee trespassed on that part of the land described in the complaint not claimed by said Lee in his answer? Answer: 'Yes.'

"2. If so, what damages, if any, are plaintiffs Hoge and wife entitled to recover for same? Answer: '$125.'

"3. Are plaintiffs Hoge and wife owners and in possession of that part of the land described in the complaint shown on the map used in the trial as A, B, C, D, E, F, A, and being that part of land claimed by the defendant in his answer? Answer: 'No.'

"4. Has the defendant Guion Lee trespassed on said land shown on said map as A, B, C, D, E, F, A? Answer: 'No.'

"5. What damage, if any, are plaintiffs Hoge and wife entitled to recover therefor from defendant Lee? Answer: ....."

Appeal by the plaintiffs, and by the defendant.

Daniel & Carter and Ward & Grimes for plaintiffs.

L. R. Varser and Wiley C. Rodman for defendant.

PLAINTIFFS' APPEAL

ADAMS, J. The plaintiffs and the defendant contend that their respective muniments of title include the land in controversy. The plaintiffs claim under grants issued in 1902, a deed executed by the State Board of Education in 1917, and *mesne* conveyances, while the defendant asserts title under a grant acquired by A. T. Roe in 1851, and subsequent conveyances. The defendant contends that the true location of the land described in his grant and deeds is as represented on the plat by the lines

A, B, Y, X, A, and that the *locus in quo* is within these lines. On the other hand, the plaintiffs insist, among other things, that the tract described in the Roe grant contains only 84 acres, and is located as represented by the lines X, Y, &, Z, X, and that it will include between 1,400 and 1,600 acres if the western boundary is extended to A, B. Indeed, the plaintiffs contend that the Roe grant lies within the boundaries of the land granted to Martin W. Walker, and that the western boundaries of the defendant's title extend only to the line C, D, E, F, or to the eastern boundary of the *locus in quo*. It is therefore apparent that the location of the land described in the several grants and deeds was a matter of vital importance in the determination of the controversy.

The land granted to A. T. Roe is described as follows: Beginning at the mouth of Juniper Swamp, running S. 45 W. 150 poles with said branch to the head; thence S. 30 poles to the county line; thence with said line S. 45 E. 150 poles to the main run of the creek swamp; thence with the run of the swamp to the beginning. In the deed from Roe to Martin Walker, and in other record evidence, the "head of the swamp" is designated as a part of the description of the land. The plaintiffs introduced evidence tending to show that the head of the swamp was at Z, or at NN, and the defendant offered evidence tending to show the location to be at A. The materiality of evidence tending to show this location is at once evident. If the head of the swamp is at A, the Roe grant and the Roe deed include the disputed land; but otherwise, if at Z or NN. On the direct examination of Duffey Toler the defendant inquired whether A was known in that locality as the head of Juniper Swamp, and the witness answered, "Yes, sir. I have only known the very point myself, or had it pointed out to me five or seven years, and have only known the branch indicated from the letter A for the same length of time." The plaintiffs objected to the question, excepted to the admission of the evidence, and in apt time moved to strike the answer from the record, and again excepted to his Honor's adverse ruling.

That natural monuments called for as the boundaries of grants and deeds generally control or prevail over courses and distances is a rule which has been repeatedly sanctioned and applied in the adjudications of this Court. But in order to make the rule effective it is essential that the monuments or objects relied on be identified, or their location admitted. When such location is admitted, or is beyond controversy, the description may become practically a matter of legal interpretation. To this principle may be referred *Slade v. Neal,* 19 N. C., 61; *Literary Board v. Clark,* 31 N. C., 58; *Bowen v. Lumber Co.,* 153 N. C., 366, and other similar decisions. But where there is a dispute concerning the true location of a natural object called for in a grant or deed, and the evi-

dence of the adverse parties touching such location is conflicting, or where the evidence tends to show two or more natural objects that may answer the description, the boundaries must be determined by the jury under the instruction of the court. This proposition is maintained in *Brooks v. Britt,* 15 N. C., 482; *Stapleford v. Brinson,* 24 N. C., 311; *Clark v. Wagoner,* 70 N. C., 706; *Weston v. Lumber Co.,* 163 N. C., 78, and other cases familiar to the profession.

His Honor, recognizing these principles, submitted to the jury the location of the head of Juniper Swamp, and to the contention of the parties on this question, Toler's testimony was distinctly pertinent. In fact, it was a circumstance particularly to be considered in its tendency to impeach as guides to the location of the head of the swamp the courses and distances called for in the grant to Roe and in the deed from Roe to Walker. In *Tatem v. Paine,* 11 N. C., 64, *Judge Henderson* said: "Where natural objects are called for as the termini, and course and distance and marked lines are also given, the natural objects are the termini, and the course and distance and marked lines can only be resorted to by the jury to ascertain the natural objects; they act as pointers or guides to the natural object. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect; in fact, I believe, none. Where there is more than one natural object in the neighborhood answering the description—that is, having common qualities—then those pointers or guides may be reverted to to ascertain where the object called for is, or which is the object designated. They do not then contradict or controvert natural boundary; they explain a latent ambiguity created by there being more than one object which answers the description."

The plaintiffs' exceptions are not identical with those presented in *Waters v. Simmons,* 52 N. C., 541. There the trial judge excluded evidence which was offered to show the location of the head of Spellar's Creek. There was no evidence that more than one natural object answered the description, and apparently the identity of the creek could be definitely determined. Toler testified that the "locality" around A was known as the head of the swamp, and the objection is rested on the ground that both the question and the answer imply knowledge acquired from general reputation or from the declaration of others. By what other means was the witness qualified to say that the place was known as the head of the swamp? In this State both hearsay evidence and common reputation, subject to certain restrictions, are admissible on questions of private boundary, but common reputation should have its origin at a time comparatively remote, always *ante litem motam,* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give

the land some fixed and definite location. *Hemphill v. Hemphill,* 138 N. C., 504; *Bland v. Beasley,* 140 N. C., 629. If it be admitted that the answer elicited amounts to evidence of common reputation concerning an object definitely fixed, reputation extending over a period of five or six years is insufficient. In *Bland v. Beasley, supra,* it was held that a period of seventeen years was not "comparatively remote." It is equally clear that the answer cannot be sustained as the declaration of a person deceased. The restrictions on the declarations of an individual concerning private boundary are (1) that the declarations be made *ante litem motam;* (2) that the declarant be dead when they are offered; (3) and that he be disinterested when they are made. We think the objection of the plaintiffs should have been sustained and the evidence excluded.

Exception 49 is addressed to the following paragraph in his Honor's charge: "The court charges you that in locating the A. T. Roe grant it is not competent to consider the calls in the junior grant, or other papers of later date, for the purpose of locating this grant; and any reference to the A. T. Roe grant in the Martin Walker grant, introduced by the plaintiffs, would not be considered by you in determining the location of the A. T. Roe grant, for the purpose of confining the Roe grant to a location within the boundaries of the Martin Walker grant."

In a line of decisions extending from *Sasser v. Herring,* 14 N. C., 340, to *Lumber Co. v. Lumber Co.,* 169 N. C., 98, this Court has consistently held that the description in a junior grant is not evidence of the boundaries in a senior grant. But the exception involves another principle. His Honor withdrew from the jury not only the description or "calls" in the junior grant, but "any reference to the A. T. Roe grant in the Martin Walker grant." Martin Walker accepted his grant with the attached surveyor's plat, which was a part of it, presumably procured by the grantee, reciting the location of the grant to Roe. The jury should have been permitted to consider this circumstance, without regard to the description by course and distance, as tending to show a declaration or admission on the part of Walker circumscribing the boundaries of the Roe grant. Such admission is competent, not in favor of the grantee (*Crump v. Thompson,* 31 N. C., 491), but against him and those claiming under him. If the recital of a deed in a subsequent deed is evidence of the former against a party to the latter and those who claim under him on the ground that it operates as an admission (*Hoyatt v. Phifer,* 15 N. C., 273), why should not the recital of location in the grant or in the survey of the grantee's entry likewise be considered? *Claywell v. McGimpsey,* 15 N. C., 89; *West v. Shaw,* 37 N. C., 483; *Gaylord v. Respass,* 92 N. C., 557; *Hickory v. R. R.,* 137 N. C., 202. In like manner, this principle apparently sustains the contention that the

deeds executed by Walker to his children are evidence tending to show that he recognized the western boundary of his grant as the eastern boundary of the land claimed by the plaintiffs.

As our view of the law requires the submission to another jury of the third, fourth, and fifth issues, the remaining exceptions need not now be considered.

New trial.

DEFENDANT'S APPEAL

ADAMS, J. The defendant's appeal from the judgment rendered on the first and second issues presents the question of his liability for alleged trespass on land situated west of the line A, B. There was evidence tending to show that the plaintiffs had title to this land; that the defendant did not claim it; and that W. J. Dunn, under a contract with the defendant, not knowing the exact location of the defendant's claim, cut timber on the western side of the line referred to. Where a servant is ordered to cut trees on his master's land and cuts some outside his master's boundaries, ordinarily an action may be maintained against the master for the trespass. 6 Labatt, sec. 2397. But here there was evidence from which the jury might reasonably infer that Dunn cut the timber in question under the defendant's authority, or, in any event, that the defendant received a part of the proceeds derived from the timber, and thereby ratified Dunn's trespass; and it is evident that the jury found as a fact, under his Honor's charge, that the defendant had either authorized or ratified Dunn's wrongful act. The motion for nonsuit and the requested instruction referred to in the seventh exception were therefore properly denied. The remaining exceptions relied on in the argument have relation to the motion and instruction which were declined by the court, and require no separate discussion. In the defendant's appeal there is

No error.

W. A. BASNIGHT ET AL. v. DARE LUMBER COMPANY.

(Filed 20 September, 1922.)

1. Principal and Agent—Implied Authority of Agent—Contracts.

An agent has not the implied authority to bind his principal by contracts that are so unusual or improbable in agencies of that character as would put an ordinarily prudent man upon his guard that such authority did not exist; and the person thus dealing with the agent is required to ascertain from the principal the extent of the agent's authority with regard to the subject-matter.

2. Same—Timber.

Where the defendant lumber corporation has an extensive plant for the cutting and hauling of its timber from large bodies of land, with a general agent in charge, a local agent with actual authority only to contract for the cutting, etc., over small parcels of land extending to periods of fifteen days, may not, by implied authority, bind his principal to a contract for the cutting of timber from a large body of timber requiring from three to eighteen years for its cutting, and the defendant, in the absence of an act of ratification, will not be bound thereby. *Chesson v. Cedar Works*, 172 N. C., 32, cited and applied.

3. Principal and Agent — Evidence — Questions for Jury — Established Facts—Questions of Law—Trials.

Whether an agent has attempted to bind his principal by an act beyond his express or implied authority is a question of fact for the jury, upon conflicting evidence; but whether the principal will be bound thereby is a question of law, under facts established or admitted.

APPEAL by defendant from *Daniels, J.*, at May Term, 1922, of DARE.

Civil action to recover damages for an alleged breach of contract. Upon denial of liability and issues joined, there was a verdict and judgment in favor of plaintiffs. Defendant appealed.

B. G. Crisp, Thompson & Wilson, and Meekins & McMullan for plaintiffs.

Ehringhaus & Small for defendant.

STACY, J. The facts in the case at bar are strikingly similar to those in *Chesson v. Cedar Works*, 172 N. C., 32, and, on authority of that case, we think the defendant's motion for judgment as of nonsuit should have been allowed.

There was evidence on behalf of the plaintiffs tending to show that in October, 1917, the plaintiff W. A. Basnight entered into a verbal contract with R. B. Cotter, whereby it was understood and agreed that the said Basnight should have the right and privilege of cutting "cooper logs" on a tract of land belonging to the defendant company and containing approximately 640 acres. With respect to the manner in which the contract is alleged to have been made, the plaintiff testified as follows:

"I went in Cotter's office and told him I would like to get a contract cutting some juniper. He said all right, sure you can get it. He said I could contract any place I wanted. I told him I wanted to contract up on 'Little Wide' on Mill Tail Creek. He asked me when did I want to go to work. I told him I would be ready the first day of November. He said all right, sir, he would let Mr. A. M. Cohoon go up with me and ramble the timber. That was all the conversation.

"Mr. Cohoon and I went up there and rambled the timber something like a week later. . . . We left Buffalo City 7 a. m., and got back

at three or four o'clock in the afternoon of the same day. Only rambled along the creek and for a short distance back. . . . Went to see Mr. Cotter again that afternoon. . . . I told him then I would like to have some understanding about it. He asked what that was. I told him I wanted to contract from 'Little Wide' through to 'Stokes Wide,' and as far back as the timber reached. He said all right, sir, you can have it. Then I said I want to know the price. He said 5½ cents a stick straight, delivered on Mill Tail Creek. There was nothing else in that conversation except that I said that I was ready to go to work at that price."

The plaintiff W. A. Basnight then formed a partnership with J. W. Ambrose for the purpose of cutting said timber and entered upon the work on or about 2 November, 1917. In the spring of 1918, after the plaintiffs had cut the timber back for a distance of 150 or 200 yards, Eph. Duval, who was a log-counter, brought them a note from Mr. Cotter in which he is alleged to have said (the note was not offered in evidence): "We cannot pay this price any longer. We will pay for the first 200 yards, 4½ cents; for the second 200 yards 5 cents, and 5½ cents for all over that." Plaintiffs then quit cutting, having cut up to that time 38,557 logs, or an average of 7,711 per month, for which they have been paid in full. Plaintiffs testified that they could have finished the cutting in three years at a profit of approximately $15,000. But it is conceded that it would have taken eighteen years at the rate they were proceeding, with their force of sixteen men.

It also appears from the plaintiffs' testimony—there was none offered by the defendant—that the main sawmill of the Dare Lumber Company was located at Elizabeth City, N. C., forty or fifty miles away from its logging operations, and that Mr. C. P. Brown was in charge of the same. This was known to the plaintiffs; and, in their original complaint, they alleged that "R. B. Cotter and said Dare Lumber Company, at the time hereinafter set forth, were engaged in cutting and marketing timber, under an agreement between said defendants constituting a partnership, as plaintiffs are informed and believe."

The authority of Cotter to enter into the present contract and to bind the defendant lumber company thereby is the crucial point in the case. Plaintiffs concede that no actual authority has been shown, and that they are compelled to rely upon the doctrine of apparent or implied authority.

It was established that the defendant owned approximately 170,000 acres of timber lands in Dare County, and maintained there an extensive logging equipment, consisting of five locomotives, eleven skidders, and six barges. Two to four hundred men were employed in Dare County; Cotter had an office on the defendant's property at Buffalo City and was

apparently in charge of said logging and woods operations. He exercised the same authority as others who had preceded him in this work.

Two methods were employed in contracting the timber to be cut; one by laying off "breadths" along the railroad and the other by "bunches" where the company had no tract. W. D. Basnight, a witness for the plaintiffs, testified that he had cut some "bunches of juniper and my contracts always ran from pay-day to pay-day, which was every fifteen days." The language used in the instant case would seem to suggest that a similar procedure was to be followed here. Indeed, it appears that such was the fact. W. A. Basnight, one of the plaintiffs, testified: "We have been paid for every stick of juniper that we actually cut in the woods under our contract. Our claim is for damages for not letting us continue to cut under the contract at the said price." He further testified that they had put in a tram road; at what expense not stated, though it does appear that it would have cost $1,200 or $1,500 for the whole tract. There was also allegation and proof to the effect that plaintiffs were ready, able, and willing to complete the contract.

There was denial of any liability on the part of the Dare Lumber Company; both defendants alleging in their answers that Cotter had no authority to enter into any such contract on behalf of said company. The plaintiffs seem to have had some knowledge of Cotter's want of authority, as witness their allegation of an alleged partnership, of which there was no evidence offered on the trial. In fact, this allegation was abandoned, and plaintiffs now seek to hold the defendant lumber company liable by virtue of Cotter's apparent agency.

The defendant's mill was at Elizabeth City, under the general supervision and management of C. P. Brown, a fact known to the plaintiffs, and there was no evidence of Cotter's actual authority, as agent of defendant company, to make such a contract. Indeed, the casual manner of its making, coupled with its unusual and extraordinary provisions, if plaintiffs have interpreted it aright, would seem to suggest inquiry on their part. The circumstances were such as to put them on notice.

"The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all or should ascertain from the principal the true condition of affairs." Mechem on Agency, sec. 389.

Whether Cotter did in fact enter into the contract as alleged was, of course, a question for the jury, and they have found that he did, but

there is an absence of any sufficient evidence to establish his authority to act for the Dare Lumber Company in the execution of such an extraordinary contract. There is quite a difference between a contract which is to last for fifteen days and one that is to run from three to eighteen years. It is not even alleged that the defendant lumber company had any knowledge of this agreement, nor that it has in any way ratified the same. No benefits have accrued therefrom which have not been paid for in full. Cotter's power to bind the Dare Lumber Company in this unusual manner could not be implied merely from his connection with the logging operations under all the facts of the instant case.

There was a judgment of nonsuit as to the defendant R. B. Cotter, from which the plaintiffs have not appealed, though exception was duly noted at the time. Hence, the correctness of this ruling is not before us for review.

The principles governing the case at bar are fully discussed in *Chesson v. Cedar Works, supra,* and *Stephens v. Lumber Co.,* 160 N. C., 107; and, upon authority of those cases, we think the defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

A. C. LATHAM, ANNIE GASKILL, ET AL. v. S. W. LATHAM, MRS. CARRIE HANCOCK, EXECUTRIX OF THE WILL OF S. W. LATHAM, ET AL.

(Filed 20 September, 1922.)

1. Pleadings—Admissions—Limitation of Actions—Statutes—Judgments—Appeal and Error.

Where the statute of limitations to the action has been pleaded, and it appears from the face of the complaint and the uncontroverted facts that the plaintiffs' cause of action is thereby barred, a judgment dismissing the cause of action on that ground as a matter of law will not be disturbed on appeal, though there may be valid exceptions for error in other phases of the trial, especially when the parties have requested the court to first determine that question.

2. Limitation of Actions—Statutes—Trusts—Fraud—Executors and Administrators.

Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life, and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated.

3. Same—Knowledge—Notice.

In order to repel the bar of the statute of limitations, by showing action commenced within three years from the discovery of the fraud, and bring it within the provisions of C. S., 441 (9), it is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence.

4. Same—Judgments—Deeds and Conveyances—Registration.

A testator devised to his executor to hold in trust for his son and his family a certain part of his estate for his son's wife, and then convey the same to his son's child or children, etc. The executor obtained, in proceedings before the clerk, with all the parties represented, an order to sell the testator's land, including that of the trust estate, to pay the debts of the deceased, and conveyances were made by him to the purchasers and registered. In an action alleging fraud on the part of the executor in procuring the lands in trust through third parties bidding at the sale, gross inadequacy of price, etc., *it is held*, that the proceedings before the clerk to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the *cestuis que trustent*, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom.

5. Same—Confidential Relations.

Held, under the facts of this case, there were no such confidential relations existing between the plaintiffs and the executor and trustee of their deceased ancestor as would repel the bar of the statute of limitations by reason of the failure of the executor or trustee to disclose the facts of the alleged fraud.

6. Limitation of Actions—Statutes—Nonresidents.

The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action.

APPEAL by plaintiff from *Bond, J.*, at April Term, 1922, of BEAUFORT.

Civil action, tried and determined on the pleadings.

The action was instituted in said county on 10 October, 1916, by plaintiffs, certain grandchildren of Fred P. Latham, deceased, successors in title to the *pro rata* rights and interests of A. C. Latham, Josephine Potts, and Henrietta Tripp, all now deceased, and who took and hold their rights as among the devisees and heirs at law of said F. P. Latham, against S. W. Latham, executor of the will of F. P. Latham, and trustee of certain portions of the real estate under said will.

Subsequent to the institution of the suit, defendant S. W. Latham, executor, died, and by order duly entered his executrix and heirs at law and devisees under his will have been made parties defendant. On matters more directly pertinent to the questions presented, the original complaint alleges:

"That Frederick P. Latham, late of the county of Craven, North Carolina, died on 3 October, 1866, leaving a last will and testament, which will was duly proven in open court and in due form of law, and recorded in the office of the clerk of the Superior Court of Craven County, by the terms of said will he devised to the defendant Samuel W. Latham the following real estate, to wit: 'The plantation whereon my son Alex. C. Latham now resides, containing 820 acres, which comprises all of the land which I acquired by descent from, and by purchase from, the heirs at law of Rufus W. Latham, together with certain personal property therein named, the said devise being contained in item 3 of said will, to hold the said land and personal estate upon the following uses and trusts, that is to say, that the said Samuel W. Latham shall from year to year collect and receive the rent hires, interest, and benefits of all the said estate comprised in this clause, and shall equally pay out and appropriate the same for the maintenance and support of my son, Alex. C. Latham, and his family, during the natural life of the said Alex. C. Latham, then in trust to convey the said estate in absolute property to such child or children (or the representatives of such as may be dead) of the said Alex. C. Latham as may him survive.' By the terms of item 8 of said will, Fred P. Latham made the following devise:

"After the death of my wife, all the estate described in the first clause of my will and given to my wife for life, except such as has been heretofore disposed of, I give and bequeath to be equally divided between my four daughters, Mary Eliza Hancock, Pauline Whitehurst, Henrietta Tripp, and Josephine Potts, the share of said Josephine Potts to be held in trust by my son, Samuel W. Latham for the sole and separate use of said Josephine Potts, discharged from all the liabilities of said husband, William Potts."

A copy of the said will is hereto attached and marked Exhibit "A," and made a part hereof as much so as if pleaded in full.

"2. That by the terms of the said will and item 9 thereof the said Fred P. Latham, deceased, directed his executors to make sale of certain personal property, and also certain land on South Creek and on the Sand Hills, and also certain perishable estate for the purpose of paying his debts, and appointed his two sons, Alex. C. Latham and the defendant Samuel W. Latham, executors to the said last will and testament.

"3. The defendant Samuel W. Latham qualified as the sole executor to the said last will and testament of the said Fred P. Latham, deceased, and letters of administration were issued to him in December, 1866.

"4. On or about 28 April, 1870, the defendant caused a special proceeding to be instituted before the clerk of the Superior Court of Craven County, wherein the heirs and devisees of Fred P. Latham were made parties, and in said special proceeding, obtained an order of license to

make sale of all the real estate devised by the last will and testament of the said Fred P. Latham, and described in said will, which will is referred to for description thereof, and also other real estate not described in said will, and which said real estate is also described in the petition in the special proceeding heretofore referred to, which petition is made a part hereof for the purpose of a full and complete description of the real estate ordered to be sold.

"5. That pursuant to the order made in the said special proceeding, the said S. W. Latham, as executor of F. P. Latham, deceased, made sale of the lands devised in said will, and other lands described in said petition by deed dated 7 October, 1871, and recorded in book 97, page 133, in Craven County registry, for a consideration of $1,959, and on the same day the said Cicero Green conveyed said land to George Green, which deed is recorded in book 97, page 136, in the register's office of Craven County, and on the same day the said George Green conveyed the same lands to the defendant S. W. Latham, by deed recorded in book 97, page 126, register's office of Craven County.

"6. The plaintiffs allege further that the defendant S. W. Latham failed and refused to make sale of the Sand Hill lands and the South Creek lands mentioned in item 9 of the said will, and therein directed to be sold for the purpose of paying the debts of the said F. P. Latham, deceased, but made sale of the lands described in the petition, as aforesaid, including more than six thousand acres of land for less than $2,000, and many times less than the true value of the said land; that at the time of the sale of the said lands many hundred acres of same were cleared and in cultivation, with the old home place containing a valuable home and out-buildings and the 800-acre plantation devised to S. W. Latham in trust for A. C. Latham during his life, and then to his children, which had on it a valuable home and out-houses, and that the said lands so sold by the defendant S. W. Latham, as executor, were bought in by Cicero Green, and on the same day conveyed by the said Cicero Green to George Green, attorney and agent of defendant, for the same consideration, and on the same day conveyed by George Green to the said S. W. Latham, defendant, for the same consideration, and the plaintiffs allege that the defendant was in truth and in fact purchaser at his own sale, and had the said Cicero Green and George Green, his attorney and agent, to buy in said lands for him, and had the said Cicero Green to convey the same to George Green and the said George Green to convey the same back to the defendant for the purpose of covering up and concealing the fact that the defendant was the real purchaser, and that in truth and in fact no consideration whatever passed between the said Cicero Green and the said George Green, and they were conspiring with the defendant for the purpose of enabling the defendant to

purchase in all of said lands at his own sale made by him as executor of F. P. Latham, deceased, for many times less than the real value thereof, to enable him to get and hold title to same in fee simple clear of and discharged of the trusts declared by the aforesaid will."

The complaint then alleges certain sales and conveyances by S. W. Latham about the same time of certain real estate not described in the will of F. P. Latham, the greater portion of which were embraced in executor's petition for sale for assets, in 1870, or were included in the deeds by which S. W. Latham conveyed the said property to the Greens, and they in turn back to himself, and with averments that this and all the other realty had passed into the hands of third parties, whose title had matured by time and adverse possession of the holders. And in section 19 of complaint further allegation is made as follows:

"That these plaintiffs had no knowledge whatever of the matters and things hereinbefore alleged and the fraud and wrongs perpetrated on them by the defendant S. W. Latham until within less than a month of the institution of this suit, and within three years prior to the institution thereof. Neither these plaintiffs nor those under whom they claim had any knowledge of the matters and things and fraud herein alleged until within three years of the bringing of this suit."

And after alleging the great value of the lands dealt with in these proceedings, and that they were bought in by defendant executor at a nominal sum, the complaint closes with the statement and prayer as follows:

"These plaintiffs are informed and believe, and so allege, that they are entitled to recover of the defendant the value of the said lands and the value of the rents and the profits therefrom arising. And by reason of the wrongful acts of the defendant hereinbefore alleged, these plaintiffs allege that they have been damaged in the sum of $92,000, as their interest appears herein, and that the defendant is indebted to them in that amount, with interest from 7 October, 1871.

"Wherefore, the plaintiffs pray that they recover of the defendant the sum of $92,000, with interest thereon from 7 October, 1871, together with the costs of this action, and for such other and further relief as to the court seems proper."

In an amended complaint, filed by leave of court, plaintiffs set forth the pertinent dates principally of the births and deaths of the claimants or their ancestors in title, as it affects the rights involved in this controversy, as follows:

"1. That the deed from George Green to the said S. W. Latham, dated 7 October, 1871, and referred to in sections 5 and 6 of the complaint, and being recorded in book 97, page 126, and also the deed from Cicero Green to George Green, bearing like date, and recorded in

book 97, page 134, both were held from record, and were not registered until 14 January, 1888; Julia J. Latham, widow of F. D. Latham, deceased, died in 1888, after the death of A. C. Latham; that the said A. C. Latham died 25 September, 1886, leaving as his only children the plaintiff A. C. Latham and Mrs. Gaskill; that Mrs. Gaskill died 3 May, 1914, leaving surviving her as her only heirs at law her two children, to wit, the plaintiffs Annie Gaskill and Alex. Gaskill; that Josephine Potts, named in said will, died 24 April, 1895, and left surviving her as her children and heirs at law Z. M. Potts, J. R. Potts, Mrs. Lucy Hanks, Mrs. Kugler, and Fred L. Potts; that none of the plaintiffs had knowledge of the facts alleged in the complaint, constituting the fraud of S. W. Latham, until within three years of the bringing of this suit, said plaintiffs being nonresidents of Craven County, the defendant S. W. Latham, and also the other defendants, falsely represented to the plaintiffs that S. W. Latham had a life estate in said lands, and upon his death it would pass to these plaintiffs.

"2. The plaintiff A. C. Latham was born 22 May, 1861, his sister, Mrs. Gaskill, was born 24 June, 1852, and she has two surviving children, Annie Gaskill and Alex. Gaskill, who were born 2 May, 1889, and 12 April, 1891, respectively. Josephine Potts was born 4 August, 1833. Her youngest surviving child, who is the plaintiff, was born in 1873. Josephine Potts was married at the date of the devise alleged in the complaint, and remained until her death, in 1895. Mrs. Gaskill was married 26 January, 1882, and was survived by her husband.

"3. The plaintiff Lucy Hanks was married prior to the death of her mother, Josephine Potts, and has been a nonresident of the State since 1896, and the plaintiff Ida Kugler was married prior to the death of her mother, Josephine Potts, and has been a nonresident of the State since 1894, prior to the death of her mother; and that the plaintiff John R. Potts has been a nonresident of the State since 1889."

Defendants answer the complaint denying all averments of fraud or improper dealings on the part of S. W. Latham, as executor or otherwise, and allege that at the time of this transaction lands were comparatively of small value; that the bulk of the cleared and improved lands were subject to the life estate of the widow of F. P. Latham, and of his son, A. C.; that the estate was involved and a sale was necessary to satisfy the valid claims of creditors; that the purchase price of sale was all properly accounted for in payment of these claims and costs, and that in 1875 the executor filed his final account with the clerk of court at which accounting all of the predecessors in title and interest of present plaintiffs were represented by their counsel, one of them being personally present. The vouchers and accounts were fully examined into and

approved by them and officially by the clerk of the court. And the said account was then recorded in the proper book of settlements, and has been of record since said date.

The answer further alleges that all the dealings were fully known to plaintiffs at the time, or their ancestors in title, and pleads specifically the various statutes of limitations and presumptions applicable to the facts presented.

Upon perusal of the pleadings, the court entered judgment as follows: "This cause coming on to be heard before his Honor, W. M. Bond, judge, upon the pleadings filed in this action, it appearing from same that the statutes of limitations are pleaded, defendants moved the court to hold upon the facts alleged in the complaint and amended complaint, that said action is barred by said statutes, and to dismiss same, and both sides desiring the court to rule on said question so as to avoid the expense and save the time of lengthy trial, if said plea should bar plaintiffs action; from said facts, as alleged in the said complaint and amended complaint, the court being of the opinion, as a matter of law, that said action is barred by the statutes of limitations and laches of the plaintiffs, and by reason of the great length of time, laches, and neglect of the plaintiffs, they should not be allowed to further prosecute their action: It is thereupon ordered, considered, and adjudged by the court that said action be dismissed; that plaintiffs are not entitled to recover anything, and that defendants go without day and recover their cost herein.

"W. M. BOND, *Judge Presiding.*"

Plaintiffs excepted, and appealed.

Daniel & Carter and Small, MacLean, Bragaw & Rodman for plaintiffs.

Ward & Grimes, Moore & Dunn, and Guion & Guion for defendants.

HOKE, J. It is a practice approved in our decisions that where a cause is called for trial and the statute of limitations having been properly pleaded it appears from the face of the complaint and the uncontroverted facts that the plaintiff's cause of action is barred by statutory limitation of time, a judgment of nonsuit or dismissing the action on that ground will not be disturbed, though there may be valid exceptions for error in other phases of the trial. *Rankin v. Oates,* 183 N. C., 518; *Earnhart v. Comrs.,* 157 N. C., 234-236; *Oldham v. Rieger,* 145 N. C., 254; *Cherry v. Canal Co.,* 140 N. C., 422.

And especially is such course permissible where, as in this case, the parties have requested the court to dispose of the case on the question suggested.

This, then, being in accord with our procedure, the court clearly had the right to determine the controversy on perusal of the pleadings, and in our opinion has correctly ruled that in any aspect of the matter the plaintiffs' cause is barred by the statute of limitations applicable.

As we understand the record, the gravamen of this demand is for a breach of duty on the part of S. W. Latham, deceased, as executor of his father, F. P. Latham, and for breaches of trust under his said will, in that without legal cause he has procured a sale by court decree of a large landed estate of F. P. Latham, amounting to six thousand acres or more, to pay debts not exceeding $5,000, and has by the intervention of nominal parties, bought in said estate and taken title thereto, or the greater part of it, for $1,959, and a mere nominal consideration, and after occupying said property under said deeds since said sale and conveyances, he has sold and conveyed the same to innocent purchasers for value, who now have and hold the title unimpeachable by action or otherwise on plaintiffs' part, and the relief demanded being against S. W. Latham and his successors, in interest for $92,000 damages incident to the fraud and breach of trust alleged against him. And this when it appears from the allegations of the complaint that the sale complained of was by regular proceedings in court, instituted in 1870, to which all of plaintiffs or their ancestors in title were duly made parties of record, when the deeds complained of were formally executed in 1871, and have been of record since 1888, and the property thereby conveyed has been in the open, exclusive, continuous, and adverse possession of the purchaser and others claiming under him since said date, and certainly since the death of the life tenants under the will of F. P. Latham, to wit, Julia J. Latham, widow of F. P., who died in 1888, and A. C. Latham, a son, who died in 1886. Recurring more particularly to the facts stated in the complaint, and the dates given by plaintiff in the amended complaint, they seem to be in full support of the statement from the carefully considered brief of defendant's counsel:

"This suit was commenced by summons dated 10 October, 1916, at which time the following number of years had elapsed since the several dates mentioned in the complaint, to wit:

"*Fifty years* since the death of Frederick P. Latham, the testator; and the qualification of Samuel W. Latham as executor.

"*Forty-six* years since special proceedings was instituted by the executor for sale for assets.

"*Forty-five* years since the deeds were executed conveying the lands, and *twenty-eight* years since the deeds were registered.

"*Forty-one* years since Samuel W. Latham, executor, filed his final account and made settlement of the estate.

"*Thirty years* since Alex. C. Latham, life tenant under item 3 of the will, died; at that time his son, Alex. C. Latham, was 25 years old, and is one of the plaintiffs now living; and Mrs. Gaskill, the devisor's daughter, and mother of the plaintiffs Gaskill, was 34 years old, and she lived until May, 1914.

"*Twenty-six* years since Julia J. Latham, widow of the testator, and life tenant under item 8 of the will, died. At that time Josephine Potts, the only remainderman under said item, represented in this suit, was 55 years old.

"*Twenty-one* years since the death of said Josephine Potts, and at the time of her death her youngest child was 22 years old.

"*Seventeen* years since coverture was a bar to the plea of adverse possession.

"When the suit was started the youngest plaintiff was 43 years old and the oldest plaintiff was 55 years old."

Assuming that the allegations of the complaint are broad enough to constitute and include a direct demand against S. W. Latham for malfeasance as executor, our decisions hold that the relationship between such and the beneficiaries of the estate becomes adversary in two years from his qualification, and such a claim will be barred, at most, within ten years from that date. *Brown v. Wilson,* 174 N. C., 668; *Edwards v. Lemmons,* 136 N. C., 329.

Considering the complaint as a demand for an accounting by a trustee under the terms of the will, the devise to S. W. Latham in trust to collect and apply the rents and hires and interest, etc., of said estate to the support of A. C. Latham and his family during the life of A. C. Latham, and then to convey to his child or children, etc. This estate, constituting an active trust during the life of A. C. Latham, would become passive at his death, which occurred in 1886, and from that date the parties would be in an adverse relation to each other, putting the statute in motion and the claim on that account would be barred, at the furthest, in ten years from the death of A. C. Latham. *Rouse v. Rouse,* 176 N. C., 171. Assuredly so when there had been an open and avowed repudiation of any and all relationship as trustee. *Rouse v. Rouse, supra; University v. Bank,* 96 N. C., 280.

Plaintiffs, however, contend that this is an action based upon the fraud of defendants, or their predecessor, S. W. Latham, whereby they have been wrongfully deprived of their property, and that the same comes under C. S., 441, subsec. 9, by which their claim is only barred within three years from the discovery of the facts constituting the fraud.

Conceding that plaintiffs' statement brings his cause within purview of this section, and undoubtedly this is the intent and purpose of the complaint, we have held in numerous decisions that under this clause an

action is barred within three years from the discovery of the facts or from the time when they should have been discovered in the exercise of proper diligence or reasonable business prudence. *In re Johnson,* 182 N. C., 525-527; *Sanderlin v. Cross,* 172 N. C., 234-242; *Ewbank v. Lyman,* 170 N. C., 505-508; *Jefferson v. Lumber Co.,* 165 N. C., 49; *Sinclair v. Teal,* 156 N. C., 458; *Peacock v. Barnes,* 142 N. C., 215.

On this question, in *Johnson's case, supra,* quoting with approval from *Peacock v. Barnes, supra,* the Court said: "We do not hold, as appellant contends, that the statute begins to run from the actual discovery of the fraud, absolutely and regardless of any negligence or laches of the party aggrieved. A man should not be allowed to close his eyes to facts observable by ordinary attention and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts must be imputed to him for knowledge, and in the absence of some actual effort to conceal a fraud or some of the essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action shall be deemed to have accrued from the time the fraud was known or should have been discovered in the exercise of ordinary diligence."

It is insisted for the appellants that their cause does not come within the effects of this principle as a conclusion of law by reason of allegations in the complaint to the effect that one or more of plaintiffs were nonresident, and that S. W. Latham, who was their uncle, had told them that he had a life estate in the property, and that appellants' right and interest therein would not accrue until his death, but on the facts of this record, such a general averment is entirely insufficient to repel the bar of the statute or to raise any issue concerning it.

So far as the alleged nonresidence is concerned, it is well recognized that nonresidence of a claimant has no direct effect on the running of the statute of limitations (*Ewbank v. Lyman, supra*), and on the general allegations of information by S. W. Latham, the uncle, there was no claim that any trust or special confidence existed between these parties that might lead the one to depend upon the other, and so far as appears, they were all adult, and had been for many years, dealing at arms length with each other, and if any such statement was made, it would be entirely insufficient to qualify or affect the rights of the parties when it appeared that for 46 years there had been an open and notorious repudiation of any and all trust relationship, when every essential fact now made the basis of plaintiffs' claim was in great part set forth of record in a judicial proceeding to which the ancestors in title of these plaintiffs

were duly made parties, and when further there had been open, notorious possession of the property in the assertion of ownership under deeds of record since 1888, and which had been made pursuant to decrees had in the judicial proceedings referred to. The cause, therefore, comes clearly within the well considered decisions of the court in which claimants were affected with knowledge and notice of the facts in impeachment of their claim. *Sanderlin v. Cross,* 172 N. C., 234-243; *Ewbank v. Lyman,* 170 N. C., 505; *Coxe v. Carson,* 169 N. C., 132; *Dunn v. Beaman,* 126 N. C., 771; *Cox v. Brower,* 114 N. C., 422.

In *Sanderlin v. Cross, supra,* speaking in reference to knowledge or notice of impeaching facts disclosed of record, *Allen, J.,* among other things, said: "It is true that in several of the cases, such as *Modlin v. R. R.,* 145 N. C., 226; *Tuttle v. Tuttle,* 146 N. C., 493, and others, it is said that the registration of a deed is not sufficient to put a party on notice that a fraud has been committed; but in those cases the action was based on fraudulent representations in procuring a deed, and the record did not disclose any fraud or violation of trust, while in this case the record shows all of the facts for which the plaintiffs contend, and, in addition, there is the circumstance of possession."

The case then quotes with approval from *Beaman's case,* 126 N. C., as follows: "The case of *Dunn v. Beaman,* 126 N. C., 771, is strong authority for the position that when the facts appear on the record, the party is affected with notice. In that case a valuable tract of land was devised in 1844 to the children of John R. Beaman. The father qualified as guardian for the children, and filed an *ex parte* petition for a sale of the land for partition, and the land was sold and the sale confirmed, and the guardian received the purchase money. The children of Mr. Beaman did not know until within three years prior to the institution of their action that any land had ever been devised to them, or that their father was their guardian, or that the land had been sold. They presented their claim against the estate for the purchase money of the land, and having been made parties to a creditor's bill, one of the creditors pleaded the statute of limitations to the claim, and the children, while disavowing any charge of intentional fraud upon the part of their father, replied that they had discovered the facts within three years. The contention was not sustained, and it was held that their cause of action was barred."

The Court said: "The children had legal notice of the facts. The will of Carraway, under which their title accrued, was probated and recorded in 1844, and the land devised to them was sold for partition in 1861 at the courthouse door after due advertisement under a decree in equity; the proceedings in equity were duly recorded, to which three of the children, who were adults, together with their husbands, were parties

praying the sale, and the decree of confirmation was properly enrolled. The deed from the clerk and master to the purchaser was duly recorded in the register's office, and was notice to the children as well as to all the world, and they were put on notice by the recitals therein contained."

And on the effects and policy of statutes of presumption and limitations in cases where there has been long and inexcusable delay, *Burwell, J.*, in *Cox v. Brower, supra,* said: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome extent. Hence, statutes of limitation have been enacted in all civilized communities, and in cases not within them, prescription or presumption is called in as an indispensable auxiliary to the administration of justice."

On careful consideration, we find no error in the record, and the judgment of the court dismissing the action is

Affirmed.

B. F. EAGLES COMPANY, INC., v. EAST CAROLINA RAILWAY.

(Filed 20 September, 1922.)

1. Carriers of Goods — Railroads—Damages—Penalty—Statutes—Filing of Claim.

Under the terms of our statute, C. S., 3524, imposing, in favor of the consignee, a penalty upon the carrier for loss of or damage to goods while in its possession, if not paid, "within ninety days after the filing of such claim by the consignee with the carrier's agent at the point of destination or at the point of delivery to another carrier": *Held*, the filing is sufficient if delivered to the designated agent for that purpose, and so received by him.

2. Same—United States Mail.

The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of C. S., 3524, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail.

3. Same—Evidence—Prima Facie—Conflicting Evidence—Questions for Jury—Trials.

Where the consignee properly addresses, stamps, and mails his claim for such loss or damage at a postoffice of the United States Government, it will be presumed that it was delivered, as addressed, in the usual course of the mails, and a denial of delivery by the carrier raises a conflict of evidence thereon for the determination of the jury, and the carrier's motion as of nonsuit is properly denied.

4. Carriers of Goods — Railroads — Penalty — Statutes — Principal and Agent.

The penalty imposed by C. S., 3524, on the carrier to pay a claim for damages, etc., within ninety days after the filing of the claim by the consignee with carrier's agent at the terminal point, etc., is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover the penalty, the consignee must file his claim with the agent, as the statute directs, and the filing thereof with another of the carrier's agents is insufficient.

APPEAL by defendant from *Horton, J.*, at June Term, 1922, of EDGECOMBE.

Plaintiff brought suit to recover $1.21 for loss or damage to goods in transit, and for a penalty of $50 for failure to pay the claim within the time prescribed by the statute. C. S., 3524.

The defendant operates a railroad from Tarboro to and beyond Macclesfield, in Edgecombe County. On 1 November, 1920, the Atlantic Coast Line Railroad Company issued a bill of lading for a shipment of lard from Rocky Mount to the plaintiff at Macclesfield, the initial and terminal points being within the State. The plaintiff's place of business is at Crisp, near Macclesfield. On arrival of the shipment at destination, it appeared that one of the tubs had been broken and a part of the contents lost. The claim was filed, if at all, on 11 December, 1920. With regard to filing his claim, the plaintiff testified as follows: "I put the letter in the mail and delivered it to the carrier on our route. I have a mail box at the store, and the carrier stops in the store and gets the mail right out of the store. I put the required postage on the letter, and I put the letter and claim in the R. F. D. letter box. Letter had return notice on it; it never was returned. I properly addressed the letter to the East Carolina Railway at Tarboro, and I put the postage on it; the letter was delivered to the carrier. I gave it to the carrier myself." This was the plaintiff's customary way of filing its claims. J. T. Hagans, a witness for the defendant, testified that he had been freight claim agent for the defendant six years; that he had not received this claim, and never saw it until 11 March, 1922, when it was sent to him as one of a list of claims.

The issues were answered as follows:

"1. Did plaintiff file claim with defendant, as alleged? Answer: 'Yes.'

"2. What amount is plaintiff entitled to recover of defendant? Answer: '$1.21, with interest from 11 December, 1920.'"

The parties agreed that only the first issue should be submitted to the jury, and that the second should be answered by the court after the verdict was returned on the first.

The defendant in apt time moved for judgment of nonsuit as provided by statute, and to the denial of its motion, and to an instruction of the court, which is set out in the opinion, duly excepted. Judgment upon the verdict for the amount of the indebtedness and the penalty of $50. Appeal by the defendant.

Don Gilliam for plaintiff.
John L. Bridgers for defendant.

ADAMS, J., after stating the facts: In case of intrastate shipments the statute requires that every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid for within ninety days after the filing of such claim by the consignee with the carrier's agent at the point of destination or at the point of delivery to another carrier, and that every carrier shall be liable for the amount of such loss or damage, with interest thereon from the time the claim is filed until it is paid. The statute provides that failure to adjust and pay such claim within the period prescribed shall subject the carrier to a penalty of fifty dollars for every such failure, and that a cause of action for the recovery of loss or damage may be united with a cause of action for the recovery of the penalty. C. S., 3524.

The plaintiff recovered both the penalty and the loss incurred, and the exceptions on appeal present the questions whether there was error in his Honor's instruction, and whether the defendant was entitled to judgment of nonsuit.

What is the technical import of the phrase "after the filing of such claim"? Similar expressions have been repeatedly construed by the courts. It has been held that a paper or an instrument is filed when it is deposited in the proper office with a person in charge thereof; when it is delivered for the purpose of filing; when it is lodged with the proper person; and when it is delivered and received to be kept on file. *Tregambo v. Mining Co.*, 57 Cal., 501; *Edwards v. Grand*, 53 Pac. (Cal.), 796; *Mann v. Carron*, 79 N. W. (Mich.), 941; *Masterson v. So. Ry.*, 82 N. E. (Ind.), 1021. The following is Webster's definition of the verb: "To deliver (a paper or instrument) to the proper officer so that it is

received by him to be kept on file, or among the records of his office." Hence, in *Thompson v. Express Co.*, 147 N. C., 346, *Brown, J.*, cited several cases substantially holding that filing a paper means receiving it into custody, and in *Power Co. v. Power Co.*, 175 N. C., 673, *Walker, J.*, held that a paper is filed when it is delivered to the proper officer for that purpose and received by him. The indorsement of the paper by the officer or other person is evidential but not requisite, unless made so by statute. *Power Co. v. Power Co., supra; Lumber Co. v. Mack*, 69 S. W. (Ky.), 712; *Peterson v. Taylor*, 15 Ga., 483. The plaintiffs' claim of loss or damage was therefore filed if it was delivered to or placed in the custody of the defendant's agent for that purpose, and by him received. But since not restricted to manual delivery of its claim, the plaintiff was not precluded from the use of the postoffice as a public agency for effecting the communication. The essential things were the delivery for filing and the receipt of the claim. The plaintiff contends, not that mailing was equivalent to filing the claim, but that the verdict removes all doubt as to the actual receipt of the claim by the defendant. As a counter argument the defendant insists that depositing the letter in the mail, prepaid and properly addressed, is not sufficient evidence of delivery, and moreover, that the jury returned their verdict under the court's erroneous instruction as to the law. When the evidence shows that a letter has been committed to the postoffice or other depository from which letters are regularly delivered, properly stamped, and correctly addressed to the place of residence of the person for whom it is intended, it will be presumed that the sendee received the letter in the due course of mail. Jones on Ev., sec. 52. In *Trust Co. v. Bank*, 166 N. C., 116, it is said: "When it is shown that a letter has been 'mailed,' this establishes *prima facie* that it was received by the addressee in the usual course of the mails and his business, and when the latter introduces evidence that it was not in fact received, or not received at the time alleged, such testimony simply raises a conflict of evidence, on which it is the exclusive province of the jury to pass." The instruction complained of is in accord with these authorities, and is free from error.

An entirely different question is involved in the defendant's contention that the plaintiff, instead of filing the claim with the agent at Macclesfield, sent it to the defendant at Tarboro, and therein failed to comply with the statute. The purpose of the penalty is to enforce obedience to the mandate of the law by punishment of the carrier. Therefore it is that the statute must be strictly construed, and he who sues to recover the penalty must bring his case clearly within the language and meaning of the law. *Thompson v. Express Co., supra; Cox v. R. R.*, 148 N. C., 459; *Sears v. Whitaker*, 136 N. C., 38. "Applying the rule by which courts should be guided in the construction of a penal

statute, *Bynum, J.*, in *Coble v. Shoffner*, 75 N. C., 42, says: 'It cannot be construed by implication, or otherwise than by express letter. It cannot be extended, by even an equitable construction, beyond the plain import of its language. If, therefore, even the intent of the Legislature to embrace such a case was clear to the court from the statute itself, we cannot so extend the act, because such a construction is beyond the plain import of the language used.'" *Grocery Co. v. R. R.*, 170 N. C., 244.

By the very terms of the statute the claim for loss or damage must be filed by the consignee with the carrier's agent at the point of destination of the shipment or at the point of delivery by the carrier in possession of the property to another common carrier. The obvious purpose is to afford the agent at the place of destination, or at the place of delivery to another carrier, fair opportunity to make investigation of the claim within the statutory period. "The transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily, the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations." *Phillips v. R. R.*, 172 N. C., 88.

In *Smith v. R. R.*, 174 N. C., 111, it is said: "The burden is on plaintiff to show not only that the claim was in writing, but that it was filed with defendant's agent at the point of delivery or of origin within four months after a reasonable time for delivery has elapsed. The point is expressly decided in *Culbreth v. R. R.*, 169 N. C., 724."

And in 34 Cyc., 587, it is said: "To constitute a valid filing for record, the instrument must be delivered at the office where it is required to be filed, and delivery of an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer indorses it as properly filed."

In his brief, the defendant's counsel earnestly insists that the plaintiff should have filed its claim with the defendant's agent at Macclesfield, and we concur in his conclusion. Having failed to file its claim as required by law, the plaintiff cannot maintain its action. The judgment of his Honor is set aside, and his denial of the defendant's motion is

Reversed.

J. B. PENNINGTON v. TOWN OF TARBORO.

(Filed 20 September, 1922.)

1. Municipal Corporations—Cities and Towns—Surface Water—Waters—Negligence—Drains—Damages.

It is an actionable nuisance for a city or town, after receiving sufficient actual or implied notice, to permit its sewer or drain to fill up with debris and other obstructions so as to repeatedly cause the surface or rain water to flood the property of a resident owner, upon the street, and thereby damage his property.

2. Appeal and Error—Instructions—Objections and Exceptions—Prayers for Instruction—Special Requests.

Where there is evidence of actionable negligence on the part of a city or town in permitting its drain, etc., to become successively stopped up so as to pond water upon the plaintiff's property, after notice thereof had been given, an exception that the charge of the court was not sufficiently definite as to the time of the notice, and the damage thereafter resulting, is untenable, it being required of the defendant to have presented this question by an appropriate request for special instruction.

APPEAL by defendant from *Horton, J.*, at April Term, 1922, of EDGECOMBE.

The action is to recover damages caused to plaintiff's property by defendant in negligently permitting the city sewer or drains to fill up, thereby causing the surface waters in the city to flood the plaintiff's property, and doing substantial damage to same. Denial of liability by defendant. Verdict for plaintiff, assessing his damages at $1,000. Judgment on the verdict, and defendant excepted and appealed.

G. M. T. Fountain & Son for plaintiff.
Donnell Gilliam for defendant.

HOKE, J. Plaintiff complained, and offered evidence tending to show, that in the summer of 1920 he was the proprietor of a building in the town of Tarboro, used by him for a garage and in the sale of automobile supplies, etc. That during said period the town authorities had negligently permitted the city sewer and drain below plaintiff's property to fill up with debris and other obstructions, causing the surface or rain waters, three times during said summer, to flood plaintiff's property and doing substantial injury both to the building and the supplies therein, amounting by plaintiff's estimate and testimony to $1,600 or $1,700.

The evidence further tended to show that after the first flooding plaintiff personally called the attention of the town authorities to the conditions presented, but they failed to correct the trouble, and there was a second and a third flooding, the last being much the worst, and

doing extensive injuries. Upon these facts, which the jury have accepted and established by their verdict, it appears that defendant has been guilty of negligence constituting a nuisance and causing damage to plaintiff's property, and for which the town has been properly held liable. *Hines v. Rocky Mount,* 162 N. C., 409; *Donnell v. Greensboro,* 164 N. C., 330; *Watson v. New Milford,* 72 Conn., 561; *Hines v. Nevada,* 150 Iowa, 620; *Nevins v. Fitchburg,* 174 Mass., 545; 9 R. C. L., pp. 672-673.

It is not seriously contended by defendant that the town is not liable for the second and third flooding, and the damages incident thereto, but it is insisted that there is prejudicial error in the charge of the court on the issue as to the amount of damages suffered, the objection being that all damages incident to the first flooding should have been eliminated for want of notice or knowledge on the part of the authorities of the faulty condition of the sewer.

While the charge is not as full or definite on the issue as could be desired, when taken in connection with his Honor's statement of the respective contentions of the parties, and considered as a whole, the jury were instructed in effect that the plaintiff should be allowed damages for the impaired value of his property or the pecuniary loss incident to defendant's wrong. This is the correct general rule applicable to the case. It was not ascertained or necessarily established by the testimony that the town was not sufficiently informed of the condition of the sewer at the time of the first flooding to import liability. And if defendant thought there were phases of the evidence permitting such an inference and limiting the damages in that respect, he should have presented the question by a special prayer for instructions. *Hill v. R. R.,* 180 N. C., 490; *Buchanan v. Furnace Co.,* 178 N. C., 643.

In this last case the position is stated as follows: "Exceptions that the instructions of the court to the jury were not sufficiently full and explicit will not be considered on appeal. If the appellant desired any particular phase of the case to be presented to the jury, he should have requested a special instruction presenting it."

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

No error.

CAROLINA BAGGING COMPANY v. UNITED STATES RAILROAD ADMINISTRATION (SOUTHERN RAILWAY COMPANY).

(Filed 20 September, 1922.)

1. Judgments — Justices' Courts — Appeal—Superior Courts—Trials de Novo—Railroads—Federal Control—Director General.

On appeal from a judgment of a justice of the peace to the Superior Court, in an action to recover damages for the loss of a shipment of goods, brought against the Government Railroad Administration and the carrier over the lines of which the shipment was to have been transported, the judgment appealed from is vacated, and a trial *de novo* had in the Superior Court and a motion to dismiss as against the carrier is properly allowed.

2. Carriers of Goods—Railroads—Director General—Federal Statutes—Substituted Agent—Motions—Parties—Nonsuit.

An action, commenced against the Government Railroad Administration during its control, and prior to 1 March, 1920, does not abate under the provisions of the Federal statute of 28 February, 1920; and there being no stated time in which the agent of the Government designated in substitution of the Director General must be made a party: *Held*, the motion of such agent to dismiss on that ground should be denied; and "the cause proceed to judgment upon his being made the party defendant by the court, a recovery, if anything, to be promptly paid out of the revolving fund." The effect of the statute is otherwise when the action has been commenced since 1 March, 1920.

APPEAL by plaintiff from *Allen, J.*, at June Term, 1922, of VANCE.

The plaintiff sued out a warrant before a justice of the peace and obtained judgment thereon 12 November, 1919, for $131.07 against defendant for failure to deliver 75 bundles of cotton ties. From this the defendant appealed in apt time to the Superior Court. The defendant named in the warrant and judgment was the "United States Railroad Administration (Southern Railway Company)." At June Term, 1922, of the Superior Court, on motion, the action was dismissed as to the Southern Railway Company on the ground that said defendant did not commit the act complained of, its lines at the time complained of being operated by the United States Government. This motion was allowed.

Thereupon, James C. Davis, agent designated by the President under the authority of section 206 (*a*) of the Transportation Act of 1920, moved to dismiss the action as to the "United States Railroad Administration" upon the ground that said United States Railroad Administration was abolished by the act of 1920, and that more than two years had elapsed since that date, and no steps had been taken or motion made to make said Davis a party thereto. The motion to dismiss was granted, and the plaintiff appealed.

J. P. Zollicoffer for plaintiff.

Hicks & Son for Southern Railway Company, and appearing specially for J. C. Davis.

CLARK, C. J. The judgment obtained before the justice of the peace was vacated by the appeal, and the cause of action was pending for trial *de novo* in the Superior Court. The motion to dismiss as to the Southern Railway Company was properly allowed (*Kimbrough v. R. R.*, 182 N. C., 235; *Wyne v. R. R., ibid.*, 257), under the authority of the *Ault case* in the United States Supreme Court.

The United States Railroad Administration, through counsel for James C. Davis, moved also to dismiss the cause under the act of 28 February, 1920, which went into effect 1 March, 1920, and which legislated Walker D. Hines, Director General, out of office. That act, section 206 (*a*), provided that all actions which could be brought against the Railroad Administration should be brought against an agent designated by the President, who so designated James C. Davis, within thirty days, as required by that act. This section, however, applies only to the bringing of an action, but does not affect this action against the Railroad Administration, which had been brought and was pending.

The section of the statute which seems to apply to this case is 206 (*d*), which provides: "Actions, suits, proceedings, and reparation claims of the character above described, *pending* at the termination of Federal control, *shall not abate* by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under this subdivision." This action was already pending, and under the statute it did not abate, but may be prosecuted to final judgment, "substituting the agent designated by the President under subdivision (*a*)." And section 206 (*e*) further provides that "such final judgments, when rendered against such agent designated by the President, shall be promptly paid out of the revolving fund created by section 10."

Section 206 therefore provides that a new action must be brought against James C. Davis, but that if the action is already pending the action "shall not abate by reason of the termination of the Federal control, but that it shall be prosecuted to final judgment," substituting James C. Davis.

This action being already on the docket, by the service upon the Railroad Administration, under the statute it did not abate. There is no provision which authorizes an abatement of the action, but on the contrary, it should be prosecuted to final judgment upon James C. Davis being substituted for the Railroad Administration.

There is no time prescribed when this shall be done, and there is no authority given to dismiss the action, but only to substitute Davis and proceed to final judgment. When counsel of James C. Davis moved to dismiss, in the absence of a statute prescribing the time within which the substitution should take place, and there being no abatement prescribed as a penalty for failure to do so in a given time, the court should have ordered Davis to be substituted as a party, and, in the language of the statute, should have proceeded in the cause "to final judgment." If the judgment should be in favor of the plaintiff, the statute provides that it "shall be promptly paid out of the revolving fund created by section 10." 41 Stat. L., 462.

It was evidently contemplated that such actions would be retained on the docket, for it is provided that payment shall be made out of the revolving fund. The above statute is brought forward and will be found in Fed. Stat. Anno. (2 ed.), Supplement 1920.

The order dismissing the action should be reversed, and the cause prosecuted to final judgment, as prescribed by the statute, James C. Davis being substituted as a party defendant.

Reversed.

FRANCES BLACKMAN v. WOODMEN OF THE WORLD.

(Filed 20 September, 1922.)

1. Insurance—Benevolent Societies—Evidence—Prima Facie Case—Nonsuit.

In the widow's action to recover upon a life insurance policy under which she is a beneficiary, evidence that the insured had died, and that she was the widow named in the policy, which she introduced in evidence, makes out a *prima facie* case, and defendant's motion to nonsuit should be overruled.

2. Same—Rules of Benevolent Societies.

The production by the beneficiary of a life insurance policy, the subject of the action, is *prima facie* evidence of its delivery to the insured; and on its face *prima facie* proof that the insured was inducted into the order, as therein recited, requiring of the defendant proof to the contrary, and a motion as of nonsuit is properly disallowed.

3. Same—False Representations—Fraud.

Upon the defendant's motion to nonsuit the beneficiary in an action to recover upon the certificate of a life insurance order, wherein the plaintiff has made out a *prima facie* case, the burden is on the defendant to show that the insured had made false representations that would avoid its liability, when relied on, and a motion as of nonsuit is properly disallowed.

4. Evidence—Nonsuit—Motions—Statutes.

Under the provisions of C. S., 567, the defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed.

APPEAL by defendant from *Calvert, J.*, at February Term, 1922, of JOHNSTON.

This was an action for the recovery of the amount stipulated in a beneficiary insurance certificate payable to the widow of the deceased member. She qualified as administratrix of the estate, but at the trial, by consent, the summons was amended by striking out the word administratrix, and the suit was prosecuted in her name individually, as beneficiary. C. S., 547. The plaintiff put in evidence the certificate with evidence of its authenticity, and that the insured had died, and that the plaintiff was his widow and the beneficiary named in the policy. The defendant pleaded that the certificate had not been delivered to J. I. Blackman under the terms and conditions on the policy; that he had not been inducted into the defendants' order in accordance with the constitution and by-laws; that the statements in the application of the deceased that he did not have jaundice, disease of the liver, gall stones, or any other disease of the digestive system, and that the representations in his application that he did not have cancer or tumor or other stomach trouble were false; that he falsely represented that he had not consulted or been attended by a physician for any disease or injuries during the past five years; and that he falsely represented in his application that he did not have and had never had bronchitis, chronic catarrh, or other disease of the throat or respiratory organs. The jury, in response to the issues submitted, found that the certificate had been delivered to J. I. Blackman, the plaintiff's intestate, under the terms and conditions of the constitution and by-laws of the defendant, and that he had been duly obligated and inducted in due form into defendant's order and negatived all the allegations as to false statements in the application, and found that said Blackman was in good health at the time of the execution and delivery of the policy. Judgment upon the verdict in favor of the plaintiff; defendant appealed.

Ray & Ray and Winfield H. Lyon for plaintiff.
Cowper, Whitaker & Allen and Ed. S. Abell for defendant.

CLARK, C. J. The production by the plaintiff of the certificate duly authenticated, and evidence that the insured had died, and that the

plaintiff was the widow named as beneficiary in the policy which she produced in open court, made out a *prima facie* case, which required the refusal of a motion to nonsuit. The production of the policy was *prima facie* evidence of its delivery by the defendant, and on its face was *prima facie* proof of his induction into the order as therein recited.

The defendant also asked for nonsuit upon the issues as to the false allegations as to the insured not having certain diseases alleged, and other statements in the policy. But these were matters in defense, the burden of proof of which rested upon the defendant, and a nonsuit was therefore properly refused. The defendant moved for a nonsuit at the close of the plaintiff's evidence, but as the defendant, upon the denial of such motion, introduced evidence, he waived the exception for a denial of the motion. The plaintiff thereupon, in reply, introduced other evidence, and the defendant's demurrer at the close of all the evidence was properly overruled, and the jury, as already stated, found against the defendant upon all the issues.

Under the former system of procedure, when a defendant demurred to the evidence or moved for a nonsuit, it was not admissible for him to introduce evidence. By C. S., 567, it is now provided that when the plaintiff rests, if a defendant moves to nonsuit, or demurs to the evidence, and the motion is denied, he is allowed to introduce evidence, but when he does so he waives the exception, and if the motion to nonsuit is renewed at the end of all the evidence, his exception must be considered in the light of all the evidence when the last motion is made.

In this case there was ample evidence to be submitted to the jury, who have found all issues in favor of the plaintiff. The appeal was argued in this Court almost entirely upon the question of nonsuit. The other exceptions do not require to be discussed.

No error.

C. GREENE v. J. C. NEWSOME ET AL.

(Filed 20 September, 1922.)

Appeal and Error—Courts—Expression of Opinion—Statutes.

Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion, forbidden by C. S., 564, and constitutes reversible error.

APPEAL by defendants from *Allen, J.*, at April Term, 1922, of HERTFORD.

The first issue and the answer thereto are as follows:

"1. Was the conveyance of the house and lot in Ahoskie, described in the complaint, from J. C. Newsome to Thomas Newsome made with the intent and purpose on the part of J. C. Newsome to hinder, delay, or defraud his creditors, or any of them? Answer: 'Yes.'"

Judgment for the plaintiff. Appeal by the defendants.

W. D. Boone for plaintiff.

S. Brown Shepherd and Bridger & Eure for appellants.

ADAMS, J. The action was prosecuted for the purpose of canceling a deed, for certain property, alleged to have been executed by the defendant J. C. Newsome in fraud of his creditors. Only one exception need be considered. The record shows that during the cross-examination of a witness for the plaintiff the following incident occurred: "By the court: Do you know where J. C. Newsome and Tom Newsome are, and also why they are not here in court to defend this action, as they should be? Their absence is a circumstance that a fraud has been committed. A. I haven't seen either J. C. Newsome or Tom here today." To this remark of his Honor the defendants in apt time excepted.

This Court has repeatedly held that a judge presiding should not at any time during the trial either express an opinion as to the weight of the evidence or make any remark from which the jury may reasonably draw an inference as to his opinion of the facts. His Honor, no doubt, in an inadvertent moment, and evidently without intending to do so, overlooked the decisions of the Court and the purpose of the statute. The jury may naturally have adopted his Honor's intimation as conclusive on the question of fraud.

We think the defendants are entitled to a new trial. C. S., 564; *Morris v. Kramer,* 182 N. C., 89; *S. v. Cook,* 162 N. C., 586.

New trial.

P. E. ROWLAND v. BOARD OF ELECTIONS OF VANCE COUNTY ET AL.

(Filed 20 September, 1922.)

1. Elections—Primary Law—County Board—Powers of Review—Qualification of Electors—Returns.

Under our primary law the right of a proposed elector to vote for the party's choice of a county official, in this case a register of deeds, is expressly referred to the precinct registrar and judges of election, without power of review, or otherwise, in the county board of elections, the authority of the county board extending only to supervise or to review "errors in tabulating returns or filling out blanks." C. S., 6042, 6048.

2. Same—Mandamus.

Where the county board of elections has assumed to pass upon the qualifications of the electors voting in a primary for the selection of a party candidate for a county office, and in so doing has declared certain of the electors disqualified, and has accordingly changed its returns and declared the one appearing to have received a smaller vote, the choice of the party as a candidate, an action will lie by the one appearing to have received the larger vote, against the county board, to compel them, by *mandamus*, to tabulate the returns made by the registrars and judges of the precinct, and then to publish and declare the same as the result of the election. C. S., 6042, 6048.

3. Elections—Primary Law—Statute—Legislative Powers—Courts.

The courts will not determine the reasonableness of the legislative enactment differentiating the authority of the county board of elections in passing upon the qualification of the electors of a precinct in a primary selection of a candidate for a county office, from the powers to be exercised by it in a general election, this being a matter entirely within the province of legislation and not subject to judicial inquiry by the courts.

4. Elections—Primary Law—Repealing Statutes.

The primary law to select a party candidate for a county office repeals all laws inconsistent with its provisions, and by incorporating therein certain provisions of the general election law, confers no authority on the county board of electors to pass upon the qualifications of the voters of a precinct, and thereby change the result of the election from that appearing upon the face of the returns it had officially tabulated.

CLARK, C. J., dissenting.

APPEAL by defendants from *Kerr, J.*, at chambers, 24 August, 1922, from VANCE.

Civil action to require the defendant Board of Elections of Vance County, by writ of *mandamus*, to tabulate the returns made by the judges and registrars of the several precincts in a primary election held in said county on 1 July, 1922, and then to publish and declare the correct result of said primary election in regard to the nomination of a candidate of the Democratic Party, for the office of register of deeds of said county. The plaintiff duly set out in his petition that, on the face of said returns, he was entitled to be declared the nominee of his party as candidate for the office aforesaid. This was not denied by the defendants, but they contend that on account of certain irregularities occurring in said election, the plaintiff's opponent, Mrs. George T. Buchan, should be declared the rightful nominee.

From a judgment in favor of the plaintiff granting the writ of *mandamus* as prayed for, and defendants, having duly excepted, appealed.

J. P. Zollicoffer, A. A. Bunn, and J. M. Peace for plaintiff.

T. M. Pittman, Andrew J. Harris, Perry & Kittrell, and Jasper B. Hicks for defendants.

STACY, J. On the hearing it was properly made to appear that on 3 June, 1922, an election was held in Vance County, pursuant to article 17, chapter 97, of the Consolidated Statutes, for the purpose of selecting, among others, a nominee of the Democratic Party as candidate for the office of register of deeds of said county. At this election the plaintiff, who, with others, had duly and regularly entered the primary, received a plurality, but not a majority of the votes cast in said contest. Whereupon, Mrs. George T. Buchan, who, as one of the contestants, had received the second highest number of votes for said nomination in the election, requested that a second primary be called and held as she was entitled to do under C. S., 6045. Pursuant to this request, and in accordance with the law pertaining to the subject, a second primary was duly called and held on 1 July, 1922. In this election, according to the returns made by the judges and registrars of the several precincts to the county board of elections, the plaintiff received 1,136 votes, and Mrs. George T. Buchan, his opponent, received 1,134 votes. Upon these returns the plaintiff contends that he is entitled to be declared the nominee of his party as candidate for the office of register of deeds of Vance County, and he brings this action to compel the defendant board of elections to make such publication and declaration, alleging that it is in duty bound so to do under C. S., 6042.

On 3 July, 1922, when the defendant board of elections met in Henderson for the purpose of receiving and tabulating the returns from the several voting precincts of the county, Mrs. George T. Buchan, through her counsel, appeared before said board and asked that she be given an opportunity or time to present affidavits and other evidence tending to show certain irregularities, prejudicial to her and affecting the result of said election adversely to her nomination. The board granted this request, over the objection of the plaintiff, and took a recess or adjournment to meet again on Saturday, 8 July. At this meeting Mrs. Buchan presented the charge and complaint, supported by affidavits, that five illegal votes had been cast for the plaintiff in said election. The ground of said charge or complaint chiefly being that the electors in question did not, and did not intend to, affiliate with the Democratic Party. Upon this showing, she asked that these votes be eliminated from the count, and that she be declared the rightful nominee by a majority of 3 votes. The plaintiff, through his counsel, demurred to this proceeding, and demanded that the result be declared according to the official returns. A further adjournment was taken until 11 July, 1922, at which time the defendant board of elections, being of opinion that it had the power and authority to pass upon the legality of these alleged illegal ballots, proceeded to hear evidence tending to show the disqualification of five electors who voted in the election, and, upon the evidence presented, the

said board concluded that the true and correct returns in this second primary should have been 1,134 votes for Mrs. Buchan and 1,131 votes for the plaintiff. The defendant board of elections thereupon undertook to change the returns to the extent indicated, and to declare Mrs. Buchan the nominee of her party as candidate for the office of register of deeds for Vance County.

The illegality of the five votes, which were in question before the county board of elections, is not admitted by the plaintiff, but he is here in this proceeding denying and challenging the power and authority of the defendant board to hear and to determine any such controversy. This is the only question before us for decision.

Clearly, if said board has exceeded its authority, the plaintiff is entitled to the relief sought. Such was the effect of our holding in *Johnston v. Board of Elections,* 172 N. C., 162. From a perusal of the statutes on the subject, we think it is manifest that the county boards of elections have been vested with ministerial or administrative powers only, which consist of tabulating the returns in primary elections and forwarding same to the State Board of Elections, in instances where such is required, and, in case of nominations for county offices, forthwith in publishing and declaring the results, C. S., 6042. These returns may not be altered or changed by the county boards of elections unless there has been some error in addition or in filling out the blanks on the part of the judges and registrars in one or more of the several precincts, in which event they "shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results." C. S., 6048.

With respect to the wisdom or impolicy of giving the county boards of elections the same power over the returns in primary elections as they have over the returns in a general election, we are not called upon to decide or to express any opinion. This is a question of policy which the Legislature alone may consider. Suffice it for us to say that, as the law is now written, no such power is vested in the county boards of elections in regard to the returns made by the judges and registrars of the several precincts in a primary election. On the contrary, such powers and duties appear to have been purposely withheld from said boards, and this evidently for reasons which seem to partake of the better part of wisdom. Finality in these matters must reside somewhere, and, under the primary law, by the express terms of the statute, the duty of passing upon the qualifications of those offering to vote in a given election has been vested in the local registrars and judges of election. C. S., 6031. No power of review, or other judicial authority, in primary elections, has been lodged in the county boards of elections.

This question was discussed by *Hoke, J.,* in *Brown v. Costen,* 176 N. C., 66, from which we quote with slight variations to fit the par-

ticular facts in hand. The Legislature did not, and did not intend to, vest the county boards of elections with power to enter upon an investigation of this character, but has referred the question chiefly involved, the right of an applicant to vote in the primary, to the decision of the election boards at the various precincts. The right to vote in a primary election, under express statutory provision, has been made to depend not only upon the applicant's status as a legal voter, but also upon his bona fide intent to affiliate with the party holding the primary. The law provides for the appointment of a registrar and judges of election in each precinct, who are required to act under the sanction of an official oath, and they may be indicted for willful neglect or failure to perform their duties properly. Also, at the request of the chairman of any political party, provision is made for the selection of some elector of that party to attend and to witness the conduct of the primary as an additional guarantee of fair play.

After a careful consideration and full debate of the question, the Legislature may have concluded that these local boards, or poll-holders, constitute the best tribunal that could be devised for determining the qualifications of a proposed voter. It may have considered, too, that, in an effort to ascertain the general expression of party electors in a legalized primary, it was well-nigh impracticable to enter upon an extended investigation of this kind before the county boards of elections, or any other tribunal, and have the same determined satisfactorily and in time to announce the rightful candidate before the general election. Of course, if a small number of votes may be challenged, then all may be challenged and the whole election may be called in question.

But whatever considerations may have brought about the exact provisions of the primary law, it is stipulated in express terms (C. S., 6031) that, when the right of a proposed elector to vote in the primary of any party is challenged upon the ground that he does not affiliate with such party, or does not in good faith intend to support the candidates nominated in said primary, his qualification and right to vote shall be referred for determination to the precinct registrar and judges of election.

Thus, the matter having been committed to these local or precinct boards, and no power being conferred on the county boards of elections to supervise or to review their findings, except in case of "errors in tabulating returns or filling out blanks," we must hold that the action of the defendant county board of elections in the instant case in undertaking to change the returns was without warrant of law, and that the plaintiff is entitled to have the same tabulated and the result forthwith published and declared. *Moore v. Jones,* 76 N. C., 182.

The suggestion that certain provisions of the general election law have been incorporated in and made a part of the primary law, giving the county boards of elections larger powers than above indicated, is without material significance on the present record, for, in those cases where this occurs, it is provided that such references shall have effect only when not inconsistent with the terms of the primary law itself. "Unless otherwise provided herein" is the language of the statute. The above provisions are clear and unambiguous; they have but little ground for construction or interpretation.

On the record, plaintiff is entitled to the relief sought, and hence the judgment must be upheld.

Affirmed.

CLARK, C. J., dissenting: Originally the county commissioners constituted the returning board of elections, and were only authorized to "proceed to add the number of votes returned, the person having the greatest number of votes being the one elected." B. R., ch. 52, sec. 21. On this it was held that "to add the number of votes returned" is a ministerial act. This statute is so plain that he who runs may read. *Moore v. Jones,* 76 N. C., 186.

Later it was enacted that county canvassers shall open and canvass and *judicially determine* the returns and make abstracts, etc. The Code, sec. 2649. The person having the greatest number of legal votes for any office to be declared elected. *Ibid.,* sec. 2699. This was held to give authority to determine the authenticity of the returns themselves, but not to pass upon the qualifications of voters. *Peebles v. Comrs.,* 82 N. C., 385.

It was then enacted, Laws 1901, ch. 89, sec. 33, now C. S., 5986, that "the board of county canvassers shall have power and authority to *judicially* pass upon all facts relative to the election, and judicially determine and declare results of the same, and they shall also have power and authority to send for papers and persons and examine the same."

These progressive steps mark a steadily advancing public policy, looking to an authoritative and controlling supervision of elections, both general and primary.

It will be noted that registrars and judges of election are not given judicial powers, except to "maintain order and to enforce obedience to their lawful commands during their sessions," for which purpose only they are constituted inferior courts. C. S., 5977.

Section 5986 has not received judicial interpretation, nor has sections 6020 or 6047 as correlating the boards of canvassers had direct consideration from this Court. There is, however, recognition of the enlarged scope of their powers, by *Hoke, J.,* speaking for the Court:

"If a second primary is to be ordered, much time may be required not only for holding the election, but for *investigating the irregularities that may occur therein.*" *Johnston v. Board of Elections,* 172 N. C., 167.

"This development of public policy along the line of supervision and control indicates a distinct purpose to provide relief from irregularities and illegalities through regular election agencies."

In Battle's Revisal, *supra,* the duty was limited to adding the figures and announcing their sum. In The Code the function was enlarged to a judicial determination of the returns.

In C. S., 5986, the power and authority of the county board are broadened to *judicially* pass upon *all facts* relative to the election, not merely the returns, *and* to *judicially* determine and declare the results of the same. So that what the court below has held to be the whole duty of the board is stated by the Legislature to be in addition to the larger duty of passing upon "all facts" relative to the election, and there is the still further judicial function of sending for "papers and persons" and "examining the same."

It is contended by the defendant board of elections that under C. S., 6020, entitled "Primary Governed by General Election Laws," that this revisal of the precinct returns by the county board applies to primaries as well as to the election itself.

The General Assembly seems to have thought that it would be better if the county board should have the same control in judicially determining the result in a county, in a primary as well as in the election itself, for the title of section 6020, "Primary Governed by General Election Laws," would seem to indicate as much, and the section itself reads as follows: "Unless otherwise provided in this article, such primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this State, and all the provisions of this chapter and of other laws governing elections not inconsistent with this article shall apply as fully to such primary elections and the acts and things done thereunder as to general elections; and all acts made criminal if committed in connection with a general election shall likewise be criminal, with the same punishment, when committed in a primary election held hereunder." The general election laws apply when not inconsistent, *Brown v. Costen,* 176 N. C., 63.

It seems reasonable that the statute, section 6020, should direct that the action of the precinct officers, who have no judicial function, should be passed upon by the county board of elections, which is vested with such authority, for in many counties the primary determines the result of the election.

After an election, the courts are vested with the judicial power upon a *quo warranto* to pass upon the result except as to members of the Legis-

lature. But this not being statutory, the courts have no power to go behind the returns of the election board in a primary, and the action of the court in this case was therefore without authority of law. If the Superior Court had any jurisdiction over this board, the power is confined to ordering its members to reassemble and exercise its powers according to law. The court had no power to say what the judgment of the board of elections should be. Its jurisdiction is limited to requiring the board to complete its labors and perform purely ministerial acts. *Johnston v. Board,* 172 N. C., 162; *Britt v. Board, ibid.,* 807.

Certainly the court was without jurisdiction to compel the board of elections to reverse their findings and declare a specific person the candidate of the Democratic Party where the right to nomination is in open controversy. This is fully discussed in *Britt v. Board, supra,* where the Court, citing Topping on Mandamus, holds "that in no case does the writ lie to compel a tribunal, judicial or administrative, to render any particular judgment or decision, or to set aside one already rendered, but only to enforce the performance of a ministerial or mandatory duty," citing *U. S. v. Seaman,* 17 How. (U. S.), 225; *Gaines v. Thompson,* 7 Wallace, 347.

The pleadings in this case show that the board of elections refused to count three Republican votes, the illegality of which was not denied at a full hearing, at which both claimants of the nomination were present, after due notice, and represented by counsel. These illegal votes were sufficient to change the result of the primary, and the board of elections held that such illegal votes should not be allowed to determine the results of a Democratic primary.

The county board of elections is authorized expressly by C. S., 5986, to "judicially pass upon all facts relative to the election, and to judicially determine and declare the result of the same," and the board of elections of Vance was vested with the same power as to primary elections by C. S., 6020. They have done this, and declared Mrs. George T. Buchan the Democratic nominee for register of deeds, the court was without any authority to examine into the action of the board or direct them, as in this case, to declare another person the nominee of the Democratic Party in the primary.

C. S., 6020, having thus given to the county election board the power and duty of revising and judicially determining the result of the precinct returns no statute authorizes the courts to go behind the decision of the county board. The law seems to be correctly summed up in the second head-note to *Brown v. Costen,* 176 N. C., 63, as follows: "Under the provisions of our primary law (Laws 1915, ch. 101), the right of a voter to cast his ballot therein depends not only upon his legal status, but upon the good faith of his intent to affiliate with the party holding

the primary, and his right in the latter respect is left to the determination of the registrar and judges of election, without power vested in the courts to supervise or control their action; and, this being an indeterminate political right, the decision of the county board must be considered final, so far as the courts are concerned, when the primary has been held in all respects in accordance with the provisions of the statute."

The action of the board of elections in declaring the nominee of the party is not subject to review by the courts, but is only subject to the vote of the people at the ballot box. In my judgment, therefore, the action of the court was without authority, and should be reversed, and the decision of the board of elections should be held a finality.

M. D. HARRISON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 20 September, 1922.)

1. Carriers of Passengers—Railroads—Care for Passengers—Rules—Damages.

It is the carrier's duty to its passenger to so enforce its reasonable rules of travel, that its employees will not subject the passengers to unnecessary assault, rudeness, or insult.

2. Same—Assault—Abusive Language—Mental Suffering—Damages.

Where the conductor of a carrier on a passenger train unnecessarily assaults, insults, and abuses a passenger, causing him personal injury and humiliation in the presence of his fellow-passengers, besides injuring his person, the passenger may recover damages for the injury to the person and to his feelings thereby caused.

3. Carriers of Passengers—Railroads—Rules—Care for Passengers—Damages.

It is a reasonable regulation of the carrier that its passenger occupy only the one seat for which he has paid, and it may in a proper manner enforce this rule without liability for damages, when the passenger has, in violation thereof, turned the back of the seat in front so that the seats faced each other, and reclined on one and placed his feet on the other.

4. Same—Evidence.

The plaintiff, in an action for damages against the carrier, was returning on the defendant's train from a city wherein he had undergone a surgical operation, and a fellow-passenger, seeing his weak condition, and to relieve his suffering, had turned two seats so as to face each other, so that the passenger could recline on one, with his feet on the other seat, seeing which, the conductor, in passing, suddenly and violently, and without notice, jerked the back of the seat whereon the plaintiff was sitting, causing him pain and suffering and the continued necessity for the injection of an opiate for several weeks. Upon evidence that the conductor

knew the plaintiff, and his then physical condition, and that he was informed thereof at the time: *Held*, the jerking of the seat was an assault upon the plaintiff by the defendant's conductor, for which the defendant was responsible in damages; and was also responsible for the insulting and abusive language he had used to the plaintiff in the presence of the other passengers in the coach, that was unnecessary under the circumstances.

5. Appeal and Error—Instructions—Objections and Exceptions.

An exception to a part of the charge of the judge containing several phases of the law upon the evidence, one or more of which is correct, will not be sustained on appeal, it being required of the appellant to point out the portion of the charge that he claims to be erroneous.

6. Same—Briefs—Rules of Court.

The appellant's brief must state the exception appearing of record he relied on, and assign the reason therefor, for the exception to be considered. Rule 34 (164 N. C., 551).

7. Appeal and Error—Instructions—Objections and Exceptions—Damages.

The charge of the court that the plaintiff in a personal injury case may recover, as the proximate cause of the defendant railroad company's negligence, for his pain, both physical and mental, is not objectionable as including "loss of bodily or mental power," of which there was no evidence, and will not be held for error when it correctly applies to a different element of damages.

8. Evidence—Sufficiency—Appeal and Error—Actions.

The plaintiff's evidence will be taken as true in passing upon the defendant's position that it was insufficient to prove his cause of action.

APPEAL by defendant from *Horton, J.*, at April Term, 1922, of WASHINGTON.

This is an action to recover damages for injuries to plaintiff, a passenger on one of the defendant's trains, caused by the acts and conduct of the conductor.

Plaintiff purchased a ticket from the defendant in Norfolk, Virginia, on 4 September, 1920, for transportation to his home in Roper, North Carolina, on the train known as "Norfolk-Belhaven train." This was the only train running from Norfolk direct to Roper. This train did not carry a Pullman or sleeping car, nor did any other train leaving Norfolk for Roper. Plaintiff left St. Vincent's Hospital on 4 September, where he had undergone a severe operation for stone in the kidney, having had an incision nine inches long and four inches deep made in his back. The wound was partially healed, and was not giving the plaintiff any pain when he was discharged from the hospital and told to go home, but to be careful. He was in a very weak and feeble condition, having been confined to his bed three weeks immediately preceding his discharge. This train, on which plaintiff was a passenger, was

crowded when leaving Norfolk, and plaintiff shared a seat with one Dr. Fields, who helped him to make his position comfortable, on account of the crowded condition of the train, by allowing him to lean against him in a reclining position. On arriving at Elizabeth City, the smoking compartment of the car where plaintiff had been riding was practically vacated, over one-half of the seats being left vacant. The plaintiff's traveling companion, Dr. Fields, pushed two seats together and told this plaintiff to lay in a reclining position to prevent his wound being aggravated, and thereby get more ease and comfort. Plaintiff had been in this position about ten minutes when the conductor came up behind him and suddenly snatched the back of the seat he was leaning against, saying in a rough and loud voice, "Get up from here," "Get up, we don't allow this." The doctor jumped up and said, "Hold on, conductor, this man has just been operated on, and is suffering. He has just left the hospital." The conductor replied, "I can't help that," and he (the conductor) snatched the seat back and went away saying, "Get over in the corner if you want to put your feet in the seat." It was testified that the seats in the corner were occupied by a passenger and filled with suit-cases. The plaintiff testified that when the conductor jerked the seat it dazed him and he was dumfounded; also, that he was humiliated by the rough and loud language used by the conductor. Other passengers in the car heard him. Plaintiff testified that he suffered great pain all the way to Roper, and that his suffering continued for about two weeks thereafter. That his wound was aggravated, he having to stand in the aisle of the car and recline on the arm of the seat, by the jerks and snatches of the train. Plaintiff testified further: "I had to stand up and sit on the arm of the seat, and anywhere else I could get ease in standing and reclining on the arm of the seat. My pain was aggravated by the train snatching me around. One-half of the seats in this compartment were vacant. When we got to Roper I was hurting pretty bad, and suffering a good deal, and nothing would help me but a hypodermic. This suffering continued about two weeks. I did not have any pain when I left the hospital. The reason I did not send for a physician, I knew he would give me a hypodermic and I had had a hundred already. The reason I did not take a sleeper, the sleeper leaves Norfolk at night, arrives at Mackeys about 2 o'clock in the night, and I would have to drive over the country roads four or five miles in a buggy or car to Roper. This is the only sleeping car leaving Norfolk for this county. They have a chair car on the train leaving Norfolk at nine, some time in the morning, for Mackeys." The conductor testified: "I have been employed by the Norfolk Southern for twenty years. I was raised in Roper and now live in Norfolk. I know Mr. Harrison,

the plaintiff in this action; know his family well. The plaintiff Harrison was a passenger on my train in September, 1920, going from Norfolk to Roper. I remember the day. After leaving Elizabeth City, several of the seats were vacant, and he turned two seats facing each other, and I caused him to turn them back. I don't remember offering him the opportunity to take other seats facing each other. I don't think he made any complaint about not being able to find a seat. I don't think I was rude to him or insulted him. I remember when the plaintiff went to Norfolk. I knew the plaintiff when I saw him, and when he went to Norfolk on my train he told me he was going for an operation. I saw him on my train on 4 September returning from Norfolk. I did not inquire about his physical condition. I knew him as a boy. I am 46 years old. When I came back and found him lying in a reclining position, I knew he had been to the hospital. I don't remember that I asked him how he felt, but when I saw his feet on the other side, I told him to get them off. He is not the only one I have told so. I tried to use good language; I do not use bad language. I do object to people riding in the train and putting their feet all over the seats that other people have to sit in. I didn't like to see seat hogs. I like to see people respect the rights of others. I don't recall or say that Mr. Harrison was a seat hog."

There was other evidence bearing more or less upon the case, but it is not necessary to state it, as that already set forth is substantially sufficient for an understanding of the questions presented.

The jury returned the following verdict:

"1. Was the plaintiff injured, humiliated, and insulted by the wrongful conduct of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,000.' "

Judgment thereon, and defendant appealed.

Van B. Martin for plaintiff.

Small, MacLean, Bragaw & Rodman and Z. V. Norman for defendant.

WALKER, J. In the consideration of this case, upon the facts disclosed by the pleadings and evidence, we may in the beginning refer to certain principles in the law of Carriers of Passengers which have been approved by this Court in *White v. R. R.*, 115 N. C., 631. The Court there holds that the liability of the defendant rests upon the obligation of the carrier not only to carry his passengers safely, but to protect them from illtreatment of other passengers, intruders, or employees. "Kindness

and decency of demeanor is a duty not limited to the officers, but extends to the crew." (*Judge Story*, in *Chamberlain v. Chandley*, 3 Mason, 242.) Passengers do not contract merely for ship-room or car-room and transportation from one point to another; they also contract for good treatment and against personal rudeness and interference with their persons, either by the carrier or his agents employed in the management of the conveyance. In respect to such treatment of passengers, not merely officers, but the crew, are agents of the carriers. 2 Wood Railway Law, p. 315. "It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers will receive proper treatment from 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 for 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 cited (in *White v. R. R., supra*) to sustain this doctrine. And the following statement of the law relating to the rights of passengers and the duty and responsibilities of carriers has been sanctioned in this and in other jurisdictions. A common carrier is liable in damages to a passenger for an injury to his feelings caused by the insulting, indecent, or abusive language, or indecent or insulting conduct of its employees, whether conductors, motormen, ticket agents, or other employees, upon the ground of a breach of its contract which obligates it not only to safely transport the passenger, but to accord to him respectful and courteous treatment, and to protect him from insult from strangers and its own employees. And the rule applies, although the carrier does not authorize or ratify such conduct, and was not negligent in selecting the employee. . . . The obligation of a carrier to use due diligence through its servants to protect its passengers from injury and abuse is equivalent to a guaranty that such injury and abuse shall not come from its servants themselves. A carrier is absolutely liable as an insurer for the protection of passengers against assaults and insults at the hands of its servants, unless the passenger alone is the cause of the trouble. . . . The duty of a carrier to carry passengers safely and expeditiously, and to conserve, by every reasonable means, the convenience, comfort, and peace of the passengers, rests on its agents, who must protect each passenger from bodily discomfort, insult, indignities, and personal violence, and the carrier is liable because of a violation of the duty he owes to passengers. Moore on Carriers, vol. 2, p. 1175, and cases to be found in the notes.

It was said in *Rose v. R. R.*, 106 N. C., 168, 171: "A railway company cannot be held liable to answer in damages because its servant, who is required to collect fares and protect it against imposition by expelling those who have not paid in the time that elapses between stations that are often but a short distance apart, informs a husband in a brusque manner, in the presence of his wife, whose head is resting on a pillow, that they must pay or get off, and, after waiting until the train reaches the next station, says, in a decided or rude tone, that they must get off. The language was certainly such as was the right, if not the duty, of the conductor to use, and the defendant cannot be held responsible for his failure, in the hurry of the moment, to modulate his voice so as to make it soft or gentle, especially when he was giving a command in the line of his duty, which the plaintiffs had shown themselves loath to obey."

There may appear to be some conflict between *Rose v. R. R., supra,* and the other authorities, including the case of *White v. R. R., supra,* but we deem it more apparent than real. In the *Rose case,* the plaintiffs were loath to obey the conductor's command to pay their fare, or get off the train. They did not comply with his demand for the fare, which he had made at first, in a proper tone and respectful manner, and without rudeness of conduct or brusqueness of behavior. As they still defied him up to the time they reached the next station, he then, using a more "decided or rude tone," told them, "You must get off here." The conductor, in that instance, was considerate and even courteous, until the situation required that he should be more peremptory. This change of manner or tone of voice on his part, and his general demeanor, under very trying and aggravating circumstances, seems to have been justified, or, at least, provoked by the inexcusable conduct of the two passengers, who should have known the rule or regulation of the carrier, and willfully refused or failed to comply with it. That case and this one are quite different, for here the plaintiff did nothing which should have aroused the anger of the conductor and caused him to act not only in a rude and insolent manner, but, on the contrary, the plaintiff was guilty of no willful misconduct, but only of a technical violation of a rule by resting his feet on the seat in front of him so that he could recline on his own seat and thus rest and ease his wounded body. A mere suggestion from the conductor, made in a moderate or usual tone of voice, would have accomplished his object and enforced the rule, if it existed, there being no evidence of it save what may be inferred from the remark the conductor made when he rudely and violently ordered the plaintiff to remove his feet from the opposite seat. But the jury could have found from the evidence that the conductor did more than this, and that

he committed an assault upon the plaintiff, when he, not only peevishly and petulantly, but violently, jerked the seat on which he was reclining and compelled him suddenly and without any warning to sit upright, which caused him to suffer pain and discomfort, owing to the suddenness of the unexpected command, and particularly by the violent jerking of the seat which forced the plaintiff to do so. But this is not all, as the conductor admitted in his testimony that he knew of the plaintiff's weak and feeble condition consequent upon the severe and serious operation which had been performed but a short while before, as he had been told by the plaintiff, while on his way to the hospital to have it done, what was the object of his visit to Norfolk. If such a rule of the company had been adopted, as is now relied on, and was a reasonable one, it certainly was not intended to be enforced in such a harsh manner, especially so under the circumstances. There seems to have been no occasion for it, as there were vacant seats in the coach, and no passenger was put to any inconvenience or discomfort by the plaintiff's using the two seats as he did. Plaintiff testified that he suffered so much physical pain afterwards, and for two or three weeks, that he was compelled to use injections of morphine to relieve his suffering, and this was not good for him, as he had taken one hundred in the hospital, and wished to avoid the further use of it. We cannot well account for the rudeness of the conductor's language and manner of addressing the plaintiff, nor the brusqueness of his behavior, to state it mildly, when more moderate and temperate language and conduct on his part would have fully sufficed for his purpose. We follow *Rose v. R. R., supra,* it being a correct statement of the law as applied to the facts of that case, but it clearly does not govern here, upon quite a different state of facts. It was held in *Cole v. Atlanta, etc., R. R. Co.,* 102 Ga., 474, that mere rudeness of language or brusqueness of behavior on the part of the servant will not be such an injury to the passenger as to entitle him to recover damages. Of course, if the servant of the carrier acts only in justifiable self-defense, as against an assault by the passenger, the carrier will not be liable; but no provocation, consisting in mere insulting language, will excuse an assault, nor will the fact that the passenger is refusing to comply with a regulation of the carrier justify the servant in using violence not proper nor necessary for the enforcement of the regulation. If the conductor, without provocation, uses opprobious words and abusive and offensive language, tending to cause a breach of the peace or to humiliate the passenger, and adds force or violence to it, and subject him to mortification, the carrier is liable in damages. But, in our case, more than this was done, as the plaintiff by the unnecessary rough handling of the conductor was made suddenly to change his posi-

tion without notice of the intention of the conductor, when milder action on the latter's part, and mere notice to the plaintiff, or a simple request from the conductor, would have produced the desired result. We conclude that the evidence in this case brings it within the rules of the law as formerly stated by us.

While a carrier may make reasonable regulations as to the conduct of its business and the running of its trains, this Court has said that "the authorities are to the effect that a degree of attention beyond that due to ordinary passengers should be bestowed on those affected with a disability by which the hazards of travel are increased; the sick, lame, and infirm are entitled to more care and attention from those in charge of a car than those in full possession of their strength and faculties." *Clark v. Traction Co.*, 138 N. C., 82; *Croom v. Railroad*, 52 Minn., 296; *Sheridan v. Railroad*, 36 N. Y., 39. Plaintiff said that the jerk of the conductor was so violent that it dazed and "dumfounded" him, and that he was hurt and greatly humiliated by his conduct and the indignity he put upon him, as the passengers saw and heard what took place. For these wrongs he was entitled to recover damages, which could embrace his mental suffering and humiliation and other compensatory damages.

The defendant complains that the court charged the jury that, as a part of the damages, they could award compensation "for the loss of both bodily and mental power," whereas there was no evidence of such loss. The exception was taken to the entire instruction on damages, which was composed of several elements, that quoted above being but one of them. The court certainly stated some of the elements correctly, and in such a case the appellant is required to be more definite in his exception, and to point out the particular part of the instruction alleged to be erroneous, and in his brief he must state the exceptions in the record on which he relies, and assign the reasons therefor, otherwise they will be deemed as abandoned. Rule 34 (164 N. C., 551). The only part of the exception reserved in the brief is this: "The court charged the jury that the plaintiff was entitled to recover for all pain he had suffered, both mental and physical," but this is far from including "loss of bodily and mental power," and refers to a different element of damages; so that even if there was no evidence of such a loss, the defendant cannot avail itself of it under the rule of this Court. We do not say that there was such evidence, and are not required to say so.

The fault of the conductor was in coming up behind the plaintiff and rudely and roughly "snatching his seat," so that he was compelled, in his weak and feeble condition, to change his position suddenly, and, necessarily, with pain and discomfort to him, and this the conductor must have known, or should have known, from what he admitted in his own

testimony as to his seeing the plaintiff on his way to the hospital to undergo a severe operation and knowing his then condition. It does not appear that any passenger needed the seat occupied by the plaintiff, as there were vacant seats in the car, nor does it appear that plaintiff's use of the seat was, in any way, actually injurious to it, or left it uncleanly, so as to prevent its convenient and comfortable use by others. Rules and regulations of the company should not only be reasonable in themselves, but enforced reasonably, and not with excessive rudeness and violence. "If an unattended person who is so sick, aged, or otherwise infirm as to be unable to assist or care for himself, be accepted as a passenger (as was done here), the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition." 2 Hutchison on Carriers, p. 1140.

"While as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would happen only to a person of peculiar sensitiveness, yet there are numerous decisions to the effect that a sick or aged person, a delicate woman, a lame man, or a child, or one not in full possession of his faculties, is entitled to more attention and care from a carrier than one in good health and under no disability, and that where physical or mental weakness or disability is apparent to, or is brought to the attention of the carrier, the high degree of care which the law imposes upon him requires the carrier to take notice of the disability and conduct himself accordingly." 4 R. C. L., sec. 594.

Here the conductor knew of plaintiff's condition, when he first saw him, and must have known that he had just submitted to a severe operation before he entered the car. If not, he was immediately notified by Dr. Fields of his serious and weakened condition. In *Weighman v. Railway Co.*, 70 Miss., 563, it was held that the carrier, after having been informed of the passenger's condition, was bound to treat him humanely and with consideration; that while it was not bound to receive the passenger in such condition upon its train, yet having done so with knowledge of his disability or of his inability to care for himself, it was liable for having failed to exercise due care to protect him from injury.

We must not be understood as holding, in this case, that a carrier may not limit a passenger to a single seat, so that he will not occupy more room than he has paid for, because such a rule would be reasonable, but it must be enforced reasonably and with due regard to the dictates of humanity, so that the passenger may be accorded proper and respectful treatment, and not be unnecessarily injured by excessive force

applied in attempting to compel obedience to the rule, and surely so, where a simple request from the conductor, it appears, would have been sufficient, in the particular instance, to accomplish the end in view. There was, here, not even a plausible excuse for supposing that such a request would not have been instantly complied with, and we may safely venture to assert that no carrier would have complained of its conductor if he had waived the technical violation of the rule in this case, under the circumstances, which were known to him. Still, the rule was a valid one, and the fault is all with the manner of its enforcement, and the consequent physical, and even mental, injury to the plaintiff, for it was calculated to humiliate him, in the presence of the other passengers, besides causing him pain and suffering. Surely the law does not permit or sanction such conduct as that of the conductor when, as it appears, other and milder methods were plainly open and available to him.

We must accept the plaintiff's evidence as true in deciding the question whether he has offered any to prove his cause of action, and thus considered, we are of the opinion that there was some evidence for the jury, and it appears from it that the conductor enforced the rule, if one existed, with undue severity, under the circumstances, and so as to give plaintiff a right to this action for the wrong.

There was no error in the trial of the case, and we must, therefore, affirm the judgment.

No error.

ELIJAH GRAY v. GUS DAVIS AND WIFE.

(Filed 27 September, 1922.)

1. Betterments—Equity—Damages—Ejectment—Mortgages— Purchasers —Sales.

In an action of ejectment there was evidence tending to show that the illegitimate daughter of the owner of lands was induced by her father to build a dwelling upon a certain three acres under her father's promise of a gift thereof; but that thereafter, the father becoming mad with her, he agreed with the plaintiff that the latter should bid in the land at a sale under mortgage he had given, and hold title for him, the mortgagor, which was accordingly done at a grossly inadequate price, the transaction between the father and the daughter having been with the plaintiff's knowledge: *Held*, the defendants, the daughter and her husband, under a favorable verdict and proper instructions, were entitled to recover in equity the increase in value to the lands caused by the improvements they had placed thereon, without reduction for the rental value of such improvements, for the time they had occupied the dwelling. *Albea v. Griffin*, 22 N. C., 9, cited and applied.

2. Same—Notice—Evidence.

In this action of ejectment, to hold the purchaser at a foreclosure sale liable in equity for improvements the defendants had placed on the mortgagor's lands, the evidence *is held* sufficient that the plaintiff had purchased for the mortgagor with notice or knowledge of the defendants' equitable claim.

3. Same—Declarations of Purchaser—Deeds and Conveyances—Title.

Where there is evidence sufficient to show that the plaintiff, in ejectment, bought the lands through a purchaser at a foreclosure sale for the mortgagor, subject to the defendants' equitable claim for improvements thereon, it was competent for the defendant to testify that the purchaser told her, before he had made the deed to the plaintiff, that he had bought it for the mortgagor, it being in derogation of his title under which the plaintiff claimed, contradictory of the purchaser's affidavit and in corroboration of the inadequacy of the consideration paid, and the other evidence in this case tending to show the entire transaction.

APPEAL by both parties from *Bond, J.*, at May Term, 1922, of BEAUFORT.

This was an action of ejectment by plaintiff, who had taken a deed from one Judkins, who, the defendants alleged, at the instance of Morgan Farrow, had bought the land in for Farrow at a mortgage sale under a mortgage executed by Farrow. The defendants admitted the plaintiff's paper title, but contended they had built the house and put other permanent improvements on 3 acres of the land at the instance of Farrow, and upon a verbal contract by him to convey this 3 acres to the *feme* defendant, the illegitimate daughter of Farrow, and alleged that plaintiff held under Morgan Farrow, with notice of their equity, and for a grossly inadequate consideration. The jury so found, and the plaintiff appealed. The defendants also appealed.

Small, MacLean, Bragaw & Rodman and W. C. Rodman for plaintiff.
Ward & Grimes for defendants.

CLARK, C. J. The defendants contend upon the evidence that they were accumulating a little lumber on a nook of land with a view to building a house to live in when the defendant, Morgan Farrow, passed along one day and saw the *feme* defendant at the spot, who was his illegitimate daughter; that he told her that he had never done anything for her, but wished to do something, and not to build the house there, but to build it on his land, on the three acres in question, and he would give her a deed for it; that she related the promise to her husband, and acting upon it, they moved the lumber, built the house, and lived in it for eight years; that, after the house and improvements were finished, Morgan Farrow fell out with his daughter upon some pretext and

brought summary proceedings in ejectment against her. There was evidence that the defendants built the house at a cost of $1,000; that Morgan Farrow passed there nearly every morning while the building was going on, and often repeated to his daughter that he would give her a deed when the house was finished; that he fell out with her about the purchase of some chairs, and he ordered her out and brought an action in the magistrate's court; that at that time the plaintiff Gray was present and heard the evidence. The justice of the peace dismissed the action. Morgan Farrow had executed a mortgage upon the entire tract of 22 acres, and under it, it was bought by one Judkins, and there was testimony that he stated that he bought the land for Morgan Farrow. Subsequently, he conveyed it to the plaintiff Gray, and there was evidence that the land was greatly in excess of the alleged price that Gray paid for it.

The court charged the jury, at request of defendants:

"(1) If you find from the evidence that Morgan Farrow agreed to convey the land to the defendants, and that the said Farrow listed the land for taxes after the deed to Gray, and that he has been working on the land since that time, and that the value of the land conveyed to Gray was greatly in excess of the alleged purchase price, you should consider all these circumstances in determining whether said Gray is a purchaser for value.

"(2) That the circumstance that the plaintiff never saw the land before he bought it, and not until the month afterwards did he go to look at it, both of which were testified to by the plaintiff, are to be considered by you on the question whether he is a purchaser for value, and even though he may have actually paid to Judkins the money recited in the deed, this would not constitute him a purchaser for value, if he agreed with Morgan Farrow to hold the title for him and to convey to him later upon repayment of said money.

"(3) If you find that the plaintiff had an agreement with Morgan Farrow that he was to take deed for the land, but he was to hold back a part of the purchase price until the defendants were gotten out of possession, then the plaintiff would not be a purchaser for value."

The court also charged the jury: "Issue one is, 'Were the defendants Davis and wife induced to put valuable improvements on the 3-acre tract in dispute by the promise on the part of Morgan Farrow that if they would do so he would make them a deed in fee for same?' Davis and wife allege that is the reason they built the house on the land. The burden is upon Davis and wife to show that fact by the greater weight or preponderance of the evidence. If they have done so, it will be your duty to answer the issue 'Yes.' If they have failed to do so, it will be your duty to answer 'No.' "

The court also charged the jury: "The second issue is, 'If so, to what extent, if any, was the value of said three-acre piece increased by reason of such improvements?' The burden is upon Davis and wife to show what improvements they put on the land, and the enhanced value of the land, not what it cost them to erect the improvements, but how much has the value of the three acres been enhanced by reason of the improvements; that is, what is the difference between the value of the land since the improvements were put on it and the value if the improvements had not been put on. The burden is on Davis and wife to show by the greater weight or preponderance of the evidence to what extent they have increased the value of the land by reason of the improvements; in other words, whatever you find by the greater weight or preponderance of the evidence to have been the increased value of the land, it will be your answer to the second issue."

The court also charged: "The third issue is, 'If the promise and improvements had been made before the time Elijah Gray got the deed for said 3 acres, did he have knowledge or notice of same?' That is, if Morgan Farrow induced Davis and wife to put the building on the land by promising to make them a deed in fee for it, and by reason thereof they put the house and improvements on the land and increased its value when Elijah Gray got the deed for the land from sale made under mortgage, did he know or have knowledge of any protest, by the following up of which he could have ascertained that the promise had been made by Morgan Farrow, and that was the reason the improvements had been put on the land. The defendants allege that Gray had notice, and the burden is on them to show that Elijah Gray had knowledge or notice of the same; if they have done so, and you so find by the greater weight or preponderance of the evidence, you will answer the third issue 'Yes'; if they have failed to do so, you will answer 'No.' "

"The fourth issue is, 'Did Elijah Gray purchase said land for value?' That is, did he pay a reasonably fair price for it; not what it is worth now, or was worth 1, 2, or 3 years ago. Did he pay a reasonable price for it at the time that he bought it at the mortgage sale on 1 December, 1919? If so, you are to restrict your investigation to that date in order to ascertain if Elijah Gray purchased said land for value. Defendants contend that a man who purchases a piece of property for such a low price as that any person knows that it is not a reasonably fair price for the property bought that would not be sufficient in its value to constitute a man a purchaser for value. In order to make a man a purchaser for value, he doesn't have to pay such a price as some man might have an opinion as to what its value might be, but only such sum as is a reasonably fair price for the property at the time he buys it. The plaintiff Gray contends that he is a purchaser for value; the defendants Davis and wife contend that he is not.

"Upon these contentions the law says that the burden is on Elijah Gray to show by the greater weight or preponderance of evidence that he was a purchaser for value. If he has done so by the greater weight or preponderance of evidence, the burden being on the man Gray to show that your answer to the fourth issue should be 'Yes, that he purchased said land for value'; if he fails so to do, it is your duty to answer the fourth issue 'No.' "

The court further charged: "Davis and wife contend that you ought to find by the evidence that this land was promised them by Morgan Farrow; that he was her father, she being his illegitimate child; that she and her husband put a certain house on the land, and that he, Morgan, being the owner of the land at the time would make them a deed in fee simple for the 3 acres of land on which the house was put; that they complied with the agreement by building the house, and thereafter some dispute arose between Morgan Farrow and his alleged daughter, and she alleges he got mad, and that he then abandoned the idea, after they had spent money putting the house on the land, to convey them the land by deed, and that he receded from his promise, which they contend he had made; that they had put the house on the land, which cost them, as they contend, some $700 or $800—I believe that is the contention they make now; and they contend further that Elijah Gray knew that he had made this promise by reason of the fact, the defendants contend, that when Morgan Farrow started suit to put Davis and wife out, when the papers were publicly read in the suit that Elijah Gray was present and heard the papers read, and that therefore before he got any deed he had notice of the fact that the defendants were claiming this land, that they had spent money in improvements on the land, and that the land had been promised to them by Morgan Farrow, which induced them to go on the land and put the improvements thereon."

The court also stated to the jury the contentions of Gray that they should not find that he had any knowledge of the agreement between Morgan Farrow and the defendants, if any, in consequence of which they placed these improvements upon the land; that he purchased for fair value and without any agreement to hold the same for Morgan Farrow. The evidence and the charge are somewhat prolix, but the above is a substantial statement of the points in controversy.

The jury found upon the issues submitted that the defendants Davis and wife were induced to put valuable improvements on the 3-acre tract in dispute by a promise on the part of Morgan Farrow that if they did do so he would make a deed in fee to the *feme* defendant for the same, and that by reason of the improvements which the defendants put thereon the land was increased in value $550, and that the plaintiff Elijah Gray had knowledge of said promise and improvements at the time he pur-

chased from Judkins after the mortgage sale; that he did not purchase said land for value; and that the fair rental value per year since Davis and wife have been in possession of said 3 acres (8 years) was $40 per year, and thereupon the court entered judgment that the plaintiff was entitled to possession of all the lands described in the complaint (as to which the defendants did not assert ownership or possession), and should recover the entire tract, but as to the 3 acres of land the defendants should recover from the plaintiff the sum of $550, being the enhanced value of the land by reason of the improvements placed on said three acres by the defendants as found by the jury, less the rental value ($320) of said 3 acres for the time (8 years) the defendants had been in possession thereof; and upon default in payment of the $230 balance within ninety days, the said 3 acres, with the improvements thereon, shall be sold, after due advertisement, as required by law in such cases, and out of the proceeds of the sale there shall be paid the defendants the sum of $230, with interest from the date of the judgment.

The issues found by the jury bring the case within the rule of equity laid down by *Gaston, J.*, in *Albea v. Griffin,* 22 N. C., 9. See, also, citations at the end of that case in the Anno. Ed., and the subsequent cases of *Ballard v. Boyette,* 171 N. C., 24, and *Ferrell v. Mining Co.*, 176 N. C., 475.

The plaintiff excepted to the charge above set out because the court did not charge the jury as prayed that if they believed the evidence to find that Gray did not have notice at the time of his purchase of the land that the improvements had been made by the defendants under a promise from Farrow that he would make them a title to the land. There was conflicting evidence upon which the jury were justified in finding as they did.

The plaintiff excepted to the answer of *feme* defendant that Judkins, after he bought the land, told her that he bought it for Morgan Farrow. This was a statement by plaintiff's grantor, in derogation of his title, while he held it, before conveyance to plaintiff, and is in contradiction to Judkins' affidavit, filed in this case, that though he knew defendant had been in possession, he knew nothing about the title, and is corroborative of the evidence as to the inadequacy of consideration, knowledge of the promise by Farrow to *feme* defendant, and other circumstances put in evidence by defendants to show the entire transaction. The other exceptions to evidence do not require discussion.

The defendants excepted that under the charge of the court the jury assessed against the defendants the rental value of the building which they had put upon the premises. The plaintiff was not entitled to rent for the buildings which had been placed upon the 3 acres as the jury find, under agreement with the owner that he would make a deed to

them for the premises. The plaintiff, according to the verdict of the jury, stands in the shoes of Morgan Farrow, having bought with knowledge of the promise made by Morgan Farrow to the defendants. There being no conveyance of the property to the defendants, the plaintiff claiming under Morgan Farrow is entitled to recover the premises upon payment of the increased value put upon the land by the improvements which Morgan Farrow had induced the defendants to make, but the plaintiff was not entitled to recover rent for the buildings which had been put upon the land by the defendants for their own use under such promise.

The judgment should be reformed by striking out the deduction of the rental value for the three acres of land of $40 per year during the time the defendants were in possession thereof. It does not appear that there was any profit derived by the defendants from the use of said 3 acres beyond the use of the house and improvements. As thus modified, the judgment will be,

On the defendants' appeal, modified.

On the plaintiff's appeal, no error.

J. J. JOHNSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 September, 1922.)

1. Damages—Consequential Damages—Contracts—Breach—Tort.

Consequential damages awarded in an action for breach of contract must be such as may fairly have been in the contemplation of the parties at the time the contract was made; and in tort arising therefrom, such as must be the natural and proximate consequence of the act complained of, and as naturally arising, according to the usual course of things, from the breach of the contract, in the absence of malice, fraud, oppression, or evil intent; and these damages are practically the same whether they arise either by breach of contract or in the tort resulting therefrom. As to whether the time of the application of the principle is the same as to actions arising from breach of the contract, and the tort committed, *quere*, the question not being presented by the facts of this case.

2. Damages—Contracts—Torts—Duty of Injured Party.

The party damaged by either a breach of contract or in tort therein arising is required to do what he can in the exercise of a reasonable care and diligence to avoid or lessen the consequence of the wrong, and for any part of the loss incident to such failure no recovery can be had.

3. Same—Carriers of Goods—Railroads—Ejecting Passenger.

A passenger wrongfully ejected from the defendant carrier's passenger train is not entitled to recover consequential damages in his action for the

loss of his rights and consequent profits under a contract he had made with a third person, of which the carrier was unaware, and caused by the failure of the passenger to meet an appointment with laborers at his destination, necessary to the performance of his contract.

APPEAL by defendant from *Horton, J.*, at January Term, 1922, of WASHINGTON.

Plaintiff J. J. Johnson boarded the defendant's train on 10 July, 1920, at Bowden, N. C., en route to Norfolk, Va., having purchased a ticket at Bowden to Rocky Mount. He was ejected from the train by the conductor at Dudley, N. C., for failure to produce his ticket. The jury found that the ejection was wrongful, and answered the issue as to compensatory damages $1,000.

Exceptions 1, 2, 3, 4, 5, 6, 7, 8, and 9 are taken to the admission of certain evidence showing that the plaintiff had a logging contract with the Rowland Lumber Company, that he had an appointment to meet certain laborers in Norfolk, Va., and bring them to Bowden, N. C., to be hired by him for the purpose of performing the said logging contract, and that he was en route to Norfolk when he was ejected from the train of the defendant. That his contract depended upon the services of these laborers, and if he failed to keep the work going he would lose his job. That on account of being ejected from the train he missed his appointment, lost his men, and his contract with said lumber company was canceled.

The court submitted two issues to the jury, which were answered as follows:

"1. Did the defendant wrongfully eject the plaintiff from its train, as alleged in the complaint? Answer: 'Yes.'

"If so, what damage, if any, has the plaintiff sustained thereby? Answer: '$1,000.' "

The court charged the jury as to certain elements of damage, such as humiliation, mental anguish, bodily pain, the loss of time and money, and then gave the following instruction: "And in addition to that, he was a man who had a contract on which he was making $300 a week clear profit by carrying men over to the Rowland Lumber Company and logging and digging railroads for them; that he had an engagement in the city of Norfolk that night and left Bowden intending to go there and fill that engagement and get those men and carry them back so he could continue to make $300 a week, and by reason of the fact that he was wrongfully ejected from this train, he was caused to lose a good deal of time, which made him lose this engagement in Norfolk, and by so doing these men were scattered and he couldn't round them up, and that fact caused him to lose his contract with the Rowland Lumber Company, and he lost a great deal of money, loss of profit and time and

money, all as he contends, naturally and reasonably and properly flowing from the wrongful conduct of defendant towards him, and that when you sum up all these elements of damages that he is entitled to—compensatory damages—that you ought to find some large amount, around $3,000." And again, in that connection, the court gave the following charge to the jury: "As to this issue of damages, the court charges you that if the plaintiff has satisfied you by the evidence, and by its greater weight, that he is entitled to damages, he is entitled to recover as actual or compensatory damages a fair and just compensation for all loss that he has sustained that naturally flows from the wrongful conduct, if you find from the evidence, and the greater weight thereof, that the same was caused wrongfully by the defendant towards him. This would include loss of time and personal inconvenience, if any, and any financial and pecuniary loss, if any. If you find from the evidence, and by its greater weight, that the conduct of the defendant was wrongful in ejecting him from the train, you will answer this issue whatever amount you are satisfied from the evidence, and by its greater weight, that the plaintiff had sustained according to that measure of damages, if you find he is entitled to recover at all. It is a question of fact for you. The court has no opinion of its own as to what your answer will be. The court has merely stated the contentions of the plaintiff and the defendant and the evidence bearing on the contentions."

Exceptions were duly taken to these instructions. Judgment upon the verdict, and defendant appealed.

W. L. Whitley for plaintiff.
Z. V. Norman for defendant.

WALKER, J., after stating the material facts: We are of the opinion that the learned judge erred in the instructions to the jury which are above stated.

The question as to the measure of damages, in cases of this kind, has been much discussed by this Court in several cases, and the law thoroughly settled.

The Court said in *Lee v. R. R.*, 136 N. C., 533, 535: "It is immaterial whether we treat the cause of action as for a breach of contract or for a negligent omission to perform a public duty arising out of a contract of carriage. The damages in either case are confined to such as were reasonably within the contemplation of the parties when the contract was made by which the duty to the plaintiffs was assumed." Whether this is strictly accurate where the action is one for the tort, in respect to the time when the damages should be in contemplation of the parties, that is, whether at the time of the commission of the tort, or at the time the

contract of carriage was entered into, we will not now inquire, for it will suffice for our purpose in this case if we assume that it is the time when the tort was committed, and in the case where the action is in contract, at the time of making the contract, for we think that in either case the failure to employ the laborers at Norfolk, and the subsequent loss of plaintiff's contract with the Rowland Lumber Company, should not have been considered in assessing the damages.

It is said in *Penn v. Tel. Co.,* 159 N. C., at pp. 310 and 311: "In so far as mental anguish is concerned, except in cases where punitive damages are sought and allowable, and except as to the time when the relevant circumstances are to be noted and considered, the amount is very much the same whether the recovery is had in contract or in tort. In the one case those damages are allowed which were in the reasonable contemplation of the parties when the contract was made, and in the other the consequential losses resulting from the tort, and which were natural and probable at the time the tort was committed. Hale on Damages, p. 48. Speaking to these principles, and their practical application, in Scott and Jarnagan's 'Law of Telegraphs,' it is said: 'But when the contract between the parties does not show they had in contemplation this wider range in the estimate of damages (in contract), the measure of damages seems to be substantially the same in either kind of action. The true rule of estimating damages in actions *ex contractu* may be stated thus: The defendant is liable only for damages as may fairly and substantially be considered as arising naturally, *i. e.,* according to the usual course of things, from the breach of the contract, or—and here is where the measure of damages takes a wider range—for whatever damages may fairly be supposed to have been within the contemplation of the parties. The rule in actions *ex delicto* is that the damages to be recovered must be the natural and proximate consequence of the act complained of. This is the rule when no malice, fraud, oppression, or evil intent intervenes. The damages which may be considered as arising naturally, according to the usual course of things, from the breach of the contract, are substantially the same as damages which are the natural and proximate consequences of the wrong complained of." "There is one principal difference in the element of damages obtaining in breach of contract and consequential damages arising from a tort. In the one case damages are recovered, as a rule, on relevant facts in the reasonable contemplation of the parties at the time the contract is made, and in the other on the facts existent, or as they reasonably appeared to the parties at the time of the tort committed." *Peanut Co. v. R. R.,* 155 N. C., 152.

And the present *Chief Justice* says, in *Kennon v. Tel. Co.,* 126 N. C., 232: "It is immaterial under our system of practice whether the action

is in tort for the negligence in the discharge of a public duty or for breach of contract for prompt delivery, for the recovery in either case is compensation for the injury done the plaintiff, and which was reasonably in contemplation of the parties as the natural result of the breach of the contract or default in discharging the duty undertaken." See, also, *Foard v. R. R.*, 53 N. C., 235; *Sharpe v. R. R.*, 130 N. C., 613; *Newsome v. Tel. Co.*, 153 N. C., 153. Damages are measured, in matters of this kind, not only by the well known rule laid down in *Hadley v. Baxendale*, 9 Exch., 341, but they must not be the remote, but the proximate consequence of a breach of contract, or the wrong, and must not be speculative or contingent. *Byrd v. Express Co.*, 139 N. C., 273. It is an elementary principle that all damages must flow directly and naturally from the wrong, and that they must be certain both in their nature and in respect to the cause from which they proceed. Shearman and Redfield on Neg., secs. 25, 26. Damages which are uncertain and speculative, or which are not the natural and probable result of the breach, are too remote to be recoverable. 2 Joyce, sec. 1284. It is universally held that damages are not to be based upon mere conjectural probability of future loss or gain. 8 A. & E., 610, and cases cited. Something more than a possible result must appear. *Newsome v. Tel. Co., supra.* It is stated in 5 Ruling Case Law, at sec. 773, p. 148, that a loss of profits which an ejected passenger might have made in carrying out a contract that he abandoned because partly disabled by his injuries, but which loss is not the natural and proximate result of the ejection, does not constitute an element of recoverable damages. And damages resulting to an ejected passenger from his loss of work, by reason of his delay at the station at which he was compelled to leave the train, are too remote to be considered, citing *Wells v. Boston & M. R. Co.*, 82 Vt., 108; *Carsten v. Northern Pac. R. Co.*, 44 Minn., 454. See, also, *Tillinghast v. Cotton Mills*, 143 N. C., 268; *Hardware Co. v. Buggy Co.*, 167 N. C., 423; *Gardner v. Tel. Co.*, 171 N. C., 405; *Sledge v. Reid*, 73 N. C., 440; and in *Bridgers v. Dill*, 97 N. C., 222, where the distinction between direct and proximate damages and secondary or consequential damages is well stated and aptly illustrated by reference to *Sledge v. Reid, supra.* In that case (*Sledge v. Reid, supra*), which was an action to recover damages for the killing of two mules, it was held that the proximate damage to the plaintiff was the loss of the mules, and his failure to make a crop was the secondary consequence, resulting from the wrong, and was too remote and uncertain; but in this case the injury to the crop was the direct and proximate damage resulting from the wrong of the defendants in repeatedly pulling down the fence and exposing the crop to the prey of cattle. It is well established that, in a "pure tort," the wrongdoer is responsible for all damages directly caused by

his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed, and which can be ascertained with a reasonable degree of certainty. *Johnson v. R. R.*, 140 N. C., 574; *Sharpe v. Powell*, 7 L. R., 1892, p. 253; 8 A. & E., p. 598; Hale on Damages, 34, 35 *et seq.* This last author, in substance, says that a wrongdoer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote; "that direct losses are necessarily proximate, and compensation therefor is always recoverable; that consequential losses are proximate when the natural and probable effect of the wrong." A well recognized restriction, applying in cases of tort and contract, and as to both elements of damages, is to the effect that the injured party must do what he can in the exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong, and for any part of the loss incident to such failure no recovery can be had. This limitation was approved by us in a case of contract, in *Tillinghast v. Cotton Mills*, 143 N. C., 268, and directly applied to a case of tort, in *R. R. v. Hardware Co.*, 143 N. C., 54. *Bowen v. King*, 146 N. C., at pp. 385 and 390.

But how can it be said that indirect or consequential damages for the commission of a tort, if founded upon a contract, are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed, if they are such as are not known to the wrongdoer, and could not be contemplated by him? In such a case, he cannot be said to have intended a result as the one flowing naturally or consequentially from his wrongful act, of which he was totally ignorant. Therefore it is that, in such cases, the law does not charge him with such damages, but only with those which the parties contemplated as likely or probably would be caused by a breach of the contract of carriage, by requiring the plaintiff to leave the car, for this substantially is the tort or wrong complained of. The liability of the defendant would be stretched entirely too far, and much beyond what justice and the necessities of the case require, if damages, which would be greatly out of proportion to the injury wrought by the unlawful act, could thus be exacted. Responsibility for damages which would include his failure to realize the benefit of every contract or business transaction of the passenger thus ejected from a train would render transportation of passengers too hazardous and destructive in character to be undertaken by any prudent persons or association of them.

It was said in *Squire v. Telegraph Co.*, 98 Mass., 277 (93 Am. Dec., 157), in commenting upon and approving the rule formulated in 1854 by *Baron Alderson*, for the Court, in *Hadley v. Baxendale*, 9 Exch., 341: "A rule of damages which should embrace within its scope all the

consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor." This language of the Court in 98 Mass., 277, was approved by us in *Williams v. Tel. Co.,* 136 N. C., 82. The rule of damages, as framed for the Court by *Baron Alderson,* in *Hadley v. Baxendale,* and generally adopted by the courts since that time, may well be repeated here with the learned Baron's comments thereon, and the reasons in support of the rule, as the latter bear directly upon the particular question we have been discussing: "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.,* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known by both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in a great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

Now, can it be said that damages arising from plaintiff's failure to meet the men at Norfolk, or the loss of plaintiff's employment by the lumber company, can both, or either, "be fairly and reasonably" considered either as arising naturally, *i. e.,* according to the usual course of things, from the carrier's breach of contract, or his tort, by whichever name it may be called, or such as may reasonably be supposed to have been in contemplation of both parties at the time the contract of carriage was made, or at the time of the breach or tort complained of by the

plaintiff? Such a loss, or such damages as are now claimed, would not ordinarily nor naturally and probably flow from the wrongful act of the carrier in refusing to transport the plaintiff beyond the place where he left the train. The justice and wisdom of the rule, both in cases of contracts and of torts growing out of contracts, is apparent, and for this reason we have approved and applied it generally to cases such as the one we now have before us. *Ashe v. DeRosset,* 50 N. C., 299; 72 Am. Dec., 552; *Spencer v. Hamilton,* 113 N. C., 49; 37 Am. St. Rep., 611; *Herring v. Armwood,* 130 N. C., 177; 57 L. R. A., 958. It has been applied, as we have seen, in actions against telegraph companies for negligence in transmitting and delivering messages. *Tel. Co. v. Hall,* 124 U. S., 444; *Cannon v. Tel. Co.,* 100 N. C., 300; *Kennon v. Tel. Co.,* 126 N. C., 232. And the same has been done in other jurisdictions. *Mackay v. Telegraph Co.,* 16 Nev., 222; *Frazer v. Telegraph Co.,* 84 Ala., 487; *Baldwin v. Telegraph Co.,* 45 N. Y., 744; 6 Am. Rep., 165; *Telegraph Co. v. Gildersleeve,* 29 Md., 232; 96 Am. Dec., 519; *Landsberger v. Telegraph Co.,* 32 Barb., 530; *Candee v. Telegraph Co.,* 34 Wis., 471; 17 Am. Rep., 452; *Beaupre v. Telegraph Co.,* 21 Minn., 155.

The other exceptions require no separate consideration or discussion at this time. The alleged errors may not occur again.

New trial.

MRS. M. E. DAVIS, WIDOW OF R. B. DAVIS, DECEASED, AND OTHERS, HEIRS AT LAW AND DISTRIBUTEES, OR NEXT OF KIN, AND A. S. BUGG AND W. M. BAIRD, ADMINISTRATORS DE BONIS NON OF R. B. DAVIS, DECEASED, v. O. C. DAVIS, AS ADMINISTRATOR OF R. B. DAVIS, DECEASED, AND THE FIDELITY AND DEPOSIT COMPANY OF BALTIMORE, MARYLAND.

(Filed 27 September, 1922.)

Reference—Findings—Judgments—Appeal and Error.

In passing upon the report of a referee, it is incumbent upon the judge to deliberate upon the evidence covered by the exceptions, and thereon find such facts as will sustain his own conclusion; and where the judge has found the same facts as those found by the referee, but has overruled the referee's conclusions thereon, which the referee's findings support, the judgment will be set aside in the Supreme Court, on appeal, so that the matter will be further passed upon in the Superior Court according to law.

APPEAL by plaintiff from *Allen, J.,* at January Term, 1922 of WARREN.

R. B. Davis died 28 September, 1914, and on 22 October, 1914, O. C. Davis, one of the defendants, qualified as his administrator, with the

other defendant, the Fidelity and Deposit Company, as his surety. O. C. Davis resigned as such administrator in 1918, and A. S. Bugg and W. M. Baird were appointed administrators *de bonis non* of the estate of the said R. B. Davis, and these are among the plaintiffs in this action. The other plaintiffs are the widow and children of R. B. Davis, some of whom are of age, and others are infants, appearing by their guardian, H. T. Egerton.

This action was brought for an accounting against O. C. Davis, former administrator, and his surety.

It will appear that the administrator, upon his qualification, instead of proceeding to settle the estate, continued the business of his intestate and engaged in farming, merchandising, running sawmills and cotton gins. Plaintiffs contend that he mixed all these operations with his administrator's accounts and conducted these affairs without system or bookkeeping from the time of his qualification in 1914 until his resignation in 1918. Plaintiffs further allege that after an effort to secure from the administrator a settlement of his account with the estate of his intestate, three accounts have been filed by him, and that an examination will show that all have been different.

The first account, filed 2 March, 1917, shows that the administrator, O. C. Davis owes the estate $165. The next account, filed 3 August, 1917, shows that the estate has to its credit $445.05. In order to reach this balance, particular attention is called by plaintiffs to item "For feeding 7 mules and horses 517 days, at 50 cents each, $1,809.50." This item, which will be more particularly considered hereafter, was entered as a credit to the administrator. In his recapitulation, following his conduct of the business, there are listed debts and liabilities amounting to $877.23. The clerk appointed a referee, and he went over the account and found a balance in favor of the estate of $2,788.57. The administrator filed still another statement, called a final statement, showing that he has in hand $1.75; indebtedness, $4,242.28; assets, $3,216.58; leaving a balance due by the estate of $1,025.70. One item of assets was a bill due by the administrator himself—a store account—amounting to $175.38.

The clerk thereupon entered judgment, in which he holds that it would be to the interest of all parties concerned to have a new administrator appointed to wind up the estate, the present administrator, O. C. Davis, and his bond to be liable, until a proper accounting can be had with the new administrator. This judgment was entered by the clerk 21 March, 1918. Thereupon, O. C. Davis resigned, and A. S. Bugg and W. M. Baird were appointed as administrators, and then this action was brought with these, and the others named, as parties plaintiffs. The account was referred to Mr. Joseph P. Pippen, September Term, 1919.

The evidence is set out, and the administrator's various accounts, showing his dealings with the estate and his handling of the assets in administration of the estate. He conducted the business four years, ran the store twelve months, conducted the sawmill two years, and sold cotton, as plaintiffs allege, without charging himself with it. As to his compensation, the administrator testified: "I was to receive $1,000 per year, commencing 1 October, 1914, and I ceased work on 1 January, 1916." It seems that he made this contract with the widow of the intestate. As to his conduct of the business, the administrator uses this language: "According to the figures, it looks like $2,000 short. I filed three final accounts, each one different."

The referee filed his report and found the defendant to be chargeable for building a postoffice building with $238.08. He also finds that he is chargeable with the sum of $1,809.50 for feeding mules, but that this was an unintentional error on the part of the administrator. He also finds that the mules were allotted to the widow for her year's support, and concludes that the estate was not responsible for their feed.

The conclusion of the referee is that the administrator and his surety was chargeable with building the postoffice, $238.08. Amount credited to himself for feeding the mules belonged to the estate, $1,809.50, and rent for house for himself and family, $120, which was decided in their favor by the referee.

Plaintiffs further contend that, unless his conduct of the store and lumber business is ratified and confirmed by the court, the administrator and his bond are further chargeable with such sums, with reference to the expense of same, as have been set out in his report at pages 53, 54, 55, 56, 57, and 58 of the record.

The judge below rendered the judgment set out at pages 65 and 66 of the record. The plaintiffs waived the court's overruling the exceptions as to the following items: Building postoffice, $238; rent of home, $120. But they excepted to the ruling of the judge as to the credit claimed by the administrator of $1,809.50, it being for the feeding of the mules, which was decided in their favor by the referee.

The plaintiffs relied upon but one exception to the judgment and, for the purpose of deciding it, waived their other two exceptions.

We find that the report of the referee closes with the following paragraphs:

"The referee therefore concludes that the defendant administrator and his bondsmen are properly chargeable with $238.08 for building the postoffice, etc., and with the sum of $1,809.50 feeding mules, etc., and with reasonable rent for the dwelling-house occupied by himself and family, that is, the sum of $120; and that unless his conduct of the store business and of the lumber business is ratified and confirmed by this

court, said defendant administrator and his bond are further chargeable with such sums with reference to the expense of same as have been heretofore set out.

"The referee desires to state that in his opinion any error of omissions or commissions that may have been made by the defendant were made wholly in error and by mistake, and that the conduct of all of his affairs as said administrator has been done conscientiously and honestly.

"The referee regrets that he cannot make a more illuminating report, but honestly believes that were he endowed with the wisdom of Solomon and with only such records as he has before him he could make but little improvement upon this report so far as his conclusions of facts are concerned. The affairs of this estate were kept in such chaotic condition as to defy intelligent analysis by the ordinary mortal.

"Respectfully submitted,

"JOSEPH P. PIPPIN, *Referee.*"

The defendant O. C. Davis, former administrator of his brother, R. B. Davis, excepted to the charging of the item of $1,809.50 for feeding the mules against him by the referee, as follows: "Exception 4. Defendant excepts to the finding of fact and conclusion of law that defendant O. C. Davis and his bond are chargeable with $1,809.50 for feeding 7 mules 517 days. Plaintiffs contend, and the referee finds, that this credit allowed by the clerk, and found by Referee Baird, to be actually less than it cost, should be struck out of the credit side of the account."

The judge, after preliminary recitals, not necessary to be stated here, adjudged as follows: "The court, after argument of counsel of plaintiffs and defendants, and after full consideration, being of opinion, from the report of the clerk and the evidence and the findings of the referee, that the defendant administrator, in all of his transactions and dealings with the property of the estate of his deceased brother, R. B. Davis, acted conscientiously and honestly, at considerable sacrifice of his personal interest and without gain to himself, and that the estate benefited by his administration, doth find and adjudge that the defendants are not liable to the plaintiffs; and the other, or third exception, relating to the cost of the feeding of the mules, is sustained, and it is adjudged thereupon that the plaintiffs take nothing by their action, and that the plaintiffs and their surety pay the cost of the same, including one-half of $50 to the referee, J. P. Pippin, and one-half of $50 to be paid by the defendants."

Plaintiffs excepted, and appealed.

B. B. Williams, T. M. Pittman, and Daniel & Daniel for plaintiffs.

T. T. Hicks & Son for O. C. Davis.

Tasker Polk & Son for bonding company.

WALKER, J., after stating the material facts: It is apparent from the record and judgment that the merits of this case have not been reached, and there is danger of doing grave injustice to the plaintiffs if the facts are not more definitely stated.

The plaintiffs restricted their case, as presented here, to one exception, which was that relating to the ruling of the court upon the item as to the feeding and keep of the mules, asserting that the judge had not properly found and stated the facts connected with it, and further, and more particularly, that the referee decided this item with them, and that the judge should not, therefore, have reversed this ruling and given judgment for the defendants without himself finding and stating the facts and his conclusions of law, so that exception could properly be taken to them. The referee finds that this credit, which was allowed the administrator, O. C. Davis, was an unintentional error. This surely must have been overlooked by the usually careful and painstaking judge who presided at the hearing of this case. No specific allusion is made to this item in the administration account of $1,809.50 for feeding the mules, and there is no finding, and certainly no adequate statement of the facts to sustain the judgment, or to enable us properly to consider and pass upon it.

It was not the question whether O. C. Davis, as administrator, had acted "honestly and conscientiously" in the execution of his trust, but whether he had negligently collected the assets of the estate, as the law required of him, and legally disbursed them, and when we come to consider the question as to the item of $1,809.50 raised by the plaintiffs' exception, we must necessarily inquire whether the defendant fed the mules from corn, fodder, etc., belonging to the estate, as was contended by the plaintiffs, or whether, in doing so, he used his own money in the purchase of their food, or his own corn, fodder, etc. This was the vital question for decision, and yet there is no finding of fact by the judge upon which we can base that crucial decision in the case. We cannot adopt the findings of the referee and sustain the judgment, as he found with the plaintiffs, and we are required, in order to sustain the ruling of the court, to do so in total ignorance of the real facts as to the disputed item, and injustice may thereby be done to one or the other of the parties, which must not happen, if we can fairly and legally avoid such an untoward result.

In *Smith v. Smith,* 123 N. C., 229, a case in principle somewhat like this, at p. 234, the Court, after questioning the justice of permitting the statute of limitations to be pleaded at that stage of the case, says: "The court allowed the motion of defendant for leave to amend the answer and plead the statute of limitations, and defendant filed his plea accordingly. And thereupon the Court doth adjudge that the plaintiff's cause

of action is barred by the statute of limitations. The judgment further declared that the defendant's exceptions to the report and account filed are allowed, and the plaintiff's application for an injunction to restrain the defendant from selling the land to collect the debt referred to in the pleadings as per note and mortgage is disallowed. The last was clearly only the conclusion of the Court as to the legal effect of the statute of limitations upon the indebtedness of the defendant to the plantiffs as set out in the complaint; for it was made without any finding of facts by his Honor. When the judge finds no facts, it is presumed that he adopted those found by the referee. *McEwen v. Loucheim,* 115 N. C., 348; *Bancroft v. Roberts,* 91 N. C., 363. But it is apparent that he did not adopt the findings of the referee, for the referee found them all in favor of the plaintiff, and the judgment is against the plaintiff. In order that the defendant's exceptions to the report of the referee should have been sustained, it was necessary for the court to have reviewed and set aside the facts found by the referee, and to have found the facts himself in favor of the defendants. This he did not do. As, therefore, there was no finding of facts by his Honor, and the findings of the referee were not approved, there is error in that part of the judgment which sustains the defendant's exceptions and denies the application for the injunction." The judgment in this case is not as much warranted as was the one in that case, for here the judge approved the referee's findings of fact, and then decided contrary to them, as the referee found the facts with the plaintiffs and disallowed the credit of $1,809.50, for feeding the mules, to the defendant, which now appears to have been the correct view of this item in the account. This evidently was an inadvertence on the part of the learned judge, as the referee's findings of fact and the allowance of the credit for $1,809.50 cannot well stand together. If the judge intended to allow the credit, he should have found facts, as said in *Smith v. Smith, supra,* which would have sustained his ruling, and to that extent he should have disapproved the findings of the referee.

We held in *Thompson v. Smith,* 156 N. C., 345: "If there is any evidence to support the findings, and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury. When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the

referee's findings in any other way." *Malloy v. Cotton Mills,* 132 N. C., 432; *Lambertson v. Vann,* 134 N. C., 108; Clark's Code (3 ed.), p. 564, and cases there collected; *Ramsey v. Browder,* 136 N. C., 251; *Comrs. v. Packing Co.,* 135 N. C., 62.

The trouble in this case is that there is confusion, if not contradiction, in the ruling of the court, when considered in connection with the referee's findings of fact, and we cannot proceed to judgment without having the two in some way reconciled with each other.

The judgment will be set aside, which will leave the report of the referee before the court for its further consideration, but with special reference to the item of $1,809.50 for feeding the mules, about which the judge may adopt the referee's findings of fact, and his conclusion of law in favor of the plaintiffs, or he may reverse or modify the same and find the facts himself, or take such other action as may conform to the course and practice of the court, and as will disclose the legal and equitable rights of the respective parties, a final judgment to be rendered, subject to exception and appeal.

There is error in the judgment and proceedings, and this will be certified.

Error.

MADISON WILLIAMS v. ELLIS HEDGEPETH.

(Filed 27 September, 1922.)

1. Contracts—Fraud—Promises—Intent to Deceive.

A promissor, not intending to perform his promise to pay for goods or lands, and who receives the goods or lands in consequence, and does not perform his promise, is guilty of such fraud or deceit as will set the contract aside at the suit of the other party to the contract.

2. Same—Deeds and Conveyances—Fraud—Equity.

A promise by defendant to perform necessary services to an old and enfeebled man, the plaintiff, which the defendant had not intended to, and which he did not, perform, and in consideration of which he had obtained a deed from the plaintiff to his lands, is evidence of fraud sufficient in equity, if established, to set aside the deed in plaintiff's suit.

3. Instructions—Fraud—Issues—Evidence—Appeal and Error.

It is not required of the judge to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of C. S., 564.

4. Instructions—Prayers for Instruction—Requests for Instructions—General Charge—Appeal and Error.

Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case, and of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant.

5. Deeds and Conveyances—Equity—Fraud—Evidence—Values of Land.

Where a suit has been brought to set aside plaintiff's deed to land alleged to be void upon the ground of fraudulent promises of the defendant to render continued services to the plaintiff, that he did not intend to perform, of which there is evidence, and the defendant contends, with his evidence, that the consideration was for past services already rendered, testimony in plaintiff's behalf as to the value of the land at the time of the agreement and the value at the time of the trial, is competent, when in confirmation of the plaintiff's position, and tends to impeach or weaken the evidence of the defendant in regard to the value of the services he claims he has rendered.

APPEAL by defendant from *Allen, J.*, at February Term, 1922, of HALIFAX.

Civil action, to set aside a deed for fifty acres of land, made by plaintiff to defendant in November, 1918, on allegations with evidence tending to show that defendant procured the execution of the deed under a promise to render needed personal services to plaintiff, who was an old and enfeebled man, the defendant having the fraudulent intent and purpose at the time not to perform the services after the deed was executed, and which defendant had thereafter failed and refused to perform.

There was denial of any such consideration for the deed on the part of defendant, with allegations to the effect that the deed was executed for the consideration of $200 due defendant for services already performed at the time of the execution of the deed, defendant offering evidence tending to support the averments of the answer. On issues submitted, the jury rendered the following verdict:

"1. Did the defendant procure the deed in controversy by the false and fraudulent representation that he would render to the plaintiff the services alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant fraudulently fail and refuse to render said services to the plaintiff? Answer: 'Yes.'"

Judgment on verdict for plaintiff, and defendant excepted and appealed.

R. C. Dunn and Travis & Travis for plaintiff.

A. Paul Kitchin, Louis B. Meyer, and George C. Green for defendant.

HOKE, J. There was ample evidence to support the verdict, the cause was submitted to the jury under a correct and adequate charge, and we find no valid reason for disturbing the results of the trial. It is established by the great weight of authority, and is held for law in this jurisdiction, that where one under the guise of a purchase acquires the goods or property of another under a promise to pay or perform, and has at the time a settled purpose to do neither, such transaction will be regarded as a fraudulent one on the part of the pretended purchaser, and same may be set aside at the instance of the vendor. In Benjamin on Sales (7 ed.), at p. 470, the American Annotator states the position as follows: "Another well established species of fraud by a vendee is purchasing with a positive intention not to pay for the goods. If such intention were known to the vendor he certainly would not sell. Its suppression, therefore, is a legal fraud," citing, among many other authorities, *Des Farges v. Pugh*, 93 N. C., 31; *Wallace v. Cohen*, 111 N. C., 103; *Donaldson v. Farwell*, 93 U. S., 631; *Stewart v. Emerson*, 52 N. H., 301, presenting an elaborate and learned opinion by *Associate Justice Doe; Watson v. Silsby*, 166 Mass., 57. And a subsequent case in this State of *Rudisill v. Whitener*, 146 N. C., 403, is an approval of the principle as stated. And in Bigelow on Fraud, the author says: "That according to the current of authority upon this subject, a debt is created by fraud, where one intending at the outset not to pay for property induces the owner to sell it to him on credit by falsely representing or causing the owner to believe that he intends to pay for it, or by concealing the intent not to pay."

It is urged for error chiefly that the charge of his Honor on the question of fraud was not sufficiently full and explicit to meet the requirements of the statute as to instructions of a trial judge. C. S., 564. It may be that his Honor did not refer to all the terms appearing in the general definition of fraud given in some of the cases on the subject, and at times required, as in suits to recover damages for fraud and deceit, but his Honor did better in giving to the jury the law of fraud as applied to the facts of this record, which he did in accord with the principles heretofore stated, and in terms sufficiently full and clear to enable the parties to present, and the jury to intelligently consider, every phase of the evidence pertinent to the issues. "He shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising *thereon*" is the language of the statute on the subject. And the charge of his Honor is in full compliance with the statutory provision.

For the same reason, the exceptions noted for failure to give the special instructions requested by defendant must be overruled.

To the extent that they are correct, or pertinent, the positions were all covered by the general charge, and in such case a refusal will not be held for reversible error. *Sternburg v. Crohon,* 172 N. C., 731-736; *Cochran v. Smith,* 171 N. C., 369. Nor is there any valid exception to the rulings of the court on questions of evidence. The only one urged upon our attention was to the reception of evidence on part of plaintiff as to the value of the property, the evidence being that at the time of the trade the land was worth $50 per acre, or $2,500, and at the time of trial, $1,250. But these estimates were pertinent facts in confirmation of plaintiff's position, and also as directly tending to impeach or weaken the evidence of defendant on the subject, who claimed and testified that the deed was executed to him in payment for past services to the amount of $200.

There is no reversible error presented in the record, and the judgment for plaintiff on the verdict will be affirmed.

No error.

MABEL K. BELL v. R. S. McCOIN, TRUSTEE, ET AL.

(Filed 27 September, 1922.)

1. Trusts—Equity—Deeds and Conveyances—Cancellation.

Where, at the suit of the wife, it appears that a deed in trust, made by herself for her benefit and that of her children, was under a misapprehension of the facts, and that its enforcement had proven to be ill-advised, improvident, and impossible of fulfillment, and that its cancellation would be to the interest of all concerned, preventing an irreparable loss, its cancellation as prayed for may be adjudged in the equitable jurisdiction of the court; but where these allegations are not admitted or proven, the case on appeal will be remanded that the facts may be judicially ascertained.

2. Same—Divorce—Parties—Husband and Wife—Marriage.

The divorced husband of the wife is a proper party to the suit of the wife to set aside her deed in trust to another for the benefit of herself and children, made during the existence of the marriage ties; and it appears in this suit that all the persons in interest have properly been made parties.

APPEAL by defendants from *Ferguson, J.,* at Special April Term, 1922, of VANCE.

Civil action to cancel a voluntary deed of trust.

On 1 December, 1920, the plaintiff, Mrs. Mabel K. Bell, with the written assent of her husband, since divorced, executed a voluntary deed of trust conveying all of her property to R. S. McCoin, trustee, for the use and benefit of herself and her four minor children.

This is a proceeding in equity to cancel said trust deed upon the ground that the same was executed under a misapprehension of the facts—the alleged mistaken facts being set out in detail in the petition—and that the provisions of the trust thereby created have proven to be ill-advised, improvident, and impossible of fulfillment; and further, that said cancellation would not only be to the best interest of all concerned, but irreparable injury and loss will result therefrom unless such equitable relief be granted.

From a judgment for the plaintiff, in accordance with the prayer of her petition, the defendants appealed.

D. P. McDuffie and J. P. Zollicoffer for plaintiff.
Thomas M. Pittman for defendants.

STACY, J. As now advised, we see no reason why the deed in question should not be canceled by order of court, if it should appear, as alleged, that the same was executed under a misapprehension of the facts, and that the provisions of the trust thereby created have proven to be ill-advised, improvident, and impossible of fulfillment; and further, that such a cancellation would be to the best interest of all concerned—resulting in preventing an irreparable loss—but, on the instant record, we must remand the cause, to the end that the facts may be found or established. It is evident that the learned judge signed the present decree with the impression that the material facts were admitted either in the pleadings or on the hearing, but this does not so appear from the answer of the guardian *ad litem,* and he does not seem to have made any admissions at the hearing, nor does it appear that the defendant McCoin, trustee, made any admissions at the hearing, other than those contained in his answer, which are not sufficient to warrant a finding of the facts as alleged. *Ewing v. Wilson* (Ind.), 19 L. R. A., 767, and note; 26 R. C. L., 1208.

It appears that J. E. C. Bell, formerly the husband of Mabel K. Bell, has been made a party plaintiff to this action; and that all necessary parties who possibly could have any present interest in the property are properly before the court and asking for the relief sought.

Remanded.

G. L. MILLER v. W. H. HOWELL.

(Filed 27 September, 1922.)

1. Contracts — Fraud — Stipulations — Parol Evidence — Principal and Agent—Bills and Notes—Negotiable Instruments.

Stipulations in a written contract made by an agent in behalf of his principal that exclude all evidence of agreements made by the agent that are not contained in the written contract are maintainable when the contract itself is valid and enforceable; but where the verbal representations of the agent are fraudulent, and affect the existence of the contract, they are admissible to set it aside in its entirety.

2. Contracts—Statutes—Public Policy—Fraud.

Where a note is given in consideration of a contract concerning a transaction that is forbidden and made criminal by the public laws of the State, it is not enforceable between the parties; and it is not required that the statute expressly declare the contract void. *Ober v. Katzenstein*, 160 N. C., 439, cited and distinguished.

3. Same—Foodstuffs—Commissioner of Agriculture.

Where a note is given in consideration of the sale of a foodstuff or "conditioner" coming within the provisions of C. S., 4742, requiring the seller to file with the Commissioner of Agriculture a statement of his purpose, a duly verified certificate as to its qualities, for registration, with a labeled package, section 4743 requiring a fee for registration, section 4744 making a noncompliance a misdemeanor, and section 4749 declaring the legislation designed to protect the public from deception and fraud, and these requirements have not been complied with by the seller, the note is uncollectible against the purchaser or maker.

4. Contracts—Public Policy—Statutes—Fraud—Bills and Notes—Negotiable Instruments—Holder With Notice.

Where it is properly established by the verdict of the jury that a note, rendered void for fraud or under the provisions of a statute, had been acquired by one not a holder for value, without notice, etc., the claim is affected with the infirmities that would invalidate it in the hands of the original holder.

APPEAL by plaintiff from *Calvert, J.*, at the Fall Term, 1922, of NORTHAMPTON.

The action is on a promissory note for $843.75, given by defendant to the Guarantee Food Company of New York, vendor, dated 3 December, 1917, payable sixty days after date. Plaintiff put on evidence the note endorsed to himself, and also a contemporaneous written contract of purchase containing the stipulation that defendant agreed to adhere strictly and be bound by the terms and conditions specified in the order, and release the Guarantee Food Company of New York from any verbal agreements or conditions of sale not mentioned on the face of the order, etc., etc.

Plaintiff further alleged, and offered evidence tending to show, that he was the endorsee and bona fide holder for value of said note, and same was due and unpaid.

Defendant denied that plaintiff was a purchaser for value and holder in due course of the note in question, and alleged, and offered evidence tending to show, that this note sued on was given to the Guarantee Food Company for stock or poultry conditioner, a food, and at time of contract, and as an inducement thereto, said company, through its agent, represented to defendant, a local merchant, that same was a duly registered article under the laws of this State, a license to sell same having been duly obtained by the vendor company, and made other representations as to the value of his said goods which were false and fraudulent, and made with the design and purpose to cheat and mislead the defendant. That said attempted sale was made by said company and, to plaintiff's knowledge, in direct violation of the laws of the State, in that the article had not been registered nor the tax paid nor license procured, as required by the statute, and the said company and its agent were therefore without lawful authority to make any such sale. That defendant signed at the time of the bargain and before shipment, doing this at the request of the company's agent, who said he didn't care to come back that way for the mere purpose of taking the notes. That before the receipt of goods defendant had become aware that the company's agent had made the false and fraudulent representations, as stated, and that the goods had never been registered under the law, nor had vendor company nor any other ever acquired any right to sell the same in this State, and thereupon defendant had refused the goods and never taken any of them from the railroad warehouse.

It appeared further that plaintiff G. L. Miller was the manager of a company in Ohio, who had made and shipped the goods at the instance of and for vendor company under its pretended contract. The cause was submitted to the jury, and verdict rendered on the following issues:

"1. Is the plaintiff the owner of the notes sued on? Answer: 'Yes.'

"2. Was the defendant induced by fraud to execute and deliver the notes sued on? Answer: 'Yes.'

"3. If so, did plaintiff purchase same before maturity? Answer: 'No.'

"4. If so, did plaintiff purchase same for value? Answer: 'No.'

"5. Did plaintiff purchase said note without notice of any infirmity or defect? Answer: 'No.'"

Judgment on the verdict for defendant, and plaintiff excepted and appealed, assigning errors.

Stanley Winborne for plaintiff.

W. H. S. Burgwyn, D. C. Barnes, and G. E. Midyette for defendant.

HOKE, J. There are various exceptions noted by the appellant, more especially as to the determination of the second issue, that as to the procurement of the contract by fraud, the objections being chiefly to the admission and consideration of evidence in contravention of the written stipulations of the contract that defendant "would adhere and be strictly bound by its terms, and releasing the vendor from any verbal agreements or conditions not mentioned on the face of the order."

As pointed out in some of our decisions on the subject, restrictions of this character may be made effective where they appear in a written agreement which abides as the contract of the parties and is controlling in the controversy between them, but they are not allowed to prevail on an issue of fraud involving the validity of the contract itself, and the statements of the agent are offered as tending to show false and fraudulent representations inducing the contract and pertinent to such an issue. *Machine Co. v. Bullock,* 161 N. C., 1; *Machine Co. v. Feezer,* 152 N. C., 516.

The matter is not further pursued, however, for in our opinion, and regardless of any finding on the second issue, no recovery can be had on this note for the reason that same grows out of and is dependent on a transaction forbidden and made criminal by the Public Laws of the State. In 1909, ch. 556, C. S., 4742, it is provided that this foodstuff, or conditioner, the subject-matter of the contract, shall not be sold or offered for sale in this State until the appellant shall file with Commissioner of Agriculture a statement of his purpose, and also for registration a duly verified certificate as to its qualities, and also file with said commissioner a labeled package of each brand, etc.

In section 4743, a registration fee of $20 is required. Section 4744 provides that any person, corporation, or agent who shall offer for sale any of these articles without having complied with the statutory requirements appertaining thereto shall be guilty of a misdemeanor, etc. And section 4749 closes with the provision that this legislation is designed to protect the public from deception and fraud in the sale of these specified products.

It clearly appears in this record, and was practically admitted on the argument, that, in regard to this stock and poultry conditioner, the subject-matter of this contract, and for which the note was given, there was an entire failure to comply with these statutory provisions, and, under our decisions applicable, we must hold that the note is not enforceable, assuredly so as between the parties, or as to persons who take without value or with notice of the infirmity. *Courtney v. Parker,* 173 N. C., 479, citing *Lloyd v. R. R.,* 151 N. C., 536-540; *Edwards v. Goldsboro,* 141 N. C., 60, and other cases.

It is insisted for the appellant that, the statute not having avoided the contract in express terms, the statutory provision by indictment is alone available, to be prosecuted by the State, and that the Court in effect has so held in *Ober v. Katzenstein,* 160 N. C., 439. In the case cited, the statute, now C. S., 1181, requires a foreign corporation, before doing business in this State, to file its charter, etc., with our Secretary of State, with an attested statement showing the amount of stock authorized and issued, its principal place of business, the name of its agent in charge, names and postoffice address of its officers and directors, etc., and in case of failure to comply, imposes a penalty of $500 to be recovered by a suit to be prosecuted by the Attorney-General. And it was held that from the character of the act and its evident purpose the contracts of a foreign corporation doing business in the State without compliance were not avoided, but that the penalty alone was enforceable, and by action as the statute prescribed, but in the instant case the sales of the kind presented are directly prohibited, are made a criminal offense, and it is in terms declared that the statute is enacted for the purpose of protecting the public from "deception and fraud."

In our view, the law appertaining to these facts and the distinction between this and the case of *Ober v. Katzenstein, supra,* are correctly given in *Courtney's case, supra,* as follows: "It is well established that no recovery can be had on a contract forbidden by the positive law of the State, and the principle prevails as a general rule whether it is forbidden in express terms or by implication arising from the fact that the transaction in question has been made an indictable offense or subjected to the imposition of a penalty. *Lloyd v. R. R.,* 151 N. C., 536-540; *Edwards v. Goldsboro,* 141 N. C., 60; *Puckett v. Alexander,* 102 N. C., 95; *Warden v. Plummer,* 49 N. C., 524; *Sharp v. Farmer,* 20 N. C., 255. In reference to an avoidance of a contract by reason of an implied prohibition, it is the rule very generally enforced that recovery is denied to the offending party when the transaction in question is in violation of a statute establishing a general police regulation to "safeguard the public health or morals, or to protect the general public from fraud or imposition." This was held in a recent case of the Supreme Court of Michigan, on a statute very similar to ours, in *Cashin v. Pliter,* 168 Mich., 386, and the position is approved by many well considered decisions of other courts. *Levinson v. Boas,* 150 Cal., 185; *McConnel v. Kitchens,* 20 S. C., 430; *Taliaferro v. Moffitt,* 54 Ga., 150; *Pinney v. Natl. Bank,* 68 Kansas, 223; *Woods v. Armstrong,* 54 Ala., 150; *Deaton v. Lawson,* 40 Wash., 486.

In *Pinney's case, supra,* it was held that, "Where a statute expressly provides that a violation thereof shall be a misdemeanor, a contract made

in direct violation of the same is illegal, and there can be no recovery thereon, though the statute does not in express terms prohibit the contract and pronounce it void."

And in *Lloyd's case, supra,* the position is stated as follows: "It is very generally held, universally so far as we are aware, that an action never lies when a plaintiff must have his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the state."

True, there are many cases which hold that the imposition of a penalty, without more, will not always have the effect of avoiding the contract, but that when the agreement is not immoral or criminal itself, the courts, on perusal of the entire statute, its language, purpose, etc., may determine whether it was the meaning and intent of the Legislature to restrict the operation of the law to the penalty as expressed and specified therein or give it the further effect of avoiding the contract. To this principle may be referred the decisions as to the effect of penalties under the usury statutes and those in enforcement of the collection of taxes, etc., and, generally, the cases of *Ober v. Katzenstein,* 160 N. C., 439, in our own Court; *Harris v. Runnels,* 53 U. S. (12 Howard), 79; *Bowditch v. New England Life Ins. Co.,* 141 Mass., 474; *Neimeyer v. Wright,* 75 Va., 239; *Pangborn v. Westlake,* 36 Iowa, 546; *Lester v. Bank,* 33 Md., 558; *Dunlop v. Mercer,* 156 Fed., 545, are in illustration of the position.

On this record we are not called on to determine whether payment of the note could be enforced by a bona fide endorsee for value and before maturity, for the jury have found, and with no valid exception noted, that plaintiff is neither a holder for value nor without notice, nor even before maturity; and, therefore, his claim is affected with any of the infirmities available as between the original parties.

There is no reversible error in the record, and the judgment on the verdict is affirmed.

No error.

J. K. BROADHURST v. F. H. BROOKS, TRUSTEE, ET AL.

(Filed 27 September, 1922.)

1. Mortgagor—Rights of Junior Mortgagee.

The junior mortgagee has the right to have the amount due under the senior mortgage ascertained and definitely determined, and, upon paying the sum so ascertained, take an assignment of the first mortgage.

2. Same—Usury—Statutes.

Where the senior mortgage is affected with a charge of usury, the amount to be paid by the junior mortgagee, before requiring the assignment, is the principal sum due, without interest. C. S., 2306.

3. Same—Injunction.

Where the mortgagor has temporarily restrained the sale of land under the senior mortgage, it is proper for the judge hearing the matter to continue the injunction to be dissolved if the mortgagor should pay the amount ascertained to be due thereunder by a certain date, and, otherwise, order that the first mortgagee may proceed to advertise and sell under the power of sale contained in his prior mortgage.

4. Mortgages—Rights of Junior Mortgagee—Title—Equity of Redemption.

A second mortgagee has the legal title to the lands, subject only to the amount legally due upon the first mortgage and the equity of redemption in the mortgagor.

APPEAL by defendants from *Allen, J.*, at chambers in Smithfield, 16 August, 1922.

This was a restraining order in behalf of plaintiff, a junior mortgagee of J. C. Stancill, forbidding the defendants to sell under a senior deed of trust executed by J. C. Stancill and wife to secure an indebtedness to the defendant Parrish. The defendants demurred to the complaint, and upon hearing before *Allen, J.*, he overruled the demurrer and continued the restraining order theretofore granted by *Daniels, J.*, to the final hearing. The defendants appealed.

Ed. S. Abell for plaintiff.
Clifford & Townsend for defendants.

CLARK, C. J. Stancill and wife, in 1915, executed their several promissory notes to Alonzo Parrish aggregating $20,000, the last of which fell due 1 January, 1921, and executed to F. H. Brooks, trustee, a deed of trust conveying certain lands as security therefor. The defendant Brooks, trustee, advertised said lands for sale under the deed of trust on 20 December, 1921. Stancill and wife thereupon instituted suit to restrain said sale, alleging that the defendant Parrish was guilty of usury, and had retained $2,000 of the principal, and that Stancill actually received only $18,000. On the hearing of the Stancill suit, *Calvert, J.*, continued the restraining order upon condition that Stancill and wife should pay, on or before 4 April, 1922, $11,462.98, with the provision that if that sum was not paid by said date the restraining order would be dissolved and the trustee should be at liberty to readvertise and sell the land. The sum thus prescribed was the principal with legal interest. This action is by the second mortgagee, who contends that the sale should not take place if Stancill should fail to make such payment until the plaintiff is afforded full opportunity to pay the principal only, without interest.

The plaintiff alleges that he will be forced to purchase the mortgaged land in order to protect his rights as a junior mortgagee, and contends that this injunction should be continued to the hearing unless the sum due on the first mortgage, deducting all interest, should be ascertained and definitely determined, and he be given opportunity to pay that sum and take an assignment of the first mortgage.

The junior mortgagee is entitled to pay off and discharge any valid lien upon the property, which cannot be done unless and until this amount is ascertained. *Elliott v. Brady,* 172 N. C., 828.

The plaintiff, as second mortgagee, has the legal title to the property subject only to the amount legally due upon the first mortgage, and the equity of redemption in the mortgagor. The lien of the first mortgage as against the second mortgagee, under our statute, if there has been usury as to the first mortgagee, is the principal without interest. C. S., 2306. The plaintiff is entitled to have such sum ascertained and an order by the judge that upon payment of that sum by the second mortgagee the first mortgage shall be assigned to him and the injunction should then be dissolved. *Elliott v. Brady, supra; Erwin v. Morris,* 137 N. C., 48.

Affirmed.

YELVERTON HARDWARE COMPANY v. PILAND AND SONS GARAGE COMPANY.

(Filed 27 September, 1922.)

Receivers—Title—Chattel Mortgage—Registration—Liens.

The title to the property of the creditor passes to the receiver at the time of his appointment by the court, and the holder of an unregistered chattel mortgage on his goods does not have a specific lien thereon, superior to the rights of the general creditors, for which the receiver holds the title in trust.

APPEAL by L. D. Gulley, one of the creditors of the defendant company, and the petitioner in this cause, from a ruling of the receiver for said defendant, alleging divers specific liens on property at the time the receiver was appointed. The matter was heard on exceptions to the report of the receiver, before *Allen, J.,* at August Term, 1922, of the Superior Court of WAYNE, and the petitioner Gulley appealed.

D. H. Bland and N. Y. Gulley for petitioner.

E. M. Land and Hood & Hood for the other creditors of the company.

CLARK, C. J. At the time a receiver was appointed to take charge of the property of the defendant garage company, it was indebted to the petitioner L. D. Gulley for borrowed money in various amounts, which were set out in promissory notes given at sundry times, secured by chattel mortgages on certain automobiles and trucks which were not registered at the time the receiver was appointed. The defendant Piland, and other creditors of the defendant company, contend that the petitioner is not entitled to the liens claimed, and also set up a claim of usury. The receiver did not pass upon the question of usury, it being agreed between all the parties that that matter should be postponed and litigated before the Superior Court.

The receiver held that the petitioner Gulley is not entitled to a specific lien upon the automobiles and trucks set out in the note for that he had not obtained any lien thereon by registration at the time the receiver was appointed. The court properly sustained this ruling of the receiver.

The automobiles and trucks embraced therein passed to the receiver for the benefit of the general creditors, and L. D. Gulley has no lien upon them, nor upon the proceeds. *Starr v. Wharton,* 177 N. C., 324.

Observer Co. v. Little, 175 N. C., 44, is decisive of this question, the Court saying: "And it is held further with us that after proceedings are instituted and receivers appointed, no general creditor can, on his own account, take any separate or effective steps in furtherance of his claim," and it is said further: "Under these conditions, it is in accord with right reason that a proceeding of this character and the appointment of receivers thereunder shall be considered in the nature of judicial process by which the rights of general creditors are 'fastened upon property' within the meaning of the principle, and avoiding all claims for specific liens which have not obtained legal priority by having the same duly registered as provided and required by law; and well considered authority is in full support of the position," citing numerous authorities.

In *Hardware Co. v. Holt,* 173 N. C., 310, *Hoke, J.,* says: "True, the receivers, unless otherwise provided in the order, could not properly assume control of the property till they had qualified. Certainly they could make no authoritative disposition of it before that; but the language of the statute is that the property vests at the date of the appointment, and that the title of the corporation is divested at that date. The statute was evidently expressed in these explicit and peremptory terms with a view of insuring a distribution of the property under conditions existent at the time of the appointment, and to prevent a creditor from obtaining any advantage over another from and after that time, and it is, therefore, expressly provided that from such date the corporation shall have no interest in the property on which a lien can be acquired."

In this case there is no controversy that the property had been actually taken possession of by the receiver, but as shown in the above cited cases, if it had been otherwise the title passed upon the appointment of a receiver and the holder of an unregistered lien could acquire no priority subsequent to the date when the property was divested by the decree appointing the receiver.

Affirmed.

CORNELIA SERMONS, EXECUTRIX, v. FRANK ALLEN ET AL.

(Filed 27 September, 1922.)

1. **Evidence — Written Contracts — Lost Writing — Contents—Search—Notice to Produce.**

   Where a party to a written duplicated contract desires to introduce parol evidence of its terms, on the ground that he had lost his own copy, and on the failure of the adverse party to produce the duplicate original after notice, it is necessary that he shall have reasonably exhausted all sources of information and means of discovery of his own copy, of which the circumstances would suggest, and which were accessible to him; and the written notice to produce must also be reasonable as to time and place.

2. **Same—Nonresident Party.**

   Where the adverse party, to whom notice to produce a written contract, the subject of the action, is to be given, resides at a different place from that of the trial, it is required, for the introduction of parol evidence of the terms of the writing, that such notice shall have been given him before he had left home to attend the trial, and notice thereof given him during the trial of the cause is insufficient.

APPEAL by defendants from *Cranmer, J.*, at February Term, 1922, of CRAVEN.

Civil action to recover damages for an alleged breach of warranty or guarantee in a contract for the sale of land.

There was evidence on behalf of the plaintiff tending to show that the defendants agreed to sell the land in question, guaranteeing the plaintiff's husband (since deceased) the sum of $20,000 in cash, or satisfactory notes and mortgage for said amount from the purchasers, and the defendants were to receive and retain all over and above this amount as commissions for making the sale. All costs of sale were to be paid by defendants. The land, supposed to contain 141.2 acres, was sold by the acre at $144 per acre, making a total of $20,332.80. Later the purchasers discovered that there was a shortage of 12.3 acres in the acreage, and they demanded a rebate or a credit of $1,771.20 on their note. This

was allowed by the plaintiff, and she now brings suit to recover said amount from the defendants, on their alleged guarantee of a net return of $20,000.

The defendants contend that they were only the selling agents of the owners, and that no such guarantee was incorporated in the contract. The whole amount of the purchase price was turned over to plaintiff's husband, and he paid the defendants their commission of $332.80.

From a verdict and judgment in favor of plaintiff, the defendants appealed.

Moore & Dunn and R. A. Nunn for plaintiff.
Guion & Guion for defendants.

STACY, J. The contract between the parties was in writing, but it was not offered in evidence. Its terms are in dispute and the plaintiff undertook to show what they were by secondary proof. The appeal presents, in the first instance, the competency of this evidence.

Henry L. Sermons, son of the plaintiff, but who was not a party to the suit, testified that there were four copies of the contract; that he had a copy, his father and mother each had a copy, and that the defendants had a copy. He further testified: "I do not know what became of them after the sale was concluded. I kept my copy in my trunk in the house. My wife and I have both looked thoroughly for it. I have not looked for my mother's copy. We live about one hundred and fifty yards apart.

"Q. Just state what the contract was?"

Defendants' counsel to the court: "If your Honor please, no notice has been served on us."

The court to defendants' counsel: "Yes, sir; let that appear in the record."

Plaintiff's counsel to the court: "We now demand production of it, if they have it."

The witness further testified, on cross-examination: "I think there were two separate contracts made, one between me and Allen and Murray (for my part of the land), and one between my mother and father and Allen and Murray. . . . I really don't know whether there were two contracts or not. That's the truth, for sure, I think there were two."

Mrs. Sermons testified: "I remember the time the contract was made. I have never seen the contract since the day the land was sold."

"The court found as a fact that the contract in question, in the possession of the plaintiff, had been lost, and that a diligent search for it had been made, to which the defendants excepted."

We agree with counsel for defendants that the foregoing was not sufficient to warrant the introduction of secondary evidence to prove the

contents of the written instrument. *Avery v. Stewart,* 134 N. C., 287, where this question is exhaustively treated in an opinion by *Associate Justice Walker.* The only positive evidence of the loss of the contract here sued upon was the testimony of Mrs. Sermons to the effect that she had not seen the contract since the day of sale. The rule applicable in such cases is stated in 1 Greenleaf on Evidence, sec. 558 (16 ed., sec. 563 b), as follows: "It seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." See, also, *Green v. Grocery Co.,* 159 N. C., 118, and *Thompson v. Lumber Co.,* 168 N. C., 228.

It will be observed that the court's finding only established the loss and inability, after diligent search, to locate the plaintiff's copy of the contract. No notice was served on the defendants, prior to the trial, to produce their copy. The cause was then being tried in Craven County, and the defendant Allen lives in Wake. "Generally, if the party dwells in another town than that in which the trial is had, a service on him (to produce papers) at the place where the trial is had, or after he has left home to attend the court, is not sufficient." *Beard v. R. R.,* 143 N. C., 141.

The other exceptions are not likely to arise on another hearing, and we shall not consider them now.

New trial.

T. S. SOUTHGATE v. B. M. ELFENBEIN ET AL.

(Filed 27 September, 1922.)

1. Deeds and Conveyances—Ejectment—Reservations in Deed—Burden of Proof.

The burden is on the defendant in ejectment, claiming that the *locus in quo* is within the exception of the plaintiff's deed, both claiming under a common source of title, to show that it is, in order to maintain his defense.

2. Same—Evidence—Nonsuit—Questions for Jury—Trials.

The plaintiff and defendant in ejectment claimed under a common source of title, and the defendant relied upon the contention that the *locus in quo* was within the reservation of the plaintiff's deed, and the reservations were not set out in plaintiff's deeds by particular metes and bounds, but incorporated therein by reference to other deeds, which were not offered in evidence: *Held,* the case was one for the jury, and defendants' motion as of nonsuit upon the evidence was improperly granted.

SOUTHGATE *v.* ELFENBEIN.

APPEAL by plaintiff from *Cranmer, J.*, at June Term, 1922, of CARTERET.

Civil action to quiet title, subsequently converted into an action of ejectment, and to recover damages for an alleged trespass.

At the close of plaintiff's evidence, on motion of defendants, there was a judgment as of nonsuit, from which the plaintiff appealed.

Julius F. Duncan for plaintiff.
C. R. Wheatly for defendants.

STACY, J. On the hearing it was admitted that plaintiff and defendants claim title to the *locus in quo* from a common grantor, Isaiah Mason.

In deraigning plaintiff's title, he offered in evidence certain deeds covering the property and describing it by metes and bounds, but containing two exceptions to lands previously conveyed by Isaiah Mason to Ephream Willis and to W. P. Mason. The defendants claim the lands under Ephream Willis and W. P. Mason, and thus under the exceptions in the plaintiff's deeds. But these deeds, under which the defendants claim, were not offered in evidence. The correctness of the nonsuit, therefore, depends upon whether the plaintiff or the defendants had the burden of showing that the disputed land lay outside the excepted territory.

This identical question was before the Court in the case of *Gudger v. Hensley,* 82 N. C., 482, where it was held: "In ejectment, where a party relies upon a reservation in a grant to support his title, the *onus* is on him to show that the land claimed is embraced within its terms." And in *Bernhardt v. Brown,* 122 N. C., 590, it was said: "The defendants except because '5,000 acres being excepted from the grant, under which the plaintiffs claim, the burden is on the plaintiffs to show that the land sued for is not the excepted part.' The law is well settled otherwise. 'The *locus in quo* being within the boundary of plaintiffs' deed, and defendant claiming under exceptions in said deed, it is clear that it is incumbent on him to bring himself within the exceptions by proof,'" citing *Steel Co. v. Edwards,* 110 N. C., 353, and *Gudger v. Hensley, supra.* Again, in *Lumber Co. v. Cedar Co.,* 142 N. C., 422: "It may now be taken as settled law that a party claiming land to be within an exception must take the burden of proving it," citing a number of authorities. See, also, *Bright v. Lumber Co.* (at this term), and cases there cited. *Bowser v. Wescott,* 145 N. C., 61; *Currie v. Hawkins,* 118 N. C., 598.

Under the foregoing principle, it follows that his Honor should have submitted the question to the jury, and that the motion for judgment as of nonsuit should have been overruled.

It may be well to note that the exceptions in question were not set out in the plaintiff's deeds by particular metes and bounds so as to show upon the face of the instruments the internal as well as the external limits and bounds of the property conveyed. The entire property was covered by the general description in the deeds, but the exceptions were incorporated therein only by reference to other deeds. *Brown v. Rickard,* 107 N. C., 645.

The judgment of nonsuit will be set aside, and the cause referred to another jury.

Reversed.

D. S. JONES ET AL. v. CITY OF NEW BERN ET AL.

(Filed 27 September, 1922.)

1. **Schools — Bonds — Taxation — Municipal Debts—Election—Board of Trustees of New Bern Academy—Statutes—Amendatory Act.**

   The board of trustees of New Bern Academy, incorporated by 7 George III., and recognized by legislation in North Carolina by amendment from time to time, and given powers incident to boards of this character for issuing bonds, as well as plenary powers in the management of the school, found it necessary in stringent financial times to borrow money at various times from banks in order to keep the schools going. Upon the presentation of the matter to the board of aldermen of the city, an election was had upon the question of issuing bonds to take up the debt, in accordance with the Municipal Finance Act of 1921, and the proposition was approved: *Held,* the said board of trustees is an official board of said city, and its debts are the debts of the city, C. S., 2937; and the bonds issued by them to take up the indebtedness created before 5 December, 1921, and approved by the voters, are a valid obligation of the city, under the amendment of chapter 106, Extra Session of 1921, to C. S., 2937 (2), authorizing municipalities to fund or refund their indebtedness. See C. S., 2787, 2960 (2), 2937 (1).

2. **Schools — Bonds — Taxation—Municipal Corporations—Necessaries—Elections—Ratification.**

   Where a school board of trustees has borrowed money, and an election is regularly called to vote upon the question as to taking up the debt by a bond issue, the approval of the voters at the election afterwards so held is a ratification of the previous act of the school board, C. S., 2938, and renders unimportant the question as to whether the money had been borrowed for necessary purposes.

APPEAL by plaintiff from *Calvert, J.,* at September Term, 1922, of CRAVEN.

This was a controversy submitted without action upon a case agreed. The board of trustees of the New Bern Academy was incorporated by 7 George III., 3 November, 1766, and amended since by Laws 1883, ch.

117; Laws 1887, ch. 135. By Laws 1899, ch. 547, the board of trustees of New Bern Academy was constituted the board of trustees for the New Bern Graded Schools, and vested with "power to employ and fix the compensation of superintendents for said schools and such teachers as are necessary, and to do all such acts as are necessary to carry on said schools." By this last mentioned act provision was also made for holding an election to vote on a special tax of 12½ cents on the $100 for said schools.

By Private Laws 1907, ch. 52, "The Board of Trustees of the New Bern Graded Schools" was incorporated with the usual powers, and a provision was made that "All special city school taxes and all public school funds derived from the State and county for the use and benefit of said schools shall be paid to the treasurer of the said board of trustees of the New Bern Graded Schools for the use and benefit of said graded schools"; and further, "That said board of trustees shall have entire and exclusive control of the said graded schools in the city of New Bern; shall prescribe rules and regulations for the government of the same; shall employ, prescribe the qualifications, and fix the compensation of all officers and teachers in the said graded schools; shall arrange a proper course of study, and shall exercise such other powers as shall be necessary for the proper control and operation of the said schools," and under the authority of Private Laws 1909, ch. 324, an election was ordered by which an additional special tax of 7½ cents per $100 was voted for said schools.

By the authority of Private Laws 1913, ch. 176, another election was held, in which an additional tax of 10 cents per $100 was voted, and the city of New Bern was authorized to issue $40,000 in bonds for said schools, of which amount $20,000 was issued, and, as provided in the act, the money was paid over to the board of trustees in such manner and for such uses and purposes in the building and equipment of buildings and in the maintenance of the schools as said board directed.

In the beginning certain property was given to the board of trustees of the New Bern Academy, and from time to time property has been received by gift, bought, mortgaged, and sold and debts contracted and paid during the 156 years since the board was incorporated, and in all this time the power of the board to do these things has been unquestioned.

During the recent World War the expenses of operating the graded schools in said city greatly increased, and the board of trustees, to keep the schools open, was compelled to anticipate the collection of taxes by borrowing money from the banks of the city. Loans were duly authorized by the board, and notes given for the amounts borrowed which have been renewed from time to time. These loans within a few years aggregated $30,000, and it was deemed impractical to pay the indebtedness

out of the current revenues, which are barely adequate to pay current expenses. The board of trustees presented the matter to the board of aldermen of the city of New Bern, and the board of aldermen duly authorized the issuance of $30,000 of funding bonds of the city of New Bern, for paying the debt of the board of trustees of the New Bern Graded Schools incurred as above stated. Section 5 of the ordinance provides: "This ordinance shall take effect when approved by the voters of the city of New Bern at an election as provided by the Municipal Finance Act of 1921."

A new registration was ordered, and a notice of election duly given as required by law, and the election was held 16 May, 1922, at which a majority of the qualified voters of the city authorized the issuance of said bonds for the aforesaid purpose of paying the debt of the New Bern Graded Schools. The result was duly canvassed, declared, and published, and pursuant thereto the board of aldermen have levied a tax sufficient to pay the principal and interest of said bonds, and is preparing to advertise and sell the same.

The validity of said bonds and the levy of said tax were submitted to the court, after a controversy without action in the manner required by law.

The case coming on before the court upon the case agreed, the court adjudged that "said $30,000 refunding bonds of the city of New Bern, N. C., for paying the debt of the New Bern Graded Schools, and the annual tax to pay the principal and interest of said bonds, approved by a majority of the qualified voters of said city at an election held on 16 May, 1922, are valid, and it is ordered that said bonds be issued in accordance with law, and that said tax be annually levied and collected."

The plaintiff in this action is a resident, voter, property owner, and taxpayer in said city, and has instituted this action on his own behalf and that of all other residents, voters, property owners, and taxpayers of said city. The defendants are the board of aldermen of said city, the mayor, city clerk, treasurer, and city tax collector. From said judgment the plaintiff appealed.

W. D. McIver for plaintiff.
R. A. Nunn for defendants.

CLARK, C. J. The facts being agreed, the only assignment of error is to the judgment. The plaintiff contends that the debt is not "a debt of the municipality" within the meaning of C. S., 2937 (2), as amended by Laws 1921, Extra Session, ch. 106, which authorized municipalities "to fund or refund a debt of the municipality incurred before 5 December, 1921." The defendants contend that the board of trustees of the

New Bern Graded Schools is an official board of said city, and its debts are debts of the city, and, therefore, the debts proposed to be funded by means of said bond issue are debts within the meaning of subdivision (2), C. S., 2937.

The city government collects the school taxes and pays over the money to the school trustees, whose duty it is to maintain the schools, and if necessary, borrow money for that purpose in anticipation of the collection of taxes. Otherwise, at times it would be necessary to close down the schools.

C. S., 2787, provides that the city shall have the power "to appropriate the money of the city for all lawful purposes." C. S., 2960 (2), reads: "The authorization of bonds by a municipality shall be deemed to be an appropriation of the maximum authorized amount of the bonds for the purposes for which they are to be issued." C. S., 2937 (1), provides: "A municipality may issue its negotiable bonds for any one or more of the following purposes: (1) For any purposes or purpose for which it may raise or appropriate money, except for current expenses," and Public Laws 1921, ch. 133, last paragraph of section 4 reads: "Bonds hereafter issued by or on behalf of any school district may be issued in the name of such corporation or in the name of any incorporated official board or body authorized to issue said bonds, or in such other manner as may be authorized by law."

The schools of the city owe $30,000, and the city is liable for the debt. The trustees of the school and the board of aldermen deem it better to fund with city bonds than to pay it out of current revenues. Ordinances were duly adopted to that effect, the question was submitted to the voters, the election regularly held, and a majority of the qualified voters of the city voted in favor of issuing the bonds and levying the tax to pay the same. C. S., 2787, provides that the city may appropriate money for all lawful purposes, and under C. S., 2960, these bonds were authorized as an appropriation for the purposes for which issued. A municipality may issue bonds, C. S., 2937.

When the bonds to be issued are not for necessary expenses, then the ordinance must be approved by the voters at an election as provided in the Municipal Finance Act, C. S., 2938. This has been done. Even if the board of trustees had no power to contract the debt in the administration of the schools without first having the sanction of the voters expressed in an election, they have ratified and confirmed the issuance by their vote in the election of 16 May, 1922. *Hammond v. McRae,* 182 N. C., 747.

On consideration of that case, we think it is unnecessary to cite further authority, and the judgment of his Honor is

Affirmed.

TOWN OF ROANOKE RAPIDS v. JOHN L. PATTERSON.

(Filed 27 September, 1922.)

1. Taxation—Time of Listing Property.

In 1919 the taxpayer was required to list his taxes on the first of May, and by Public Laws 1919, ch. 84, sec. 8, all property was required to have been listed as of 1 January for the years 1920, 1921, 1922, 1923, upon the valuation of May, 1919. By ch. 1, sec. 1, Extra Session of 1920, the valuation of 1 May, 1919, was approved and accepted for the years stated, and by sec. 8 of ch. 1, Extra Session of 1920, except for the purpose of taxation of the year 1920, the taxes were required to be listed 1 May, that is, those of 1921, etc.: *Held*, the language of these acts is unambiguous, leaving nothing open to construction, and requires that for the year 1920 the tax on property was to be charged on the tax books as of the first day of the year.

2. Same—Domicile.

Under the provisions of our statutes, all personal property and all taxable polls shall be listed by the taxpayer in the township in which he resides, the residence in such instances being interpreted as the place of domicile.

3. Same—Residence—Animus Manendi.

The words "domicile" and "residence" are not, in accuracy, convertible terms, the former being a person's fixed and established dwelling place, as distinguished from his temporary, although actual, place of "residence," the former implying both his physical presence in a particular locality and his intention to make this locality a permanent abiding place, both as to actual residence or occupancy and as to the *animus manendi*.

4. Taxation—Change of Domicile—Place Where Taxes Are Due.

Where a taxpayer has listed his property for taxation in May, 1919, in the township of his domicile, and a few days prior to 1 January, 1920, has made arrangements and intends to move his domicile to another township, but does not actually reside there until 3 January, 1920, his taxes are due and payable at the place of his former domicile, or the township from which he has removed.

APPEAL by defendant from *Allen, J.*, at March Term, 1922, of HALIFAX.

The issue was answered by the jury in favor of the plaintiff, and from the judgment rendered the defendant appealed.

George C. Green for plaintiff.
W. E. Daniel, Travis & Travis, and Daniel & Daniel for defendant.

ADAMS, J. On 1 January, 1920, the defendant had situate in the town of Roanoke Rapids real property of the value of $2,700, and owned personal property of the value of $21,321. The plaintiff levied for that year a tax of 85 cents on property valued at $100. Upon the defendant's

refusal to pay the tax assessed against his property, the plaintiff brought suit and recovered judgment. The appeal involves the two questions whether the owner was required to list his property as of 1 January, 1920, and if so, whether at that time the defendant was a resident of Roanoke Rapids. In 1919 the taxpayer filed his verified statement with the list-taker on 1 May; but the next year it was not so. Special machinery was provided by the Revaluation Act. "All real property shall be valued as of 1 May, 1919, and when such valuation has been completed, it shall become the value to be used for all tax purposes for the years 1920, 1921, 1922, and 1923. All personal property shall be listed as of 1 January in each year, and from and after the completion of the revaluation herein provided for all real property shall be listed as of 1 January of each year." Public Laws 1919, ch. 84, sec. 6. See secs. 19, 21. "The assessment of valuation of property, made under provisions of chapter 84 of the Public Laws of 1919, is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State, and by all subdivisions of the State for which taxes are levied for the year 1920, and the valuation of real property so fixed shall be adopted for the years 1921, 1922, and 1923, except as such valuations may be hereafter changed according to law." Public Laws, Extra Session, 1920, ch. 1, sec. 1. "The tax upon all real and personal property shall be charged upon the tax books for the year 1920 against the owners of such property on 1 January, 1920, in accordance with the intent and purpose of chapter 84 of the Public Laws of 1919, and whenever in said act there is any provision requiring property to be listed for taxation after the year 1920 on 1 January, that such provisions are hereby amended by substituting in lieu thereof the words '1 May,' to the end that all personal property may be listed, and all real property relisted as of 1 May after the year 1920, under the rules and regulations as may be hereafter provided by the General Assembly." Public Laws, Extra Session, 1920, sec. 8. In these statutes the legislative intent is clearly indicated; the language is unambiguous, and resort to extrinsic aids to construction is not required. The conclusion is unavoidable that for the year 1920 the tax on property was to be charged on the tax books as of the first day of the year. The time for listing property since 1920 is designated in Public Laws, Extra Session, 1920, ch. 1, sec. 8, *supra.*

The law provides that all personal property and all taxable polls shall be listed in the township in which the person so charged resides. Ordinarily this is the place of domicile. *Hall v. Fayetteville,* 115 N. C., 281. The question of the defendant's domicile was submitted to the jury. His counsel requested the instruction that if it was his intention to terminate his legal domicile in Roanoke Rapids on 31 December, 1919, and to transfer it to Rosemary, and in pursuance thereof removed with

his family from Roanoke Rapids on the morning of 3 January, and thereafter listed his personal property in Rosemary, he was not a resident of Roanoke Rapids on the first of January. This instruction his Honor declined, and charged the jury that both an intention or purpose and the consummation of such purpose were necessary to effect a change of domicile. When accurately used, "domicile" and "residence" are not convertible terms. Domicile is a person's fixed, permanent, established dwelling-place, as distinguished from his temporary, although actual, place of residence. *Salem v. Lyme,* 29 Conn., 74; *Reynolds v. Cotton Mills,* 177 N. C., 412; *Wheeler v. Cobb,* 75 N. C., 21; *Horne v. Horne,* 31 N. C., 99. Domicile implies both physical presence in a particular locality and an intention to make such locality a permanent abiding place—both a residence and the *animus manendi.* The defendant's own testimony is to the effect that he acquired his domicile at Roanoke Rapids in 1901, and is, moreover, substantially an admission that he made no change of domicile or residence until 3 January, 1920. By careful examination of the record, we are satisfied that the defendant's exceptions should not be sustained, and that the appeal presents

No error.

J. B. COLT COMPANY v. MRS. O. R. TURLINGTON.

(Filed 27 September, 1922.)

1. Contracts, Written—Effect of Signature of Party—Vendor and Purchaser.

One having signed a written contract is presumed to have read and agreed to it, and ordinarily is bound by its terms.

2. Same—Parol Evidence—Evidence—Trials.

Where the purchaser has signed with the vendor's selling agent a contract for the sale of goods, in this case a heating and lighting plant, naming the contract price in a certain sum, restricting the terms of the contract to those therein stated, and expressly excluding any representation the agent may make not included in its written terms, parol evidence on the purchaser's behalf, in the absence of fraud or other equitable defense that would avoid the contract, tending to show that the agent, as a part of the consideration, had agreed for his principal, that the price named included other obligations of the principal, in this case the installation of the plant, is incompetent as contradicting the terms of the writing.

3. Same—Waiver—Burden of Proof.

Where the purchaser is excluded by the written terms of his contract from showing, by parol evidence, other obligations the agent of the seller

had agreed to for him, as principal, the burden of proof is on him to show that the agent had a right to waive the written terms of the contract, if he relies thereon as a defense in an action brought to recover the contract price.

APPEAL by plaintiff from *Calvert, J.*, at February Term, 1922, of HARNETT.

On 4 October, 1917, the parties entered into a written contract for the purchase by the defendant of a heating and lighting plant. The plaintiff brought suit to recover the contract price of $206.25, with interest. The defendant admitted the execution of the written instrument, and alleged that the plaintiff verbally contracted to install the system at her home and had failed and refused to do so. Under an instruction of the court to answer the first issue nothing if they found the facts to be as testified to, and to consider the evidence as to the second, the jury found that the defendant was not indebted to the plaintiff, and that the plaintiff was indebted to the defendant in the sum of $8.26—$5.26 for freight and $3 for hauling the plant from the station to the defendant's house. From the judgment rendered the plaintiff appealed.

Young, Best & Young for plaintiff.
Clifford & Townsend for defendant.

ADAMS, J. The defendant admitted the execution of the written contract, which was introduced in evidence. Among other stipulations therein are these: "This order shall become a contract between the purchaser and the company upon acceptance thereof in the space below by one of the officers of said company; it being understood that this statement, upon such acceptance, covers all of the agreements between the purchaser and the company, and that no agent or representative of the company has made any statement or verbal agreement modifying or adding to the terms and conditions herein set forth. It is further understood that upon acceptance of this order, the contract so made cannot be canceled or revoked by either party, nor may it be altered or modified by any agent of the company, or in any manner except by agreement in writing between the purchaser and the company acting by one of its officers." The defendant did not allege fraud or mistake, or any other equitable defense in her answer, but alleged only the plaintiff's breach of contract to install the machinery. For the purpose of showing such breach, the defendant was permitted to offer proof that the plaintiff's agent delivered to her an unsigned paper-writing and told her it was a copy of the written contract; and that this paper contained the item, "Installing, $35," which is not in the original order. She was permitted

to introduce also certain of her letters addressed to the plaintiff charging it with a breach of contract in failing to set up the generator and appliances at her dwelling. To the admission of this evidence the defendant excepted.

The exception, in our opinion, should have been sustained. The defendant has not alleged that she is entitled to the cancellation of her contract on the ground that she was deceived by the plaintiff's agent, and thereby lulled into security. Having signed the contract, she is presumed to have read it, and is bound by its terms. *Dellinger v. Gillespie,* 118 N. C., 737; *Griffin v. Lumber Co.,* 140 N. C., 520; *Medicine Co. v. Mizell,* 148 N. C., 384; *Leonard v. Power Co.,* 155 N. C., 17; *Taylor v. Edmunds,* 176 N. C., 327.

Since the defendant is bound by her written contract, it is apparent that she cannot offer evidence to alter, vary, or contradict its provisions. She expressly stipulated that her written order should cover all the agreements between her and the plaintiff, and that the agent neither had made nor should make any verbal agreement modifying or adding to its contents. If the agent gave her an unsigned paper with a stipulation not appearing in the contract she had executed, the plaintiff was not bound by the agent's unauthorized agreement, because not only was the agent's authority limited, but the defendant in express terms assented to the limitation. It is true that a restriction on an agent's powers ordinarily may be waived; but even then the burden rests on the party claiming the waiver to show that it was within the scope of the agent's authority, and it must be shown, not by the agent's declaration, but *aliunde.* In the case at bar the language used in *Medicine Co. v. Mizell, supra,* may appropriately be employed: "But it is positively stated in the order that there is no agreement, verbal or otherwise, affecting the terms of the order, except the one expressed therein, and to this the defendant freely assented by signing the written instrument. The well settled rule of law forbids him now to show the contrary by oral testimony." *Moffitt v. Maness,* 102 N. C., 457; *Taylor v. Hunt.* 118 N. C., 168; *Walker v. Venters,* 148 N. C., 388; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Walker v. Cooper,* 150 N. C., 129; *Woodson v. Beck,* 151 N. C., 145.

For error in the admission of incompetent evidence, the plaintiff is entitled to a new trial. Let this be certified.

New trial.

JEANETTE BROTHERS COMPANY v. HOVEY & COMPANY ET AL., AND MARS HILL TRUST COMPANY, INTERVENER.

(Filed 4 October, 1922.)

1. Contracts—Offer and Acceptance—Reasonable Time—Evidence—Questions for Jury—Trials.

Where men of fair minds may come to differing conclusions on the question, the reasonableness of the time in which an offeree must accept a contract for the sale of goods is a question for the jury, when the parties have determined upon no specific time in which the acceptance must be made, but only that it be a reasonable one.

2. Same—United States Mails.

Where the seller of potatoes has made an offer of sale for future delivery to the proposed purchaser to be accepted within a reasonable time therefrom, by mail, the purchaser's letter of acceptance within a reasonable time, and mailed to the seller before receipt of the latter's letter of cancellation, completes the contract, and upon the seller's breach thereof the purchaser may recover his damages.

3. Contracts—Offer and Acceptance—Breach—Damages.

Where the seller has breached his contract of sale of potatoes, to have been delivered to the purchaser at a specified future time and place, the measure of damages is the difference between the contract price, and the market value of the potatoes at the time when and at the place where the goods should have been delivered by the terms of the contract.

4. Same—Instructions—Verdict—Appeal and Error—Harmless Error.

In this action, permitting a recovery by the defendant of damages for the plaintiff's (seller's) breach of contract in the delivery of potatoes, the jury having awarded as damages the difference between the contract price and the market value, etc., an instruction that allowed them to include the defendant's loss under contracts he had made with third parties, if erroneous, was harmless error.

5. Contracts—Breach—Attachment—Intervener—Banks and Banking—Agency for Collection—Principal and Agent.

Where the defendant pleads and relies on a counterclaim for damages alleged to have been caused by the plaintiff's breach of the contract he has sued on, and has attached here a draft of the plaintiff, a resident of another state: *Held*, a bank that has intervened, claiming the right to the proceeds of the draft, cannot maintain this position when the jury have found, under correct instructions upon sufficient evidence, that the intervening bank was only an agent for collection.

APPEAL by defendant from *Ferguson, J.*, at February Term, 1922, of PASQUOTANK.

Civil action for breach of contract of sale for seed potatoes. There was evidence tending to show that in November, 1919, W. H. Jeanette, a member of plaintiff firm of Elizabeth City, N. C., was at Resque Isle, Maine, and made a tentative agreement with defendants, resident and doing business at Mars Hill, Maine, for the purchase of 1,100 sacks of

seed potatoes at $5.60 per sack, and that the contract of sale was to be in writing, and $1 per sack paid thereon at time same was completed. The potatoes sold for delivery between 1 and 20 January, 1920. That pursuant to an arrangement between them over the telephone, defendants, or their agent, was to have contract at railroad station as plaintiff was on his return. That on 6 November the written contract was brought to station by defendant's agent, and it was then further agreed that W. H. Jeanette should take same home with him to Elizabeth City and examine and decide on the question of acceptance, notifying defendant within a reasonable time after his return, and also remit the prepayment of $1 per sack. There was also an offer on part of defendants that plaintiff should have option to purchase 400 additional sacks at the same price on given notice of acceptance as aforesaid. That W. H. Jeanette, who had been in Maine on his wedding trip, had contracted a severe cold and was very ill from its effects, making it necessary for him to remain in New York for six or seven days on his return journey, and he did not arrive at Elizabeth City till 12 or 15 November. That there was no increase of the price of potatoes of any significance during November, and plaintiff, considering that the matter was in no way urgent, did not communicate with defendants about the matter till 29 November, when he wrote and duly mailed a letter to defendants notifying them of the acceptance of the contract, and enclosing check for $1,100, the stipulated amount of the prepayment. It further appeared that on 14 November defendants had written plaintiffs, withdrawing the offer of the 400 additional sacks, and on 28 November defendants had mailed a letter at Mars Hill, addressed to plaintiffs at Elizabeth City, withdrawing the written offer of the 1,100 sacks, but this in the ordinary course of mail could not and did not reach Elizabeth City for three or four days, and was not received until after plaintiffs had mailed their letter of acceptance, enclosing the check.

Defendants' evidence was to the effect that at the time the written contract was delivered, plaintiff had told defendant's agent that he would probably reach Elizabeth City by the 11th, and only a reasonable time was to be allowed for acceptance. That there was no marked rise in the price of potatoes until 15 December, and after that there was a continued advance during the selling season. The evidence further showed that from 1 to 20 January, the period for delivery, the market value of potatoes was from seven to eight dollars per sack wholesale in carload lots, and plaintiff could have sold all of these at from $9 to $10.50 per sack in the course of his business.

An inspection of the record shows also that plaintiffs had sued out an attachment in the cause, and had same levied on a draft, and its proceeds in the hands of National Bank of Elizabeth City for $1,614.49,

said draft having been drawn by Hovey & Company on Spence and Hollowell in Elizabeth City, and sent to said bank for collection by the Mars Hill Trust Company, and it appeared further that on 30 October, 1920, said Mars Hill Trust Company was allowed to intervene and set up its claim to this draft and its proceeds. And on the trial offered evidence tending to show that it had purchased the draft for full value and was the bona fide owner of same. There were also facts in evidence permitting the inference that said trust company was not the owner in good faith, but that it had received and forwarded the draft merely as collecting agent for defendant.

On issues submitted, the jury rendered the following verdict:

"1. Did the plaintiff and the defendant enter into a contract relating to the purchase of potatoes, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff ready, able, and willing to comply with said contract? Answer: 'Yes.'

"3. Did the defendant wrongfully refuse to comply with said contract? Answer: 'Yes.'

"4. What damages, if any, is the plaintiff entitled to recover? Answer: '$2,265.'

"5. Was the interpleader, the Mars Hill Trust Company, the owner of the proceeds of draft attached in this case, at the date of said attachment? Answer: 'No.'"

Judgment on the verdict for plaintiffs, and defendant appealed, assigning errors.

Ehringhaus & Small for plaintiff.
W. A. Worth for defendant.
Thompson & Wilson for intervener.

HOKE, J. According to the evidence and contentions of both of the parties, the plaintiff had a reasonable time in which to accept defendant's offer, and it is held in this jurisdiction that when men of fair minds can come to differing conclusions upon it, the question of reasonable time is for the jury. *Holden v. Royall,* 169 N. C., 676-678; *Clause v. Lee,* 140 N. C., 552; *Blalock v. Clark,* 137 N. C., 140. In application of the principle, and under a proper charge, the jury have necessarily determined that defendant's offer continued to be an open one, and this being true, the further instruction of his Honor is in full accord with the authorities on the subject, that if plaintiff mailed his letter of acceptance at Elizabeth City on 29 November, enclosing check, and before notice of withdrawal received, the contract was "consummated," though defendants had mailed such notice at Mars Hill on the day previous. *Patrick v. Bowman,* 149 U. S., 411; *Tayloe, Appellant, v. Merchant Fire*

Ins. Co., 50 U. S., 390; *Brayer v. Shaw*, 198 Mass., 198; *Wheat et al. v. Cross*, 31 Md., 99; American notes to Benjamin on Sales (7 ed.), p. 78; *Byrnes v. Van Trenhoven*, 5th L. Rep., 1879-1880, C. P. D., p. 344; Anson on Contracts, sec. 51; 1st Paige on Contracts (2 ed.), sec. 134.

The precise case is presented in *Patrick v. Bowman, supra*, where it was held, among other things: When an offer is made and accepted by the posting of a letter of acceptance before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance.

And in *Wheat, etc. v. Cross, supra*, in facts not dissimilar to those presented here, it was held: "That until notice of withdrawal actually reached the vendor, the offer was continuing and the acceptance thereof by him completed the contract."

And stating the rule generally prevailing on the subject in Paige on Contracts (2 ed.), sec. 134, it is said: "Revocation of an offer which has been made to some specific individual must in the absence of a statute be communicated to the offeree before the offeree has accepted such offer in order that such revocation may have any legal effect. A revocation sent by mail or telegraph is ineffectual as a general rule until received by the offeree."

And the issue on damages has also been decided under approved principles: The difference between the contract price and market value at the time when and place where the goods should have been delivered by the terms of the contract. *Richardson v. Woodruff*, 178 N. C., 52 (plaintiff's appeal); *Tillinghast v. Cotton Mills*, 143 N. C., 268; *Hosiery Mills v. Cotton Mills*, 140 N. C., 452.

True, in certain aspects of the case the jury, on this issue, was allowed to consider a loss of profits on resale in the Elizabeth City market, provided the pertinent conditions were known to vendors, and plaintiffs were unable to procure other potatoes for resale in the usual course of their business, and there seems to be facts in evidence to justify the submission of that view under the principles approved in *Gardner v. Tel. Co.*, 171 N. C., 404, and other like cases. But the damages were clearly awarded by the jury under the lower estimate and by the difference in the contract price and market value as heretofore stated.

As to the claim of the intervener, there were facts in evidence permitting the inference that the Mars Hill Bank took and held the draft and its proceeds as collecting agent of defendants and not as owner, and this view being accepted by the jury, its claim has been properly disallowed. *Worth Co. v. Feed Co.*, 172 N. C., 335; *Davis v. Lumber Co.*, 130 N. C., 174.

We find no error to appellant's prejudice, and the judgment on the verdict is affirmed.

No error.

W. J. ROEBUCK v. BOARD OF TRUSTEES OF ROBERSONVILLE.

(Filed 4 October, 1922.)

1. Schools — School Districts — Constitutional Law — Statutes—Amendments—Bonds—Taxation.

Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, Art. II, sec. 29, and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendment, does not contravene the constitutional amendment as to "establishing or changing the lines of school districts," the lines established under the prior valid statute remaining the same.

2. Same—Elections—Approval of Voters.

Where the only purpose of a statutory amendment to an act passed prior to the adoption of Article II, section 29, of our Constitution is to authorize an increase in the amount of bonds to be issued by a school district for school purposes, upon the adoption of the statutory amendment by the voters of the district, the act of the voters in approving the statutory amendment is a vote to authorize and approve the issuance of the bonds, and to vest power in the trustees of the school district for that purpose.

APPEAL by defendants from *Connor, J.*, at chambers, in August, 1922, from MARTIN.

Controversy without action, to determine the validity of a school bond election, submitted on an agreed statement of facts.

From a judgment declaring that the election in question was held without authority or warrant of law, the defendants duly excepted and appealed.

Critcher & Critcher for plaintiff.
Smith, Dunning & Moore for defendants.

STACY, J. It appears from the facts agreed that on 3 June, 1922, an election was held in Robersonville Graded School District, Martin County, same having been held in accordance with the provisions of Private Laws 1905, ch. 204, as amended by Private Laws 1921, ch. 152, and that at said election a majority of the qualified voters resident in said district voted in favor of the proposed bond issue of $50,000.

Plaintiff contends in the first place that the act of 1921 above mentioned is in conflict with Article II, section 29, of the State Constitution, and therefore void. The Robersonville Graded School District was created by Private Laws 1905, ch. 204, in which the lines and boundaries

of said district were specifically set out and fully described in said act. This was done, of course, prior to the adoption of the constitutional amendment in 1916 prohibiting, among other things, any local, private, or special legislation in regard to "establishing or changing the lines of school districts." In section 8 of this act, the board of trustees of said school district was authorized and empowered to issue bonds to an amount not exceeding $3,000, for the purpose of erecting or acquiring school buildings, furnishings, and other necessary equipment. In the amendatory act of 1921 it was provided that this section should be amended by striking out in line three thereof the words and figures, "three thousand dollars ($3,000)," and inserting in lieu thereof the words and figures, "fifty thousand dollars ($50,000)."

It will be noted that the act of 1921 does not undertake to establish a new school district, nor to change the lines or boundaries of the one already existing. Its only purpose is to increase the power and authority of the present board of trustees with respect to the amount of bonds which it is authorized to issue, after said bonds have been approved by a majority of the qualified voters resident in the district. We think it is clear that this amendatory act does not fall within the prohibition of the recent constitutional amendment, now Article II, section 29, of the Constitution. *Board of Education v. Comrs.*, 183 N. C., 300; *In re Harris*, 183 N. C., 636, and cases there cited.

It is further objected to the validity of the bonds in question that, under section 4 of the act of 1921, the election of 3 June, 1922, was not to authorize the issuance of the bonds with the approval of the qualified voters of the district, but only to ratify and to adopt the amendment itself.

Section 4 of the act is as follows: "That an election shall be called by the board of trustees of Robersonville Graded School District within two years after the first day of March, one thousand nine hundred and twenty-one, and such election shall be advertised, conducted, and held under the rules and regulations set out in said chapter two hundred and four of the Private Laws, session one thousand nine hundred and five, and at such election all electors of said district who wish to vote for this amendment shall cast a ballot with the words 'For New School Buildings' written thereon, and all the electors wishing to vote against this amendment shall cast a ballot with the words 'Against New School Buildings' written thereon, and if a majority of all ballots cast at such election shall be 'For New School Buildings' the said chapter two hundred and four of said Private Laws of one thousand nine hundred and five shall be amended as in this act provided, and in case of a majority of all ballots cast at such election shall be 'Against New School Buildings,' this act shall be null and void and of no effect."

In the notice of election it was stated that the purpose of the election was to ascertain "the sense of the qualified voters of said graded school district on the question of whether the board of trustees of said Robersonville Graded School District shall issue bonds in a sum not to exceed $50,000 for the purpose of erecting modern school buildings and equipment therefor." And on the ballots cast by a majority of the qualified voters resident in the district were the words "For New School Buildings." Those voting in the minority cast ballots with the words "Against New School Buildings" appearing thereon. The bond issue, beyond all peradventure, was the question upon which the electors voted. *Perry v. Comrs.*, 183 N. C., 393. Indeed, we think it follows as a necessary conclusion that a vote to amend the act so as to increase the power and authority of the trustees to issue bonds in an amount not to exceed $50,000, for the purposes stated, was a vote to authorize and to approve the issuance of said bonds. A vote to vest a given power in an administrative board is a vote to approve the exercise of that power by such board.

Speaking to a similar question in *Keith v. Lockhart,* 171 N. C., 456, *Associate Justice Hoke* said: "We see no reason why, as designed by this last section, if it had been otherwise valid, a majority vote for 'no stock law' should not be construed and considered as an adequate and sufficient expression of approval by the voters, authorizing the commissioners to levy a tax for the specific purpose."

From the foregoing, and upon the facts agreed, we hold that the bonds in question may be issued as valid obligations of the district.

Error.

L. T. GRANTHAM ET AL. v. EARL S. SLOAN ET AL.

(Filed 4 October, 1922.)

Injunction—Equity—Incompleted Ground Shown for Relief.

Where a sale under the power of a first mortgage or deed of trust is sought to be enjoined by the first mortgagor upon the ground that the first mortgagee had agreed to bid in the land to be sold by his trustee, then lease it for a year to the second mortgagor, a purchaser from the first mortgagor, and give the first mortgagor a certain option of purchase, etc.: *Held*, the carrying out of the alleged plan necessitates the sale by the trustee in the first mortgage which is sought to be enjoined in the instant suit, and there being no present equity of the plaintiff shown in accordance with the contract he has set out, it was error to continue the preliminary restraining order to the final hearing.

GRANTHAM *v.* SLOAN.

APPEAL by defendants from *Cranmer, J.*, at chambers, 2 March, 1922, from CRAVEN.

Civil action to restrain the sale of land under a deed of trust.

From an order continuing the injunction to the final hearing, the defendants appealed.

Moore & Dunn for plaintiffs.

Charles L. Abernethy and Guion & Guion for defendants.

STACY, J. The following statement of the case will suffice for our present decision:

On 12 November, 1919, the plaintiffs purchased a valuable farm from Dr. Earl S. Sloan and wife, giving their notes for a part of the purchase price, and to secure payment of same, executed a deed of trust on the property, with the usual power of sale in case of default. The plaintiffs then sold and conveyed the farm to one C. H. Stocks, taking his notes, secured by a second deed of trust on the property, for a part of the purchase price, and the said Stocks agreed to assume payment of the notes given by plaintiffs to Dr. Sloan. Plaintiffs then hypothecated Stocks' notes with the Peoples Bank of New Bern.

Default having been made in the payment of the notes held by Dr. Sloan, both by the plaintiffs, who made them, and the defendant Stocks, who assumed their payment, the trustee was directed to foreclose the first deed of trust, and to this end the property was duly advertised for sale.

During the period of advertisement, and before the date of sale, it is alleged an agreement was entered into by all the interested parties, whereby the plaintiffs, with the consent of the Peoples Bank, agreed to release Stocks from his original obligation; Dr. Sloan was to bid in the property at the sale, lease it to Stocks for the year 1922, and then give the plaintiffs an option at $1,000 more than the principal amount of their present indebtedness, allowing them six years within which to pay for the property in full. When this was done, "the plaintiffs were to be relieved of all obligations by virtue of the notes held by Earl S. Sloan and secured by the first deed of trust, as above recited."

Pursuant to this understanding and agreement, it is alleged the plaintiffs, the defendant Stocks, and the Peoples Bank executed the said contract (though the record does not show that it was signed by any one), and the defendant Earl S. Sloan, in breach of his agreement, failed and still refuses to execute either the option or the lease. Whereupon, this suit was instituted to enjoin the sale, as advertised under the original deed of trust, and to recover damages for alleged breach of contract in

failing and refusing to execute the option and the lease as aforesaid. From the order continuing the injunction to the final hearing, the defendants appealed.

Upon these, the facts chiefly relevant, we think the restraining order should have been dissolved, as the plaintiffs apparently have failed to make out a case calling for any equitable relief. It seems that the negotiations had between the parties were not fully consummated. True, it is alleged that the plaintiffs have released Stocks from his original obligation, but this is negatived by the contract itself, copy of which appears in the record, and by the fact that said notes are still held by the Peoples Bank as collateral security. Furthermore, the option, which it is alleged the defendant was to sign, contemplated a sale of the property by the trustee, as witness the attestation clause: "In testimony whereof, the said parties of the first part have hereunto set their hands and seals, and this option shall operate and take effect from and after the sale of said land, under the deed of trust heretofore executed by Grantham and Murray to said T. A. Uzzell, trustee, and is conditioned on the purchase of said land at such sale by the said Earl S. Sloan, of the first part."

Even if the defendant Sloan did orally agree to execute this option, its validity and binding force was conditioned upon his purchasing the land at the trustee's sale; and hence it appears that no action would lie until default after this had occurred. Should he fail to make such purchase, the plaintiffs would be in no position to insist upon the terms of the option, according to the express provisions of the alleged agreement.

Error.

BANK OF ROSEBORO v. G. H. WATSON AND G. W. FLEMING.

(Filed 4 October, 1922.)

Principal and Agent—Statute of Frauds—Deeds and Conveyances—Purchase Price—Money Advanced Agent.

Where the agent, acting under verbal authority from his principal, purchases certain timber for the latter, and under his principal's instructions draws on him through the bank for the purchase price and commission, and under like authority the bank has cashed the draft, the question as to whether the statute of frauds requires that the principal execute a sufficient writing in order to be bound for the purchase of the timber, has no application, and the bank may recover from the principal the amount of the draft as money it had advanced him for the purchase of the timber, and which it has paid the agent upon the principal's verbal authority.

BANK *v.* WATSON.

APPEAL by defendant Fleming from *Lyon, J.,* at March Term, 1922, of SAMPSON.

This action was brought by the Bank of Roseboro against the defendants to recover $3,250 advanced by said bank for the benefit of the defendant Fleming to aid him to purchase certain timber from D. A. Butler and S. J. Andrews; the advancement of said funds having been made at the instance of the defendant Watson as agent of the defendant Fleming, and upon a draft drawn by said Watson on Fleming by the latter's authority, and cashed by the plaintiff bank. The plaintiff in its complaint alleged liability to it on the part of both the principal and the agent for the amount so advanced, but the jury found that Watson was the agent of Fleming in securing this advancement, and was not liable to the plaintiff; that Fleming alone was liable, and judgment accordingly. Appeal by Fleming.

Faircloth & Fisher for plaintiff.
Butler & Herring for Fleming.

CLARK, C. J. This action is not upon the draft nor for the recovery of the purchase price of the timber as contended by the defendant Fleming, but is for the recovery of money advanced him for the purchase of the timber at the instance of his agent, Watson.

The defendant Fleming pleads the statute of frauds, and rests his defense upon the contention that he is not liable because, as he alleges, the subject of the action is realty, and that he is sued for the purchase money, not having signed any memorandum in writing making him liable for such purchase.

This is a misconception of the controversy. Though the amount the plaintiff is asking for is the same which Fleming was to pay for certain timber ($3,250), and $250 of this was to go to his agent, Watson, Fleming's liability arises from the advancement of the $3,250 by the bank, at the instance of Watson, who represented to the bank, as the jury finds, "that he was acting as the agent for Fleming at the time of making the deed and drawing the draft."

The evidence is that Watson asked Fleming to make sufficient advancement of funds to enable him to procure a deed from Butler and Andrews, and Fleming directed Watson to go to the plaintiff bank and ask it to advance the $3,250, out of which to pay $3,000 for the timber and to pay Watson $250 for his services, and to say to the bank that he, Fleming, would honor a draft for the $3,250 drawn on him with deeds attached, through his local bank.

The deed for the timber was executed by Butler and Andrews to Watson, then from Watson and wife to Fleming, and both deeds were

attached to the draft as directed by Fleming, but when the draft reached Fleming's bank the price of timber had dropped, and he refused payment of the draft, and without reimbursement to the plaintiff for its outlay and trouble.

The statute of frauds has no application. It is simply the case where the money with which the timber has been paid for was advanced by the bank upon a draft on Fleming, drawn by Watson upon Fleming's authority. The jury having found the agency, there can be no question as to the liability of the principal at whose request, and at whose instance, the draft was drawn. We find

No error.

THE T. C. MAY COMPANY v. THE MENZIES SHOE COMPANY.

(Filed 4 October, 1922.)

1. Contracts—Offer—Acceptance—Vendor and Purchaser.

An essential element of a binding contract for the sale of goods is the offer of sale by the one party and the acceptance of its terms by the other; and when the offer is communicated and shows an intent to assume liability, and is so understood and accepted by the party to whom it is made, it becomes equally binding upon the promissor and promissee.

2. Same—Silence—Evidence of Confirmation.

The acceptance of an offer of the sale of goods may be established by words or conduct of the offeree showing that he meant to accept it according to its terms; and while ordinarily the mere silence of the offeree will not amount to his assent, it may otherwise be construed when such silence is under circumstances that would justify the reasonable inference of its acceptance.

3. Same—Traveling Salesman—Principal and Agent.

The term "traveling salesman" generally implies one who takes or solicits orders for goods in behalf of his principal, and forwards them to his principal for approval or rejection; and where a person has only represented himself as such to the buyer of goods and the sale was accordingly made on this authority, the consent of the principal must in some sufficient way be evidenced for the purchaser to establish the contract as one binding upon him.

4. Same—Evidence—Nonsuit—Questions for Jury—Trials—Appeal and Error.

Where there is evidence that the purchaser of merchandise has placed two orders with the traveling salesman of the seller, in February, one for immediate shipment and the other for July; and by custom the seller was allowed eight or ten days for acceptance, and the seller, having shipped the first order and received payment, has written in June for the financial statement from the purchaser, promising attention, and opening

up an investigation of the seller's responsibility, resulting in cancellation of the July shipment; and thereafter, in August, the seller has shipped the goods at advanced prices, claiming it was a new order for the goods: *Held*, the evidence raised an issue which should be answered by the jury, and the seller's motion of nonsuit in the purchaser's action to recover the difference between the contract price and the advanced prices charged should have been denied.

APPEAL by defendant from *Allen, J.*, at October Term, 1921, of NASH.

The plaintiff is a corporation conducting a mercantile business at Spring Hope, and the defendant is a corporation organized and existing under the laws of Wisconsin.

On 6 February, 1919, the plaintiff gave the defendant's salesman two orders for shoes. The first ($93.60) was shipped, payable 45 days net, on 11 April, and was paid by the plaintiff on 24 June. The plaintiff alleges that to the orders was attached a slip of paper which was as follows: "We protect you. If we can reduce prices before this order is shipped, we will bill these shoes at the reduced prices. In consideration of this guarantee, no part of this order is subject to cancellation. (Signed) The Menzies Shoe Company, Milwaukee, Wisconsin"; that the shoes, for which the second order was given, were to be shipped 25 July, and that the defendant in breach of its contract delayed shipment until the fall, and refused to ship on open account as agreed; that the shoes were billed to the plaintiff at a price higher than that agreed on, and that the plaintiff is entitled to recover of the defendant the difference between the price which the plaintiff paid and the original contract price. The bills for the shoes shipped in the fall were paid by the plaintiff through the First National Bank of Spring Hope, and after making payment to said bank, the plaintiff issued a summons against the defendant and filed a complaint alleging that the defendant had not shipped the shoes described in the second order of 6 February at the prices agreed, and that the defendant was indebted to the plaintiff by reason of the defendant's breach of contract in the sum of $1,168.70. The plaintiff also levied a warrant of attachment on $1,291.60 in possession of the bank, being a part of the money paid by the plaintiff for shoes shipped in the fall of 1919. The bank filed an answer admitting that it was indebted to the defendant in the sum of $1,933.97. The defendant entered a special appearance, and made a motion to dismiss, which being denied, the defendant excepted and afterwards filed an answer denying indebtedness to the plaintiff, and alleging that the second order of 6 February was never accepted by the defendant, but was canceled in August, and that the defendant thereafter, with full knowledge of the cancellation of said order, gave an entirely new order to the defendant for shoes to be shipped on the terms agreed on at that time

between the plaintiff and the defendant. The defendant assigned as its reason for canceling the second order of 6 February that the plaintiff was a new customer and failed to comply with the terms of shipment of the first order, and that meanwhile the defendant had investigated the financial standing of plaintiff and declined to extend credit on open account for the amount for which the second order was given.

At the close of the evidence, on motion of the defendant, the court entered judgment of nonsuit, and the plaintiff excepted and appealed.

Manning & Manning, I. T. Valentine, and Finch & Vaughan for plaintiff.

Upham, Black, Russell & Richardson, Austin & Davenport, and Harold D. Cooley for defendant.

ADAMS, J. The definition of a contract as an agreement to which the law attaches obligation implies, among other essential elements, the mutual assent of the parties, which generally results from an offer on the one side and acceptance on the other. The offer, when communicated, is a mere proposal to enter into the agreement, and must be accepted before it can become a binding promise; but when it is communicated, and shows an intent to assume liability, and is understood and accepted by the party to whom it is made, it becomes at once equally binding upon the promissor and the promissee. 1 Page on Contracts (2 ed.), sec. 74 *et seq.;* 1 Elliott on Contracts, sec. 27 *et seq.* Such acceptance may be manifested by words or conduct showing that the offeree means to accept; for, while it is generally held that the intention to accept is a necessary element of acceptance, the question of intent may usually be resolved by what the offeree did or said. As a general rule, his mere silence will not amount to assent; but if he declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he admits the truth of the circumstance relied on or asserted. 1 Page, *supra,* sec. 160; 1 Elliott, *supra,* sec. 48; *Royal Ins. Co. v. Beatty,* 119 Pa. St., 9.

In the instant case the record presents two questions: (1) Whether the plaintiff made the defendant an offer of purchase, and if he did, (2) whether the offer was accepted by the defendant. The plaintiff admits that it gave the defendant's traveling salesman the order referred to, but avers that it was not conditional upon acceptance by the defendant. In this conclusion we cannot concur.

In our opinion the salesman did not assume to make an absolute sale of the goods; on the contrary, he represented himself as a traveling salesman, and was dealt with as such by the plaintiff. The term "traveling salesman" is generally accepted in the sense of a salesman who takes

or solicits orders for goods and forwards them to his principal for approval or rejection. 19 C. J., 790. The plaintiff evidently recognized such limitation of the salesman's authority, for A. E. May testified that he did not think the salesman could bind his company to an acceptance of the order.

We are therefore chiefly concerned with the inquiry whether it is permissible to deduce from the evidence, construed in the light most favorable to the plaintiff, the inference that the defendant accepted the plaintiff's order. If such conclusion may reasonably be inferred, the judgment of nonsuit cannot be sustained. *Sikes v. Ins. Co.,* 144 N. C., 626; *McCaskill v. Walker,* 145 N. C., 252; *Cotton v. R. R.,* 149 N. C., 227; *Newby v. Realty Co.,* 182 N. C., 41; *Weathers v. Baldwin,* 183 N. C., 276. Inspection of the record and examination of the briefs filed by counsel lead to the conclusion that the controversy as to the alleged acceptance should have been submitted to the jury. There is evidence tending to show that on 6 February the plaintiff signed and delivered to the defendant's salesman two orders for shoes, one of which was to be filled soon thereafter and the other 25 July; that the defendant acknowledged the receipt of these orders, and informed the plaintiff that they should receive prompt attention; that the custom of the trade at that time required of the defendant acceptance or rejection of the orders within eight or ten days; that the shoes described in the first order were shipped in the month of February, and that there was no further communication concerning the order until 27 June, when the defendant wrote the plaintiff that it was "receiving the defendant's preferred attention," and requested additional information as to the plaintiff's financial condition; that subsequent correspondence took place between them resulting in the defendant's cancellation of the order. It is unnecessary to recapitulate the contentions of the parties for the reason that the evidence, in our opinion, is of sufficient probative force to justify its submission to the jury on the question of the defendant's acceptance of the order. Of course we express no opinion on the merits. The judgment of nonsuit must be set aside, and the controversy submitted to the determination of another jury.

New trial.

E. C. BEARD, JR., v. SOVEREIGN LODGE OF WOODMEN OF THE WORLD ET AL.

(Filed 4 October, 1922.)

1. Judgment—Default—Pleadings—Admissions.

A judgment by default final for the want of an answer is permissible under the provisions of our statute, C. S., 575, when the complaint alleges one or more causes of action, each consisting of the breach of an express or implied contract to pay absolutely or upon contingency, a sum or sums of money fixed by the terms of the contract, or computable therefrom.

2. Same—Courts.

Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, C. S., 595, and also heard on appeal in the Superior Court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside.

3. Insurance, Life — Contracts — Policies—Provisions—Time of Action Agreed Upon—Limitation of Actions—Disabilities.

Provisions in a policy of life insurance requiring that no suit shall be commenced thereon within ninety days from the receipt of the proof of death of the insured, by the insurer, or not more than a year thereafter, are valid and binding as a definite time fixed and agreed upon by the parties to the contract, and not to be regarded as a statute of limitation which is stayed in its operation by the minority of the party; and a failure to comply with these contractual restrictions will work a forfeiture of the right of the beneficiary to recover upon the contract made for him by the parties.

4. Insurance, Life—Contracts—Policies—Agreements—Conditions—Commencement of Actions—Statutes—Presumptions of Death.

The provisions of the law raising the presumption of the death of the person, after a period of seven years, etc., cannot be successfully shown as a compliance with the terms of a life insurance policy, requiring that proof of death of the insured should be furnished the insurer within a year, etc., and made a requisite as to the time within which suit shall be commenced, whether the presumption of death is considered as of the commencement of the absence of the insured, the end of the period of seven years, or at some intermediate period, when it appears that the action has been commenced more than a year after allowing the full statutory period of seven years.

5. Appeal and Error—Dismissal.

Where, on appeal, it is decided in the Supreme Court that the plaintiff's action cannot be sustained, the defendant's appeal, dependent thereon, will also be dismissed.

APPEAL by both parties from rulings on motions heard by *Daniels, J.*, at chambers, by consent, 15 May, 1922, from CRAVEN.

The plaintiff brought suit to recover of the Sovereign Lodge $2,000 alleged to be due him on a beneficiary certificate. He alleged that the defendant was a corporation conducted as a secret benevolent and beneficiary fraternity, and that Sycamore Lodge, as agent of the defendant, issued to E. C. Beard, Sr., the certificate sued on, in which the plaintiff was named as beneficiary; that he was informed and believed the insured died on or about 6 December, 1908; that at the time of his death the insured was a member of the defendant corporation in good standing, having paid all his dues; that the plaintiff had demanded of the defendant the amount alleged to be due on said certificate, and that the defendant had refused to make payment. On 29 July, 1921, the clerk of the Superior Court of Craven County rendered judgment by default final against the defendant for $2,000, with interest from 6 December, 1908, having found as a fact that the time allowed by statute for filing an answer had elapsed. On 20 April, 1922, after notice to the plaintiff, the Sovereign Camp of the Woodmen of the World entered a special appearance before the clerk and moved to set aside the judgment for want of service, as set forth in its affidavits and written motion, and on 22 April the clerk vacated and set aside said judgment so far as it affected said Sovereign Camp. From this judgment the parties appealed to the judge, and on 4 June his Honor adjudged the service of summons to be sufficient in law and the judgment by default final to be unauthorized upon the face of the complaint? His Honor set aside the judgment and retained the cause for trial. Both parties appealed.

Shaw & Jones for plaintiff.
Cowper, Whitaker & Allen for defendant.

PLAINTIFF'S APPEAL.

ADAMS, J. The plaintiff prosecutes this action to recover $2,000 alleged to be due by virtue of a certificate of insurance issued by the defendant for the benefit of the plaintiff on the life of his father. The defendant contends that the plaintiff has failed to furnish proof of the death of the insured and to set out in the complaint a sufficient averment of compliance with the contract to justify a judgment by default final.

At common law a judgment by default, which was taken to be an implied confession of the cause of action, was rendered either where the defendant's attorney, having appeared, was not informed of an answer to be interposed to the action, or where the defendant himself appeared but said nothing in bar of recovery; and the defendant, in theory at least, said nothing where there was no defense either on the pleadings, the law, or the merits. 1 Tidd's Pr., 562; 2 Tidd's Pr., 930; 3 Chitty's Pr., 672. In modern practice a judgment by default is one taken

tiff's registered mortgage, without express or implied waiver of the plaintiff's lien, and that the note procured by the mortgage was tainted with usury, C. S., 2306, the judgment should direct a sale of the mortgaged automobile, and payment of principal without interest to the plaintiff, and surplus, if any, to defendant after deducting costs; and, also, payment of any damages for deterioration or detention caused by the defendant's use of the car held by him under replevy bond, after the bond of plaintiff in claim and delivery was given by him. C. S., 836.

APPEAL by defendant from *Devin, J.*, at May Term, 1922, of WAKE.

This was an action for the possession of an automobile with the ancillary remedy of claim and delivery. The plaintiff claimed the right to possession by virtue of a chattel mortgage executed to him by Carr E. Booker, duly recorded in the office of the register of deeds of Wake to secure a note in the sum of $600, and interest, for money loaned, dated 1 November, 1920.

The defendant gave bond, retaining possession of the automobile, alleging that he bought it on or about 12 April, 1921, from Carr E. Booker, an automobile dealer and agent for the Crow-Elkhart cars in Raleigh. He asserted that he bought the car from said Booker at a sale room in the city of Raleigh, and that he had no notice of any mortgage or claim held by said defendant.

The plaintiff testified that he made a loan to Carr E. Booker to secure which his mortgage and note were given. He made demand on the defendant W. F. Booker, when he found he had possession of the car, who said he bought the automobile from Carr E. Booker for $1,000, and declined to give up the car. Carr E. Booker has left the State. He left the night that the plaintiff made the demand on him for the car. On cross-examination, plaintiff said he extended this note to 1 September, upon a payment thereon of $75. The plaintiff further testified that he does not think that Carr E. Booker ever sold an automobile in Raleigh unless it was a second-hand one; that he had an automobile stock in Raleigh, and this was the only one in that class. He said the other cars were stored cars. The plaintiff said he had no intimation that there would be any attempt to sell this car. He never agreed that it should be sold, and was never asked permission to sell it. He held the mortgage as security for the loan; that defendant's place was not full of cars.

The defendant testified that he was only distantly related to Carr E. Booker; that he was not interested in his business, and did not owe him any money; that he did not know there was any mortgage or lien on the car when he bought it; that he bought it out of the stock Carr E. Booker had in hand; that when he bought the car from Carr E. Booker he did not ask him if there was any mortgage on it, and did not examine the

alleges that he was eight years of age when the insured died, and that he attained his majority on 3 June, 1921. The summons was issued against the defendant twelve days thereafter. The defendant contends that proof of loss was not furnished, and that the action was not instituted in accordance with the provisions above set out, and for this reason cannot be maintained. Here two questions arise: (1) Whether the recited provisions are valid in law, and (2) whether the time prescribed for bringing suit is suspended during the plaintiff's minority. Concerning these questions it may be said that this Court, conforming its decisions to the great weight of authority, has uniformly adhered to the doctrine that provisions of this character, when made one of the stipulations in the policy sued on, are valid, binding, and enforceable; that the time limited is not a statute of limitation, but a contract which imposes a restriction upon the right of action by definitely fixing the period within which the plaintiff must assert his rights, and that a failure to comply with such requirement works not only a denial of the plaintiff's remedy, but a forfeiture of his right to enforce the defendant's obligation. *Muse v. Assurance Corporation,* 108 N. C., 240; *Dibbrell v. Ins. Co.,* 110 N. C., 194; *Lowe v. Accident Assn.,* 115 N. C., 19; *Faulk v. Mystic Circle,* 171 N. C., 301; *Tatham v. Ins. Co.,* 181 N. C., 434; *Suggs v. Ins. Co.,* 1 L. R. A., 847; *Meade v. Ins. Co.,* 64 L. R. A., 79. It is likewise held that this doctrine is in no wise affected or modified by the minority of the plaintiff, or by C. S., 407. The question is definitely presented and decided in *Heilig v. Ins. Co.,* 152 N. C., 360, and in *Holly v. Assurance Co.,* 170 N. C., 4; Vance on Ins., 508. See, also, *Thigpen v. R. R., ante,* 33.

Whether the death of the insured occurred on 8 December, 1908, or at the expiration of seven years from that date, or at any intermediate period, the plaintiff, in either event, has not complied with the contract, and cannot maintain his suit. It must therefore be dismissed.

Plaintiff's action dismissed.

DEFENDANT'S APPEAL.

ADAMS, J. Since the plaintiff cannot maintain his action, the defendant's appeal need not be considered. It is accordingly dismissed.

Appeal dismissed.

J. J. GRADY v. PINK HILL BANK AND TRUST COMPANY.

(Filed 4 October, 1922.)

1. Banks and Banking—Principal and Agent—Cashier—Personal Interest —Implied Powers of Agency—Inquiry as to Agent's Authority.

A cashier of a bank has no implied authority, by virtue of his position, to bind the bank by a transaction with another, in which, with the knowledge of the other party, express or implied, he is acting for his own interest alone, and not that of the bank for which he is cashier; and where such third party relies upon a transaction of this character as a credit upon a note he owes the bank, the burden is upon him to show that such authority has been actually or impliedly given the cashier by the board of directors or other officers of the bank having this power.

2. Same—Dual Agencies—Equity—Innocent Parties—Negligence.

Where a cashier of a bank accepts as a credit upon a note given to the bank, one given to a borrower by a concern which the cashier largely owns and controls, without the knowledge or consent of the directors or other proper officers of the bank: *Held*, the borrower was put upon notice of the want of authority of the cashier to act for the bank in this respect, and he is not entitled to have such credit allowed upon his note to the bank.

APPEAL by defendant from *Lyon, J.*, at June Term, 1922, of LENOIR.

The sole question involved is whether the $5,000 note executed by the plaintiff to the bank has been paid in full or whether there is a balance due of $1,500, and interest. The Bank of Pink Hill was closed by order of the Corporation Commission of North Carolina and placed in the hands of a receiver. Judgment in favor of the plaintiff. The defendant appealed.

H. D. Williams for plaintiff.
Cowper, Whitaker & Allen for defendant.

CLARK, C. J. G. S. Willard was cashier of the insolvent Bank of Pink Hill for seven years immediately prior to the date when it was closed by order of the Corporation Commission, and was acting cashier at the time of all the transactions involved in this case. Upon the evidence it appears that about a week before the bank was closed, and while it was being examined by the bank examiners, the said Willard disappeared, and the officers and directors of the bank could not ascertain his whereabouts. He returned a few weeks later, and in the meantime the bank had been closed by the bank examiners because of its insolvent condition, and a receiver was appointed under whom the bank is now undergoing liquidation.

It further appears from the evidence that said G. S. Willard, cashier, was also secretary and treasurer and general manager of the chain of

stores doing a general merchandise business under the corporate name of Willard & Smith Company. This company had been organized in December, 1917, and Willard was the promoter of the company, and also the largest stockholder, and as secretary and treasurer and general manager he had complete charge of its finances and signed its checks. The Willard & Smith Company is also insolvent and in the hands of a receiver undergoing liquidation.

On 17 November, 1919, the plaintiff borrowed from the Bank of Pink Hill $5,000 and gave a note for that amount due 17 November, 1920, signed by his wife and J. B. Thomas as sureties. This loan was approved by the loan committee of the bank. Some time after this loan was made and before it was due, Grady placed about $1,500 in money on deposit in the Bank of Pink Hill, and about the same time Willard went to Grady and asked him to lend this money, which was on deposit in the bank at 4 per cent, to Willard & Smith Company, stating that the company would give Grady its note for the loan at 6 per cent, and would make the note payable before 17 November, 1920, so that it could be paid in time for Grady to meet his $5,000 note due the bank. Grady thereupon loaned Willard, for his company, the $1,500, and accepted therefor a note signed by Willard & Smith Company, by G. S. Willard as secretary and treasurer, and bearing as security the personal endorsement of G. S. Willard on the back thereof.

The day before Grady's $5,000 note was due, on 16 November, 1920, he went to the Bank of Pink Hill and paid $2,300 in money to Willard as cashier of the bank on his note. Grady also testified that he pulled out the $1,500 note of the Willard & Smith Company and said to Willard, "I want to use this note, too," and Willard said, "That is all right." Grady thereupon turned over to Willard the $1,500 note and Willard issued a receipt to Grady for $3,800. The testimony of Willard as to this transaction was that he merely accepted the $1,500 note for collection, and at the time told Grady that he would pay the $1,500 note for his company as soon as his company could get the money to pay it with, and he thought the company could pay it by the time the $5,000 note came back from Richmond, where it had been hypothecated with some bank. The records of the bank, which were put in evidence, showed that $2,300 was paid on the Grady note on 16 November, and no entry whatever was made as to the Willard & Smith Company note.

On 17 November, 1920, Grady went back to Willard at the bank, accompanied by J. B. Thomas, and paid $200 in cash and gave a renewal note for $1,000 due 20 January, 1921, endorsed by Thomas, which transaction, Grady contends, paid the $5,000 note in full. Grady testified that Willard did not give him the $5,000 note at that time, stating

that the note was hypothecated with a Richmond bank, but he did obtain a receipt from Willard for $5,000 as full payment of the note.

On 20 January, 1920, when the $1,000 renewal note became due, Grady paid Willard $100 and gave a renewal note for $900. When the bank went into the hands of a receiver, the $900 note was hypothecated with the Farmers and Merchants Bank of Kinston. Grady later paid this note to the Kinston bank, and the canceled note was in evidence.

The books of the Bank of Pink Hill were offered in evidence and showed that proper entries were made on said books, showing all of the payments made by Grady and the renewal notes given by him just as Grady testified to, except as to the first payment, and as to this payment the books of the bank showed an entry of the payment of $2,300 instead of $3,800. No record whatever was made of the $1,500 Willard & Smith Company note on the books of the bank, and said note has never been found among the assets of the bank, and the bank has never owned same nor received a single penny as payment on said note. The $5,000 Grady note was found among the "on hand" notes of the Bank of Pink Hill at the time the bank closed, showing a balance due thereon of $1,500. The only entry of payment on the back of said note was as follows: "Pd. $3,500." This entry was put there by Willard after it had been returned by the Richmond bank.

Grady admitted in his testimony that during all of these transactions with Willard he knew that Willard was cashier of the Bank of Pink Hill, and was also a large stockholder as well as secretary and treasurer and general manager of Willard & Smith Company. He further admitted that when he turned the Willard & Smith Company note over to Willard he knew that Willard had signed this note as secretary and treasurer of the company, and had endorsed his name on the back thereof, and was therefore personally interested in the note. Grady made no inquiry as to whether Willard had authority from the officers of the bank to accept the Willard & Company note to Grady as a payment on the Grady note.

The president of the Bank of Pink Hill and one of the directors, who were both members of the loan committee, testified that neither the loan committee nor the officers and directors of the bank were consulted by Willard or by the plaintiff in reference to accepting the Willard & Smith Company note as payment on the Grady note, and did not know that such had been done; that Willard, the cashier, had never been authorized by them to accept notes of third persons in payment of any indebtedness to the bank, and that he went beyond his authority and disobeyed the instructions given him and the by-laws of the bank in accepting the $1,500 note from Grady as a payment to the bank, if he did so accept it.

The court charged the jury, after stating the contentions of the parties, that the only question for them to determine was whether in the transactions between Grady and Willard on 16 November the $1,500 note of Willard & Smith Company was accepted as an absolute payment on the $5,000 note, or was merely accepted for collection or to be credited thereon when paid. We think this was not the test in this case, whether the plaintiff's note was accepted by Willard as an absolute payment or merely for collection or credit, but the case should be determined rather upon the sound proposition of law that one acting in the capacity as cashier of the bank, and who was at the same time an officer and active manager of another corporation, cannot in law bind the bank in a transaction in which both he and his corporation are adversely interested to the bank, and especially when the third party enters into such transactions with the cashier with full knowledge and notice that the cashier is attempting to so act in a dual capacity. Such transaction is neither binding on the bank as between it and the cashier, nor as to the third party. The authorities seem to be well settled upon this point. In 3 R. C. L., 444, sec. 71, it is said: "The cashier of a bank is its chief executive officer. Still he is but an agent of the bank, and his actions are governed by the general rule applicable to agents, and if he exceeds his authority, his acts will not bind the bank. Whether any particular act does or does not fall within the general power of the cashier is said to be a question of law for the court, and not of fact for the jury, although a question of fact may arise when it is claimed that the acts or conduct of the board of directors have amounted to a public holding out of the cashier as its agent to perform other and unusual acts for the bank."

In this case there was no allegation in the complaint, and no evidence whatever to support any contention that the acts or conduct of the board of directors of the Bank of Pink Hill gave Willard any authority to perform any other acts than those relating to his office.

In 3 R. C. L., 449, sec. 76, it is said: "The cashier has power to receive payment of debts owing the bank, though his authority in this respect is to receive payment only in money, and he has, by virtue of his office, no authority to accept the stock of a corporation in payment of a debt due the bank. And when a person claims a discharge from a debt due to the bank, not by payment, but by giving other or different notes, bills of securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof." This principle of law seems well established, and is conclusive of this case. Among other authorities are *Bank v. Hollingsworth,* 135 N. C., 556; *LeDuc v. Moore,* 111 N. C., 516; *Williams v. Johnston,* 92 N. C., 532; *Gordon v. Price,* 32 N. C., 385; 8 C. J., 572, sec. 794; 21 R. C. L., 73, sec. 72; *ibid.,* 84, sec. 88; *Bank v. Hart,* 20 L. R. A., 780.

In 21 R. C. L., 84, sec. 88, it is said: "The note of a third person given for a prior debt will be held a satisfaction, where it was agreed by the creditor to receive it absolutely as payment, and to run the risk of its being paid. The onus of establishing that it was so received is on the debtor. But there must be a clear and special agreement that the creditor shall take the paper absolutely as payment or it will be no payment if it afterwards turns out to be of no value. A receipt in full of an account does not establish an agreement on the part of the creditor to accept as absolute payment at his own risk the note of a third person for the debt."

It is a well settled principle of law that the cashier cannot bind the bank by his acts in respect to matters in which he is personally interested, and third persons are bound to know that the cashier has no authority to use the funds of the bank for his own benefit. *Williams v. Johnston, supra; LeDuc v. Moore, supra;* Tiffany on Banks and Banking, 325, sec. 82, and notes; 7 C. J., 552, sec. 162; *Hier v. Miller,* 63 L. R. A., 952; *Bank v. Hart, supra.*

In Tiffany on Banks and Banking, p. 325, it is said: "The authority of the cashier does not extend to transactions that are without the corporate powers. It is confined to transactions which are for the benefit of the bank. It does not extend, for example, to the making of accommodation paper. Nor does it extend to a transaction which is for the benefit of the cashier personally, and one dealing with him with notice that such is the character of the transaction can acquire no rights thereby against the bank, unless the transaction was actually authorized, either expressly or by implication."

Hier v. Miller, supra, is almost on all fours with this case. It is there said, discussing the duties of a cashier: "But he could not absorb the funds of the bank in the satisfaction of his private debts without an express and especial authorization. The office of cashier does not import such power. Whether or not such authority actually did exist, the defendant was bound to inquire. It has been well understood from of old that no man can serve two masters. He will hold either to one or to the other. For a like reason the cashier could not serve both himself and the bank in a single transaction, and because he was attempting such a perilous thing, the defendant was put upon guard as to the extent of his power. 'It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time.' No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself."

It is further said in that case: "It is said that when a bank places an officer at the window, where he transacts its business with the public,

it in effect tells the world that he is trustworthy and reliable, and that he will act within the scope of his authority. It does nothing of the kind. Such a declaration would protect a recipient in the enjoyment of a Christmas gift to the entire body of corporate assets. By placing an officer at the window to do its business a bank publishes to the world that he is there to do its business, and not his business; that he has no power or authority to do any act outside the legitimate prosecution of the corporate enterprise; and that it will not be bound by any perversion of the corporate funds to his personal use."

Williams v. Johnston, supra, is exactly in line with the views above expressed. In that case a debtor contracted with an agent who was authorized to collect a debt that he would deliver timber at the agent's mill for the agent's individual use, which was to be applied in payment of the debt. The Court held that the delivery of the timber under this contract did not discharge the debt due the principal. The Court in that case said: "The very relation between the parties requires good faith, and one who participates in his own interest, in the conversion of a trust fund to the use of the agent or trustee, is not allowed to take personal advantage therefrom. It is an unwarrantable inference proposed to be drawn from a general agency, a right to appropriate what is received to the agent's own use in the absence of any previous authority or subsequent sanction to such act. In this aspect the charge is misleading. The inquiry should have gone beyond the existence of a general agency and extended to an assent, actual or implied, to this misuse of her funds. The issue was too narrow and the instruction too restricted. The agent's right to use the property of his principal is not an incident to its management, and such the jury would naturally understand to be the meaning of the instruction."

Upon the evidence and in the light of the above cited authorities, Grady was not an innocent party in this transaction. He admitted time and again in his testimony that he knew all about Willard's financial and business relations with the Willard & Smith Company, and knew that Willard was personally interested in this Willard & Smith Company note which he surrendered to Willard as cashier of the bank, not only as an officer and the largest stockholder in Willard & Smith Company, but as the sole endorser on the note itself. Notwithstanding this full knowledge and notice of the adverse interest between Willard and the bank, and notwithstanding his full knowledge of the great opportunity he was giving Willard to defraud the bank, the plaintiff Grady proceeded to deal with Willard in this transaction without making a single inquiry from the officers or directors of the bank, who were within easy reach, and without even asking Willard himself, or anybody else, a single question as to his authority to bind the bank in such an irregular

and uncustomary transaction in banking business as the one in question. On the other hand, all the evidence shows that Willard, regardless of whether he took the Grady note as an absolute payment or merely for collection or credit, was acting entirely without authority and without the knowledge or consent of the officers or directors of the bank, and was doing an act which was very unusual in banking business. The evidence clearly shows that Grady was not an innocent party, and acted with full knowledge and notice of Willard's dual capacity and personal interest.

Even if Grady was an innocent party and had gone into this transaction without knowledge or notice of Willard's dual capacity and personal interest, it would not relieve him under the facts in this case, for he was the party who made it possible for Willard to defraud the bank, and thus cause the loss which has occurred. In such event, the well known principle of law would apply that when one of two innocent parties must suffer, the party whose negligent acts made the loss possible must be the one to suffer.

The first transaction in this matter was when Willard, acting as cashier, suggested to Grady and induced him to withdraw $1,500 which Grady had on deposit in the bank at 4 per cent, and loan it to his own company with his own endorsement at 6 per cent. This was an act of disloyalty to the bank on the part of Willard, and put Grady on notice of the nature of the transaction. Grady also had notice that Willard was running an independent business in which he was deeply interested.

The real question involved is simply whether Willard, in the absence of express authority on the part of the directors, could take in a note for $1,500 given by his own company and endorsed by himself personally and credit it as a payment upon the note due by Grady to the bank for $5,000. Such a proposition ought to need no citation of authorities, but the absolute necessity of holding such transactions illegal has induced us to cite many authorities condemning such an act as illegal, and we find none to the contrary.

It does not appear, as suggested, that the $1,500 note executed to the plaintiff was to be discounted and placed to the credit of Grady. To do this involves the right of the cashier to discount his own paper, without authority or knowledge of the bank officers, and to place the proceeds as a credit on the note of Grady. The evidence is that even this was not done because when the $5,000 note was found in the possession of the bank by the receiver, there was endorsed on it only the credit of the $3,500 which Grady had actually paid. That credit was endorsed in the handwriting of Willard.

Grady knew, or should have known upon all the circumstances above related, that Willard could not accept his own indebtedness as a credit

upon Grady's note to the bank. Even if the $1,500 note had been discounted, the proceeds thereof would not have been $1,500, but a lesser sum, the discount being deducted.

If bank cashiers can be held by the courts to have authority, and especially as in this case, when there is no attempt to prove authority to do so, to accept their own notes in payment of indebtedness due the bank, no bank can be deemed safe.

The learned counsel for the plaintiff suggested that this transaction was equivalent to Willard handing out his own check for $1,500, and then Grady handing it back to be credited. If Willard had handed out his own check and Grady had paid it in or the check of any other person, and the check had not been paid, the indebtedness of $1,500 due the bank by Grady would not have been discharged. Besides, even if there had been authority to discount this note, the burden of proof of which would have been on the debtor, Grady, the evidence is that it was not discounted and the proceeds were not applied for the endorsement on the note by the cashier shows a credit only of $3,500. Willard gave a receipt for the $5,000 note, but did not cancel and surrender the note to Grady. Even if he had done so, either purposely or by mistake, Grady would still owe the $1,500 which has never been received by the bank. It was not in fact discounted or credited on Grady's note. Willard's testimony is that he took the $1,500 note and told Grady that his company would pay it as soon as it got the money, but there is no evidence that this was ever done. Presumably not, as the company was insolvent. Willard's receipt for the $5,000 does not entitle the plaintiff to recover the uncanceled note when in fact the $1,500 has not been paid.

Grady knew all the circumstances. He knew the disloyalty of the cashier to the bank in the beginning; he knew that the cashier could not accept his own paper as legal tender in discharge of the plaintiff's indebtedness to the bank, and upon the evidence the court should have granted the motion for a nonsuit.

Reversed.

HERMAN NEWBERN AND I. W. FISHER v. J. B. LEIGH, TRUSTEE, AND K. R. WINSLOW.

(Filed 11 October, 1922.)

1. Wills—Probate—Common Form—Conclusions—Statutes.

A will duly admitted to probate is conclusive as to its validity until vacated on appeal or declared void by a competent tribunal. C. S., 4145.

2. Same—Fraud—Caveat—Purchasers for Value, Without Notice.

Where, under a will duly admitted to probate, a devisee of lands has sold the same to a third party, and thereafter, upon caveat entered, the will has been set aside, the proceedings are *in rem*, and the purchaser for value and without notice of the fraud acquires a good title against the heirs at law of the deceased owner.

APPEAL by defendants from *Bond, J.*, at chambers, Elizabeth City, 20 May, 1922, from PASQUOTANK.

John L. Hinton was a resident of Pasquotank, and died in 1909, leaving a will, which was duly probated and recorded in said county 29 January, 1910. His children, Mary F. Hinton, R. L. Hinton, C. L. Hinton, E. V. Hinton, W. E. Hinton, and Ida Sawyer were the sole beneficiaries under said will.

Among other lands owned by the said John L. Hinton at the time of his death was this tract of 200 acres. R. L. Hinton acquired the interest of the other devisees under the will, and on 15 March, 1913, conveyed it to D. E. Williams. On 5 May, 1915, D. E. Williams conveyed the same property to P. G. Sawyer, who conveyed it to Taylor and Hollowell. Taylor afterwards acquired Hollowell's interest, and on 7 August, 1918, W. E. Taylor conveyed the property to K. R. Winslow, one of the defendants in this action.

On 30 September, 1918, a caveat was filed to said will of John L. Hinton, by some of his grandchildren, the plaintiffs herein, who were not named in the will. The caveat was later sustained and the will set aside. *In re Hinton,* 180 N. C., 206.

On 2 September, 1920, the defendant K. R. Winslow sold said land to Fisher and Newbern, the plaintiffs in this action, and took a mortgage for the balance of the purchase money. Said Newbern and Fisher having made default in the payment of the deferred installments, J. B. Leigh, trustee in the deed of trust to secure said indebtedness, advertised the property for sale, when this action was filed by the plaintiffs and the defendants were enjoined from making sale of the property.

A motion to make the restraining order permanent was heard before *Bond, J.*, who held that the defendant Winslow could not give a good title to the property, owing to the fact that the will of the said John L.

Hinton, the original owner of the land, had been set aside under the caveat filed in 1918; and continued the restraining order to the hearing, and the defendants appealed.

Aydlett & Simpson for plaintiffs.
W. A. Worth for defendants.

CLARK, C. J. The fact that upon a caveat filed 3 December, 1919, the will of John L. Hinton was set aside cannot possibly affect the title of the defendants. There is no evidence nor claim that the devisees named in the will, probated in 1910, had any knowledge or intimation that the will would be attacked, and there is no contradiction that these defendants, as well as all others in the chain of title to the said property, were purchasers for value before the caveat was filed, and without any notice of any defect in the will of John L. Hinton, and that they were in all respects bona fide purchasers. A purchaser for value without notice of fraud under a devise in a will duly probated and recorded takes a good title.

Even were R. L. Hinton chargeable with constructive notice, this would not avail the plaintiffs in this action, for the first purchaser may have notice and take title accordingly, yet a second purchaser for value from him and without notice is a bona fide purchaser and takes a valid title. 2 Devlin on Deeds, sec. 746.

The courts have even held that where a purchaser for value without notice of fraud conveyed property, the second purchaser gets a good title even though he had notice of the fraud. *Lanier v. Lumber Co.*, 177 N. C., 200; *Arrington v. Arrington,* 114 N. C., 166; *Wallace v. Cohen,* 111 N. C., 104.

C. S., 4145, referring to the previous section on wills and testaments admitted to probate, provides: "Such record and probate is conclusive in evidence of the validity of the will until it is vacated on appeal or declared void by a competent tribunal."

The various purchasers of the land in question were not only bona fide purchasers for value without notice of any imperfection or irregularity in the will of John L. Hinton, but had on the records a judgment of the probate court declaring the will to be genuine and the last will and testament of John L. Hinton, and they also had before them the statute to the effect that the records of the probate court were conclusive evidence of the validity of the will.

The question here presented is whether purchasers for value and without notice of any imperfections or irregularities in a will which has been duly admitted to probate and adjudged to be valid and recorded, can have their title impeached by the fact that subsequent to their pur-

chase, the will has been set aside as invalid. It is true that this precise question has not been presented before in the courts of this State, but it has been repeatedly passed upon in the United States Supreme Court, and in other courts of the Union, and the decisions are uniform and, we think, in accordance with the ruling in this State upon analogous questions, that the bona fide purchasers without notice acquire a good title.

In *Foulke v. Zimmerman,* 81 U. S., 113, it was held that: "A probate of a will of realty in Louisiana, when the testator died domiciled in New York, is valid until set aside in the Louisiana court and the purchaser from the devisee of such will of real estate in Louisiana, while the order of the court of that state establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will to which he is not a party."

In *Davis v. Gaines,* 104 U. S., 386, which is quite a famous case, involving a large amount of property in the city of New Orleans (known as the "Myra Clark Gaines will case"), the Court held that a will having been admitted to probate by the court in accordance with the law ordering a sale of all the immovables of the deceased, which sale was made to a bona fide purchaser for a valuable consideration was a judicial sale, and that title thereunder was not affected by the discovery and probate of a later will making a different disposition of the property.

The opinion in that case is a very exhaustive discussion of the subject, and cites numerous cases to the same effect. All the cases in fact hold that the proceeding establishing a will and ordering it to registration is *in rem* and binding upon all the world, especially as to innocent purchasers taking without notice and for value.

In *Thompson v. Sampson,* 64 Cal., 330, it was held: "Where the probate of a will is had, and the estate is distributed under the will, an heir, who, after removal of his or her disabilities, obtains a decree vacating the probate cannot follow the property devised in the hands of a bona fide purchaser for value from a distributee prior to the revocation and at a time when the proceedings were valid and binding."

In *Arterburn v. Young,* 77 Ky., 509, it was held: "The title of a purchaser of real estate from a devisee is not affected by the Circuit Court's reversal of a judgment of the county court, probating a will on an appeal prosecuted by the infant children of the testator more than five years after the rendering of the order of probate in the county court." In that State there was a statute authorizing such action within five years. The Court takes notice that this is a statutory exception, but that there was no waiver of the rights of infants.

In *Hughes v. Burris,* 85 Mo., 660, where there was a similar statute giving heirs five years in which to attack a will admitted to probate, a conveyance by the devisee executed after the probate and within the five

years was held of no effect as against the heirs after the will was adjudged invalid. These two States are exceptions to the general rule to the extent of the statute.

In *Steele v. Renn,* 50 Tex., 468 (*S. c.,* 32 Am. Rep., 605), it was held that a purchaser of devised lands from the devisee under a will duly proved held a good title, as against absent heirs, though the will was afterwards annulled as a forgery.

To the same effect is *S. v. McGlynn,* 20 Cal., 268. In that case is a very full and satisfactory discussion of the matter, and it is held: "The decree of the probate court admitting wills to probate is final and conclusive as to the validity thereof, if not reversed by the appellate court, and it cannot be vacated or questioned by any other court, either incidentally or by direct proceedings for the purposes of impeaching it. Wills admitted to probate must be recognized and admitted in all courts to be valid as long as the probate stands."

In *Reeves v. Hager,* 101 Tenn., 712, it was held that a purchaser from a devisee, under a will that has been admitted to probate in common form, cannot be deprived of his character of innocent purchaser by reason of the unusual nature of the provisions of the will so long as its probate is not assailed. In that case it was also held, in a full discussion, that "a purchaser who in good faith takes an absolute deed from a devisee and pays full price for the property in ignorance of any infirmity in the will or other defect of title obtains a title superior to any right or claim of an infant heir, who subsequently and before attaining his majority enters the contest, and has the probate in common form set aside and the will annulled; the probate of a will is a proceeding *in rem* and operates upon the subject-matter. Probate, even in common form, so long as it remains in force, binds all parties, whether adults or minors, and is conclusive of the testamentary character of the instrument, the testamentary character of testator, the due execution of the will, and as to all questions of fraud, imposition, and undue influence affecting the will."

The case of *Fallen v. Chidester,* 46 Iowa, 588, has been cited as holding a contrary doctrine, but that case was decided upon the special provisions of the statutes of Iowa then in force, under which probate in that State did not establish, at that time, the testamentary character of the instrument, and hence did not give validity to a title based upon it.

The conclusiveness of the probate of a will is discussed in the notes to *Schultze v. Schultze,* 60 Am. Dec., 353; *Michael v. Baker,* 70 Idaho, 593, and *Bowen v. Johnson,* 73 Idaho, 53.

In 28 R. C. L., 375, sec. 376, the law is thus summed up: "The admission or rejection of a will to probate is a judicial determination of the character and validity of the instrument presented as a will, and

is in effect a judgment *in rem*. The decree of a probate court admitting a will to probate is final and conclusive if not reversed by the appellate court, or set aside and revoked, by direct proceedings, and cannot be questioned collaterally. The courts of common law formerly went so far as to hold that the forgery of a will, which had been admitted to probate, could not be made the ground of an indictment until the probate had been revoked, but according to a later and sounder decision, though probate is conclusive until set aside, the disposition of the property does not protect the forger from punishment. Though it was otherwise at common law, in modern times the probate of a will being a proceeding *in rem* is conclusive not only on the parties and privies, but to all the world. The next of kin will be bound by a sentence admitting a will to probate, although not a party to proceedings nor summoned 'to see proceedings' if at the time of any prior contest to the probate, they had notice thereof and did not intervene. The executor in seeking to propound a will is in privity with the legatees claiming under an instrument, and a decree denying probate will be binding against him, even though they were at the time of the decree unable under such disabilities as coverture, or infancy, or even if at that time they were not *in esse*." This latter proposition is stated in *Redmond v. Collins*, 15 N. C., 430. The opinion of *Ruffin, C. J.*, in that case has been often cited since. See citations in the Anno. Ed.

In R. C. L., 377, sec. 378, it is further said, with copious citation of authorities: "The probate of a will by the probate court having jurisdiction thereof is usually considered as conclusive of its due execution and validity, and is also conclusive that the testator was of sound and disposing mind at the time when he executed the will, and was not acting under duress, menace, fraud, or undue influence, and that the will is genuine and not a forgery."

In 40 Cyc., 2110, it is held: "A purchaser for value from a beneficiary, or at a judicial sale under a will, is protected, even though the will is subsequently annulled." It is also said, to the same purpose, in *Hodges v. Bauchman*, 8 Yerg., 186: "An application for the probate of a will is a proceeding *in rem*, and the judgment of the court upon it is binding upon all the world until revoked or set aside." To same purport, *Scott v. Calvert*, 3 How. (Miss.), 158; 3 Redfern on Wills, 63.

The will of John L. Hinton was probated in January, 1910, the caveat was filed late in 1918, and in the interim the various transfers of the land had been made by parties who were in no way connected with the estate of John L. Hinton. The caveators are not laying any claim to the land in question, and are in no way interested in this suit. If titles to real estate can be set aside by the attack on a will which constitutes a

link in the chain of title, it would shake the very foundations of real estate titles and the titles in which a will is a link would be always looked upon with doubt.

The order in this cause continuing the restraining order must be set aside and the action dismissed.

Reversed.

B. P. WAY v. MOREHEAD CITY SEA FOOD COMPANY AND CARTERET ICE, TRANSPORTATION, AND STORAGE COMPANY.

(Filed 11 October, 1922.)

1. Corporations — Purchase—Absorption—Stockholders—Actions—Independent Promise.

Two corporations by proper procedure agreed that the one should purchase the entire assets of the other, giving the stockholders of the selling corporation the right to take for their stock either cash from or stock in the purchasing corporation, at par value, and the purchasing corporation accordingly took over the assets of the selling one, and refused payment in cash to a stockholder in the latter company that he had elected to take, and he, upon the refusal of both corporations, brought action against them for the purchase price, in cash for his shares of stock: *Held*, the transaction between the corporations was for the personal benefit of the plaintiff, and he may maintain his action against the purchaser on its promise to pay, independently of any action of the selling corporation in which he was a shareholder.

2. Same—Consideration.

Where one corporation has absorbed or taken over the entire assets of another corporation, by purchase, under an agreement giving the stockholders in the latter the choice of taking stock in the purchasing corporation or cash for his stock, the transaction affords a consideration for the promise of the purchasing corporation to pay cash to a stockholder in the selling one, who has elected to sell for the cash, and duly notified both companies of his election, and made proper demand for the money, all before this action brought to recover the amount.

APPEAL by defendant ice company from *Cranmer, J.*, at June Term, 1922, of CARTERET.

The defendant, which we will call, for brevity, the ice company, having decided in meetings properly held to enlarge its plant, accepted an offer from its codefendant, the sea food company, to sell to it certain property, it being all the said company's holdings of real estate, on which was located the ice factory, cold-storage packinghouse, sidetracks, and water front, with riparian rights to the same, for the sum of $40,000 cash, with the understanding that the stockholders of the Morehead City

Sea Food Company reserve the right to take stock in the consolidated company, as appears from the record, known as the ice company. And the following resolution was duly passed by said ice company:

"Resolved that in the judgment of this board of directors, the properties offered by the Morehead City Sea Food Company are truly worth the sum of $40,000; and that it is wise and highly advantageous for this company to secure said properties at the price named, and to pay therefor either with cash, or with full paid-up capital stock of this company at par. Resolved further, that the additional increase of $40,000 in the capital stock of this company authorized by the stockholders of this company this date, for the purpose of securing additional properties either by cash from the sale of the said stock, or issuance thereof to the stockholders of said Morehead City Sea Food Company electing to take stock of the ice company, is deemed wise and proper by this board of directors. Resolved further, that the president and secretary be and they are hereby authorized and directed to consummate the purchase of said properties, first having had counsel for this company to pass upon the title thereto, and the deed for the same from said Morehead City Sea Food Company to this company; and when said transfer papers and title are pronounced satisfactory, they are hereby authorized and directed to receive said deed and papers, procure registration thereof, and to pay the consideration therefor, either in cash or fully paid-up stock of this company, as the stockholders respectively of said Morehead City Sea Food Company may elect to receive same. Resolved further, that pending the consummation of the purchase of said properties mentioned, the secretary-treasurer of this company be and he hereby is authorized and directed to pay to the Morehead City Sea Food Company, by proper voucher of this company, the sum of $500 prior to 1 November, 1919, to close the option on said properties, which said $500 shall be received by the purchaser as part of the consideration for said properties, and so receipted."

This action was brought by the plaintiff to recover the cash equivalent of the stock owned and held by him in the sea food company, it being $4,898.90, plaintiff having alleged that he made known to the defendant before this action was commenced, that he elected to take the cash instead of stock, and demanded payment of the same, which reasonable demand was refused by the defendant, and that no part of the said cash, to which he was entitled by virtue of the unanimous agreement of the two corporations, has ever been paid to him, and he therefore demanded judgment for the same.

The defendant "ice company" filed the following demurrer to the complaint:

"The defendant Carteret Ice, Transportation, and Storage Company demurs to the complaint, and for grounds of demurrer, says:

"1. That plaintiff has not the legal capacity to sue in this action, since he sues neither for the alleged corporation in which he claims stock, nor as one for whom the corporation has, upon proper allegation, refused to prosecute.

"2. That there is a misjoinder of parties and of causes of action in the complaint, for that plaintiff seeks to recover for the Morehead City Sea Food Company, to his use, a claim which only may be recovered, if any recovery can be had, by said company, and in the same action seeks to recover of the Morehead City Sea Food Company the par value of his stock in said company.

"3. That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

"4. That the complaint contains a statement only of a defective cause of action, for that it appears that such cause of action, if any exists, is not against this defendant, but lies, if at all, between the plaintiff and Morehead City Sea Food Company."

The court sustained the demurrer of the ice company, and dismissed the action as to it. It is stated in the record that the sea food company also filed a demurrer, which was overruled by the court, and the company permitted to answer over, but there was no appeal by it, nor does its demurrer appear in the record. But this, as we think, is not very important or material.

Judgment was entered in accordance with the rulings of the court, and the ice company appealed.

C. R. Wheatley and Charles L. Abernethy for plaintiff.
Julius F. Duncan for defendant ice company.

WALKER, J. It appears in the complaint that the plaintiff has demanded the relief to which he alleges that he is entitled from both defendants, and that they have refused the same. The defendant, the ice company, contends that the plaintiff has no right to sue it, but that it must seek its remedy through the sea food company, of which he is a stockholder, and that, at least, he cannot sue this defendant until that remedy has first been exhausted, citing as authority for this position *Merrimon v. Paving Co.*, 142 N. C., 539; *Staton v. R. R.*, 147 N. C., 436; *Victor v. Mills*, 148 N. C., 110; *Lasley v. Mercantile Co.*, 179 N. C., 577. It was said in the case last cited: "It is insisted that plaintiff, a stockholder, cannot maintain the present suit because he has not shown or alleged that he first made application to the directors or management to take action in the matter, citing *Merrimon v. Paving Co.*,

142 N. C., 539, and other cases. The principle approved in these decisions is recognized as to suits concerning corporation management, to collect corporate claims, or, in some way, to enforce or regulate corporate action, but has no application to a suit to dissolve a corporation for nonuser of the powers where, as in this instance, the right to proceed is conferred on the individual stockholder by express provision of the statute, and without regard to the amount of his holdings." And it is similarly said in 10 Cyc., at p. 965: "The distinction between the right of a shareholder to sue or defend for the corporation and his right to sue for the redress of injuries which are personal to himself, whether committed by the corporation or through the malfeasance of its agents, is total and clear. The rule which restrains a shareholder from suing to redress injuries to the corporation does not operate to impose any restraint upon him from suing to redress injuries which are personal to himself or to restrain wrongful acts which are not only wrongs against the corporation, but also violations of duties arising from contracts or otherwise, and owing directly to the injured shareholders." And again, at pp. 965-966: "If the directors are guilty of a breach of trust, injuries to the corporate property or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may do it in their individual names. This rule is founded in part upon the consideration that the directors are trustees for the shareholders, and that in any action to redress breaches of trust on the part of the directors as toward the shareholders, the shareholders are the real parties in interest."

It is said in *Heggie v. B. & L. Assn.*, 107 N. C., at p. 590: "The corporation represents the share-owners in defending an action involving the rights and obligations of the corporation, and, in the absence of fraud or collusion, binds them, and individual stockholders cannot assert or defend the rights of the corporation," citing *Moore v. Mining Co.*, 104 N. C., 534; Cook on Stock and Stockholders, sec. 678; *Foundry Co. v. Killian*, 99 N. C., 501.

So that the principle, upon which reliance is placed to defeat this action by the plaintiff, has no real application to the case, but the peculiar facts of this case make the position more clearly untenable, for here the right to have cash paid to him, for his stock in the Way Food Company is plainly and unequivocally given to the plaintiff by the very terms of the contract between the two companies, concurred in unanimously by the stockholders. The fair interpretation of that contract is that each stockholder of the Way Food Company may elect to take either cash or stock in the ice company for the stock held by him in the sea food company. It seems from the allegations of the complaint,

admitted in law by the demurrer, that before this action was brought the plaintiff notified the defendants that he would elect to take cash for his stock, and demanded payment of it, the other stockholders, except one B. C. Way, having elected to take stock in the ice company in exchange for the stock held and owned by them in the sea food company. It appears further that the latter company has sold or disposed of all its property, and has further been taken over and absorbed by the ice company. The terms of the agreement between the two companies and their stockholders makes the cash, which each stockholder of the sea food company elects to take for his stock in that company, directly payable to him and not to his company, and this clearly gives him the right to sue for the same if it is not paid to him on proper demand for the same. There is here not only an express promise by the ice company to pay the money for the stock at par value, that is, so many dollars for each share, but the ice company has received the property and assets of the sea food company as a consideration for the promise so made by it. It cannot hold the property and repudiate its promise, but the law will exact full performance of the same. The case, in principle if not in form, is not unlike that of *Friedenwald v. Tobacco Works,* 117 N. C., 544, the facts of the two cases being substantially alike.

The court erred in sustaining the demurrer of the ice company, which will be overruled, and both defendants will be allowed to answer over.

It may be that when the answers come in the facts may appear differently, and require different consideration and treatment, but we cannot now anticipate how this will be.

Error.

H. F. PIERCE v. M. J. CARLTON ET AL.

(Filed 11 October, 1922.)

1. Bills and Notes — Notes — Negotiable Instruments—Fraud—Title—Acquisition by Original Payee—Holder in Due Course—Burden of Proof.

Where the fraud of a payee of a negotiable note would render the instrument invalid originally in his hands, it will also render the instrument invalid in his hands when, with notice of and participating in the fraud, another has acquired the note by endorsement for value, and, in turn, has endorsed the same to the original payee for value; and the burden is upon the original payee in his action upon the note to show that he had acquired the title as a holder in due course, when the defendant has shown the infirmity in the instrument. C. S., 3039.

2. Bills and Notes — Notes — Negotiable Instruments—Fraud—Title—Original Payee—Holder in Due Course.

The payee of a negotiable instrument, that he has procured by fraud, may not acquire a valid title by afterwards acquiring the same from a bona fide holder in due course, who had no knowledge of the infirmity of the instrument.

3. Appeal and Error—Verdicts—Issues.

Where a verdict, interpreted by reference to the pleadings, the facts in evidence and the charge of the court, has given the appellant the full benefit of the positions he has insisted upon in the determination of the issue submitted, the refusal of the court to submit the issue in the precise terms as tendered by the appellant, will not be held for reversible error.

APPEAL by plaintiff from *Daniels, J.*, at November Term, 1921, of DUPLIN.

Civil action to recover the balance due on three promissory notes, executed by defendants, payable to Crawford & Ceas, of date 11 February, 1913, payable respectively, 1 June, 1914; 1 June, 1915; 1 June, 1916. There was evidence on part of plaintiff tending to show that these notes, each having entered thereon a credit of $100, and leaving aggregate amount due of $2,100. That on the afternoon of 11 February, the notes having been endorsed in blank by the payees, plaintiff bought said notes for $1,800, and without notice or knowledge of any infirmity affecting the validity of said notes. That thereafter, in February, 1913, plaintiff sold and delivered said notes to his brother, Thomas B. Pierce, cashier of a bank in Durham, for $2,100, said Pierce being also a purchaser for value without notice. And that in June, 1915, there having developed a dispute about the notes, plaintiff, not desiring to have his brother involved in any controversy concerning them, bought the notes back from his brother for $2,100, and same were endorsed to plaintiff without recourse, etc.

On the part of defendants there was allegation with evidence tending to show that said notes were procured by false and fraudulent representations on the part of the payees, and that plaintiff not only had full notice and knowledge of the fraud at the time he first acquired said notes, but that he had actually aided and abetted the payees in the fraudulent conduct and representations by which the note was procured.

On issues submitted the jury rendered the following verdict:

"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.'

"3. Was Thomas B. Pierce the purchaser of said notes in good faith, and without notice of infirmity, or any defect, and before maturity, for value? Answer: 'Yes.'

"4. In what amount, if any, is the plaintiff entitled to recover of the defendants? Answer: ....."

Judgment on the verdict for defendants, and plaintiff excepted and appealed, assigning for error chiefly the refusal to nonsuit for want of any evidence to show participation in the alleged fraud on part of plaintiff; and, second, the refusal to submit the issue, "Did H. F. Pierce, plaintiff, participate in any fraud, as alleged?"

Stevens, Beasley & Stevens for plaintiff.

Grady & Graham and Rivers D. Johnson for defendants.

HOKE, J. Our statute on negotiable instruments, C. S., ch. 58, in sec. 3039, makes provision as follows: "*When subject to original defenses.* In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

This principle that one who acquires title from a holder in due course may recover though he himself may have had notice of the infirmity when he acquired the instrument from such holder was recognized before the enactment of this statute. In Calvert's Daniel on Negotiable Instruments, after stating the position that a purchaser with notice of the defect may acquire title from a holder in due course, the author says: "But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." Calvert's Daniel (6 ed.), sec. 805.

And the exception so stated is approved by the general current of authority. *Andrews v. Robertson,* 111 Wis., 337; *Kost v. Bender,* 25 Mich., 515; *Arregon Coffee Co. v. Rodgers,* 105 Va., 51; *Hayes v. Kalashian, etc.,* 22 R. I., 101; Brannan's Negotiable Instrument Law, pp. 204 *et seq.*

In some of these decisions the principle is held to include one who reacquires the note as agent of the payee, or for his benefit, and also to one by whose influence and agency the note was fraudulently procured. *Battersbee v. Calkins,* 128 Mich., 569; *Wray v. Warner,* 111 Iowa, 64. It was the clear purpose and meaning of our statute, we think, to extend

the exception thus far, and to apply the principle not only to a payee who has procured the execution of a note by fraud and afterwards reacquires the same from a bona fide holder, to the agent who acts for such a payee in reacquisition of the instrument, or to one who aids and abets the payee in the fraud by which the instrument is procured.

There are also decisions which seem to hold that the exception referred to properly applies to one who, not being a party or participant in the fraud, has purchased such a note from the payee with knowledge or notice thereof, and reacquires the same from a bona fide holder. *Cline & Co. v. Templeton,* 78 Ky., 550; *Dollarhide v. Hopkins,* 72 Ill. App., 509.

There is doubt if our statute permits an interpretation which would apply to the facts presented in these last cases. The more natural meaning of the language used would apply the exception to the payee or other taking part in the fraud or illegality which rendered the instrument invalid. We are confirmed in this estimate by perusal of an article by Professor Brannan appearing in 26th Harvard Law Review on certain suggested amendments to the negotiable instrument law, pp. 493-502. In that article the learned writer himself expressed the doubt we have advanced as to the meaning of the present statute, and suggests an amendment to the law by which the uncertainty may be removed. On the facts of the present record, we are not called on to make definite decision on this question for the reason that his Honor, in submitting the second issue, that as to present plaintiff's ownership in good faith of the notes, instructed the jury that if present plaintiff held the notes by endorsement for value from a bona fide holder, he was entitled to their verdict on the issue, unless defendants had satisfied them by the greater weight of the evidence that plaintiff was a "participant in the fraudulent conduct by which the notes were secured."

It is the recognized principle in this jurisdiction that a verdict may be given significance and correctly interpreted by reference to the pleadings, the facts in evidence, and the charge of the court. And the plaintiff having received the full benefit of the position, insisted on by him in the determination of the issue submitted, the refusal of the court to submit the question in the precise terms of the issue as tendered may not in any event be held for reversible error. *Kannan v. Assad,* 182 N. C., 77; *Reynolds v. Express Co.,* 172 N. C., 487.

We do not consider it necessary or desirable to refer in detail to the testimony tending to establish fraud in the procurement of the notes and plaintiff's participation therein, but will only say that we have carefully examined the record, and the facts in evidence are fully sufficient to require that the issues be submitted to the jury, and that plaintiff's motion to nonsuit was properly overruled.

No error.

WEST CONSTRUCTION COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 October, 1922.)

1. Negligence—Contributory Negligence.

The contributory negligence on the part of the plaintiff that will bar his recovery in an action for damages for a personal injury negligently inflicted is the plaintiff's failure to exercise due care, as a proximate cause or occasion for the injury sustained, occurring and coöperating with the negligent act of the defendant, and the defendant will not be held liable if its negligence would not have produced the injury but for the contributory negligence of the plaintiff.

2. Same—Proximate Cause.

The proximate cause of actionable negligence is the real, efficient cause, or that without which the injury would not have occurred.

3. Same—Instructions—Appeal and Error.

An instruction upon the issue of contributory negligence in a personal injury action that makes the plaintiff's right to recover depend alone upon whether his negligence contributed to the injury, with a refusal of plaintiff's prayer for instruction that his contributory negligence must have been the proximate cause of the injury to bar his recovery, is reversible error.

4. Negligence—Contributory Negligence—Proximate Cause—Contributing Causes.

In an action to recover damages for a personal injury, it is not necessary, to bar the plaintiff's right of recovery, that his negligence be the sole proximate cause of the injury, for it is sufficient if his negligence is a cause, or one of the causes, without which the injury would not have occurred.

APPEAL by plaintiff from *Ferguson, J.*, at March Special Term, 1922, of LENOIR.

Civil action to recover damages for an alleged negligent injury to plaintiff's truck, caused by collision with defendant's train.

From a verdict and judgment in favor of defendant, the plaintiff appealed.

Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse for defendant.

STACY, J. The sole question presented on this appeal is the correctness of the court's charge on the issue of contributory negligence. The jury answered the issue of negligence in favor of the plaintiff, and the issue of contributory negligence in favor of the defendant. It is agreed that the evidence of the plaintiff and that of the defendant was sufficient to warrant the jury in answering both issues as they did.

That portion of the charge which forms the basis of plaintiff's exceptions is as follows: "If you answer the first issue 'Yes,' you will then consider the second issue; the burden is on the defendant in that issue to prove by the greater weight of the evidence that the plaintiff's servant, driving the truck, was negligent, and that his negligence contributed to the injury."

After the jury had considered the case for some time, they returned to ask for further instructions in regard to the issue of contributory negligence. His Honor directed their attention to what he had previously said on the subject, and stated that such was the correct rule, repeating it. Whereupon, counsel for plaintiff requested the court to add to his charge the further instruction that, unless such negligence on the part of plaintiff's driver was the proximate cause of the injury, they would answer the second issue "No." This was declined, his Honor stating that he would permit the charge to remain just as he had given it. It would seem that the plaintiff was entitled to this additional instruction from what was said in *Moore v. Iron Works,* 183 N. C., 438; *Johnson v. R. R.*, 163 N. C., 443, and *Smith v. R. R.*, 145 N. C., 98.

Contributory negligence, as understood and used in legal parlance, is such an act or omission on the part of a plaintiff amounting to a want of due care, as, concurring and coöperating with the negligent act of the defendant, is a proximate cause or occasion of the injury sustained. Two elements, at least, are necessary to constitute contributory negligence: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. These are the vital questions to be determined upon the issue of contributory negligence. There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action. Beach on Contributory Negligence (3 ed.), sec. 26. On the other hand, in an action like the present, the defendant is not to be held liable if his negligence would not have produced the injury but for the contributory negligence of the plaintiff.

The meaning of proximate cause has been stated in many ways, when considered in the light of the variant facts of numerous cases. For example, it has been said that when the plaintiff's negligence is proximate, while that of the defendant is remote, there can be no recovery; but that when the defendant's negligence is the proximate cause and the plaintiff's negligence the remote cause of the injury, the plaintiff may maintain his action. And by proximate cause here is meant the real efficient cause, or the cause without which the injury would not have occurred. In determining this cause, however, it may be well to note

that proximity in point of time and space is not the question to be decided. This would seem to be a sufficient statement of the rule as applicable to the instant case.

The plaintiff's negligence, in order to bar a recovery in an action like the present, need not be the *sole* proximate cause of the injury, for this would exclude the idea of negligence on the part of the defendant, as in any legal sense material or significant. It is sufficient if his negligence is a cause, or one of the causes, without which the injury would not have occurred. If the plaintiff's negligence be the sole and only cause of the injury, it would not be contributory negligence at all, but rather the source of a self-inflicted injury.

For the error, as indicated, a new trial must be awarded.

New trial.

J. W. MANGUM v. MUTUAL GRAIN COMPANY, INC.

(Filed 11 October, 1922.)

1. Bills and Notes—Negotiable Instruments—Drafts—Intervener—Title—Burden of Proof.

An intervener claiming the proceeds of a draft attached in the plaintiff's action, in order to recover, must make out his claim and show title to the property attached.

2. Same—Banks and Banking—Holder in Due Course—Prima Facie Case.

Where it is shown that the draft, the subject of plaintiff's attachment, had been duly executed, made payable to the intervener and in its possession, it raises the presumption that the intervener became a holder in due course; and with the other evidence in this case: *Held*, sufficient to establish a *prima facie* case of the intervener's bona fide ownership and to leave the issue for the jury to determine, under a proper instruction.

3. Same—Depositors—Instructions—Agency for Collection.

The plaintiff attached the proceeds of a draft in the hands of a local bank for a debt against the defendant nonresident drawer, which had been sent by the intervener bank where the defendant deposited. The evidence raised the question as to whether the intervener was a purchaser in due course or merely received the draft for collection. The draft was endorsed to the intervener bank, and there was evidence that it had no authority to charge it back to the drawer, if unpaid, but was taken with other collateral for the defendant's debt to it under a plan for substituting securities, etc.: *Held*, it was correct to charge the jury that if the intervener bank was a purchaser for value without notice, it became *prima facie* the owner; but if by express agreement or one implied from the course of dealing, the intervener had a right to charge back the draft to the depositor, if unpaid, it was an agency for collection.

APPEAL by intervener from *Devin, J.*, at April Term, 1922, of WAKE.

Plaintiff, a citizen of this State, having a cause of action against the Mutual Grain Company, a foreign corporation, instituted this suit in the Superior Court of Wake County and sought to obtain service by attaching the proceeds of a certain draft in the hands of the Bank of Wake, Wake Forest, N. C., it being alleged that said funds belonged to the defendant.

Thereafter, at the December Term, 1920, the Merchants National Bank of Richmond, Va., was allowed to intervene and to set up its claim of title to the proceeds of said draft.

Upon the issue thus raised, there was a verdict and judgment in favor of the plaintiff. The intervener appealed.

John G. Mills and Charles U. Harris for plaintiff.
N. Y. Gulley for intervener.

STACY, J. Appellant excepts because his Honor instructed the jury that the burden was on the intervener to make out its claim and to show title to the property attached. We find no error in this instruction. *Moon v. Milling Co.*, 176 N. C., 410. But when it was shown that the draft, with bill of lading attached, was duly executed and in the possession of the intervener, made payable to its order, the presumption arose that it was a holder in due course. C. S., 3040; *Mfg. Co. v. Tierney*, 133 N. C., 635, and cases there cited.

There was further evidence tending to show that the bank was the holder and purchaser of the draft for value, without notice of any defenses or equities. This was sufficient to establish, *prima facie*, a case of bona fide ownership; and intervener was entitled to have the jury so instructed. 1 Dan. on Neg. Inst., sec. 812.

On the other hand, the plaintiff contended that the intervener was not a purchaser of the draft for value, but held the same merely as collecting agent for the defendant Mutual Grain Company. *Feed Co. v. Feed Co.*, 182 N. C., 690. Touching this phase of the case, the material evidence was as follows: On 31 July, 1920, the Mutual Grain Company borrowed $1,909.10 from the Merchants National Bank of Richmond, Va., executing a demand note therefor, and giving to the bank, at the same time, as collateral security to said note, an equal amount in drafts, including a draft on the plaintiff for $1,185. This was sent to the Bank of Wake, Wake Forest, N. C., and paid by the plaintiff. Immediately thereafter this suit was instituted, and the proceeds of said draft attached in the hands of the Bank of Wake. W. F. Augustine, witness for the intervener, testified: "We took these drafts as collateral to secure this debt, and sent them down to the Bank of Wake, Wake Forest,

North Carolina, for collection, under our collection No. 8061." He further said: "We considered the item our property, and did not feel that we had a right to charge it back against the account of the Mutual Grain Company." On the face of the demand note above mentioned, in addition to the power to sell in case of default, appears the following stipulation in regard to the manner in which the Merchants National Bank of Richmond, Va., was to hold the said collateral drafts: "With authority to use, transfer, or hypothecate said collateral; it being required, on payment or tender at maturity of above amount, that the holder hereof shall return an equal quantity of said securities, and not the specific security deposited."

In the light of this evidence, his Honor charged the jury as follows: "Now, there is this rule of law, that where a bank takes a draft for value and without notice, it becomes, *prima facie,* the owner; but where there is an agreement between the bank and the person from whom the draft is acquired that the bank shall have the right to charge back the amount, if the draft is not paid, by express agreement, or one implied from the course of dealing, and not by reason of liability as drawer, the bank is an agent for collection and not a purchaser." This charge was correct and fully supported by the evidence. *Brooks v. Mill Co.,* 182 N. C., 258, and *Moon v. Milling Co., supra.* The case seems to have been tried in substantial conformity to our decisions on the subject, and we must affirm the judgment.

No error.

W. H. ROGERS v. W. FRANK BOOKER.

(Filed 11 October, 1922.)

1. **Mortgages — Registration — Notice — Automobiles—Vendor and Purchaser—Liens—Deeds and Conveyances.**

   Where the mortgagor of an automobile has sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale: *Held,* an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he acquired the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which were left with the mortgagor for sale.

2. **Judgments—Claim and delivery—Actions—Mortgages—Liens—Vendor and Purchaser—Damages—Statutes.**

   Where it is established by the verdict in claim and delivery that the mortgagor had sold to the defendant an automobile subject to the plain-

tiff's registered mortgage, without express or implied waiver of the plaintiff's lien, and that the note procured by the mortgage was tainted with usury, C. S., 2306, the judgment should direct a sale of the mortgaged automobile, and payment of principal without interest to the plaintiff, and surplus, if any, to defendant after deducting costs; and, also, payment of any damages for deterioration or detention caused by the defendant's use of the car held by him under replevy bond, after the bond of plaintiff in claim and delivery was given by him. C. S., 836.

APPEAL by defendant from *Devin, J.*, at May Term, 1922, of WAKE.

This was an action for the possession of an automobile with the ancillary remedy of claim and delivery. The plaintiff claimed the right to possession by virtue of a chattel mortgage executed to him by Carr E. Booker, duly recorded in the office of the register of deeds of Wake to secure a note in the sum of $600, and interest, for money loaned, dated 1 November, 1920.

The defendant gave bond, retaining possession of the automobile, alleging that he bought it on or about 12 April, 1921, from Carr E. Booker, an automobile dealer and agent for the Crow-Elkhart cars in Raleigh. He asserted that he bought the car from said Booker at a sale room in the city of Raleigh, and that he had no notice of any mortgage or claim held by said defendant.

The plaintiff testified that he made a loan to Carr E. Booker to secure which his mortgage and note were given. He made demand on the defendant W. F. Booker, when he found he had possession of the car, who said he bought the automobile from Carr E. Booker for $1,000, and declined to give up the car. Carr E. Booker has left the State. He left the night that the plaintiff made the demand on him for the car. On cross-examination, plaintiff said he extended this note to 1 September, upon a payment thereon of $75. The plaintiff further testified that he does not think that Carr E. Booker ever sold an automobile in Raleigh unless it was a second-hand one; that he had an automobile stock in Raleigh, and this was the only one in that class. He said the other cars were stored cars. The plaintiff said he had no intimation that there would be any attempt to sell this car. He never agreed that it should be sold, and was never asked permission to sell it. He held the mortgage as security for the loan; that defendant's place was not full of cars.

The defendant testified that he was only distantly related to Carr E. Booker; that he was not interested in his business, and did not owe him any money; that he did not know there was any mortgage or lien on the car when he bought it; that he bought it out of the stock Carr E. Booker had in hand; that when he bought the car from Carr E. Booker he did not ask him if there was any mortgage on it, and did not examine the

record; that Carr E. Booker told him the car had been run some; that when he asked the defendant if he gave permission for the car to be sold, he said: "Of course my mortgage had to be paid."

The defendant further said that he was in the mercantile business; that he took mortgages and had them recorded; that he sold mules and horses and held mortgages against them.

L. J. Sears testified for the defendant that he had been to Carr E. Booker's place of business, had seen cars in there, but on the day he went there were only two; one was new and the other old. The plaintiff testified that he did not tell the defendant in either of the conversations he had with him that he had ever consented for the car to be sold; that Carr E. Booker had never asked him for permission to sell it; that he did not tell the defendant that Carr E. Booker had the car there to sell; that Carr E. Booker never made such statement to him.

Upon the issues submitted the jury found that there was due the plaintiff, on the note and mortgage described in the complaint, $500; that the plaintiff was entitled to the possession of the automobile by virtue of said mortgage; that its value at the time it was taken under claim and delivery was $800. Judgment for plaintiff. Appeal by defendant.

No counsel for plaintiff.
Percy J. Olive and Little & Barnes for defendant.

CLARK, C. J. Upon this conflicting evidence, the court charged the jury as follows: "Now the mere fact that C. E. Booker was permitted to retain possession of the automobile was no implied authority to sell it free from lien of recorded mortgage, and would not have the effect of avoiding the validity of the mortgage, and would not give to the purchaser from C. E. Booker an unencumbered title. A recorded mortgage is a notice to all the world, if it is recorded in the proper county, C. S., 3311, and all that C. E. Booker could pass was his interest in said automobile. But if you find from this evidence, and by the greater weight thereof, that the plaintiff gave to Mr. C. E. Booker authority to sell the car free from lien of said mortgage, and thereby released the mortgage with respect to this automobile, agreeing that he would look only to C. E. Booker to pay the debt, if you find these facts by the greater weight of the evidence you would answer the second issue 'No,' that is, if the defendant has satisfied you by the greater weight of the evidence that the plaintiff has released the lien and permitted him to sell it, then you would answer the issue 'No,' and Mr. Rogers would not have any right to possession of the automobile, because he would have thereby waived his lien with respect thereto. So that presents the question here."

This was the only assignment of error in this appeal, except to the judgment. This was not the case of a mortgage upon a stock of goods which was left in the hands of the mortgagor for sale. There was nothing to indicate in the remotest degree such state of facts. The evidence is that Carr E. Booker borrowed money from the plaintiff and gave him a mortgage upon a single automobile as security, and that this mortgage was duly and promptly recorded, and upon the charge the jury found that Carr E. Booker had no authority, express or implied, to sell it free from the lien of the recorded mortgage.

There was no prayer for instructions, and there was no error in the respect assigned to the charge.

We think, however, there was error in the judgment. On the issues submitted, the jury found that there was due the plaintiff on the note and mortgage described in the complaint, $500; that the plaintiff was entitled to the possession of the automobile by virtue of said mortgage; and that the value of the automobile at the time of the seizure under claim and delivery was $800, and the court rendered judgment that the plaintiff recover possession of the automobile, and if that cannot be had, that he recover of the defendant and his surety $800, the value of said automobile at the time of seizure, and costs of the action, to be discharged upon payment by defendants of said $500, and costs.

The court gave the plaintiff judgment for $500, without interest, because the loan was tainted with usury. C. S., 2306; *Smith v. B. & L. Assn.*, 119 N. C., 255; *Ward v. Sugg,* 113 N. C., 489; *Fowler v. Trust Co.,* 141 U. S., 406. The usury did not impair the validity of the mortgage, and only forfeits the interest. *Spivey v. Grant,* 96 N. C., 214. But the defendant acquired a valid title to the vendor's interest in the automobile subject to the mortgage, and he is entitled to have the judgment modified if he so desires to direct a sale thereof and payment to him of the surplus, if any, after payment of $500, and costs.

The defendant has had the use of the automobile, and if it has deteriorated in value below $500, and costs, since the bond in claim and delivery was given, the plaintiff, if so advised, can have his damages sustained thereby assessed. C. S., 836; *Randolph v. McGowans,* 174 N. C., 203, on motion and inquiry in the cause. *Hendley v. McIntyre,* 132 N. C., 276; *Hall v. Tillman,* 103 N. C., 276.

The judgment, as above stated, is

Modified and affirmed.

Z. V. BERRY AND S. A. MORRIS v. RICHMOND CEDAR WORKS.

(Filed 11 October, 1922.)

1. Evidence—Grants—Deeds and Conveyances—Boundaries—Location of Lands—Substantive Facts—Questions for Jury—Trials.

Where, in an action of trespass, a surveyor has testified that he knows the boundaries of the land in dispute as described in the complaint, he may testify that they are within the natural boundaries set out in a grant from the State, upon which the plaintiff relies, and such evidence, being of a substantive fact, is not objectionable as involving a vital matter on which the parties were at issue, or that it assumed to determine an essential element of the verdict for the jury to decide.

2. Trespass — Evidence — Title—Color—Adverse Possession—Statutes—Principal and Agent.

In an action of trespass involving title to lands, the plaintiff relied on adverse possession under color, and the defendant also upon such possession. Both parties relied upon the possession of their respective agents occupying camps on the land about fifty yards apart. Evidence held competent, in plaintiff's behalf, to show that defendant's agent had offered money to plaintiff's agent to quit possession, during such occupancy, as a part of the *res gestæ*, and also competent under the circumstances of the case, as tending to show the defendant's agent afterwards acquired the possession of the land with the defendant's approval, and for the purpose of evicting the plaintiff's watchman peaceably, if possible, and forcibly, if necessary.

3. Evidence — Deeds and Conveyances — Color—Adverse Possession—Fraud.

A deed in the chain of title of a party in an action of trespass does not lose its character as color under which sufficient adverse possession will ripen his title, by reason of fraud in a prior grantor, the deed being valid until set aside by a court of equity.

4. Instructions—Adverse Possession—Deeds and Conveyances—Color—Boundaries—Appeal and Error.

Where a party to an action of trespass claims title under color by adverse possession, a requested prayer for instruction that disregards the essential element of possession up to known and visible lines and boundaries is properly refused.

5. Limitation of Actions—Statutes—Adverse Possession—Posting Lands—Title.

The posting of land, without possession, is not equivalent to the *possessio pedis* against the owner, or more than a notice of a claim, and is not such adverse possession as will ripen the title to the claimant.

6. Deeds and Conveyances—Formal Parts—Interpretation—Grantor and Grantee.

The formal parts of a deed are construed together to ascertain the intent of the grantor, and though it is necessary that there should be a grantor and a grantee, it is not required that their names should appear

in any particular part of the deed, where there is no repugnancy, if the deed is signed properly by those assuming to convey, and it elsewhere appears that the grantor and grantee are mentioned sufficiently clear to designate them as the respective necessary parties.

APPEAL by plaintiff from *Daniels, J.*, at January Term, 1922, of TYRRELL.

Civil action. The issues were answered as follows:

"1. Are plaintiffs owners and entitled to possession of the lands described in the complaint? Answer: 'Yes.'

"2. Did defendant Richmond Cedar Works wrongfully and unlawfully trespass upon same? Answer: 'Yes.'

"3. What damage, if any, has plaintiff sustained? Answer: 'One cent.'"

Judgment for plaintiffs; appeal by defendant.

Aydlett & Simpson for plaintiffs.

T. H. Woodley and Thompson & Wilson for defendant.

ADAMS, J. The action was brought to recover damages for alleged trespass, but as the defendant admitted possession and the removal of timber, the controversy was practically confined to the first issue. The plaintiffs introduced a grant to Josiah Collins, dated 9 July, 1796, a deed from W. E. and H. L. Cohoon to F. N. Hussey, dated 28 November, 1883, and *mesne* conveyances to the plaintiffs. Failing to exhibit a connected chain of title from the State, the plaintiffs undertook to establish their right to recover by showing adverse possession for seven years under known and visible lines and boundaries and under colorable title. The defendant contended that even if those under whom the plaintiffs claim had thus acquired title, it was divested by the defendant's subsequent adverse possession under color for the statutory period. The action was brought prior to 1 May, 1917. C. S., 426, 427, 428.

Several of the exceptions entered of record were abandoned on the argument; those brought forward and relied on have received our careful consideration, but some of them are so obviously untenable as to require no discussion.

Exception 2: T. B. Shallington, a surveyor, testified for the plaintiffs that the land described in the complaint lies within the boundaries of the Collins grant, and the defendant excepted on the ground that the question involved one of the vital matters on which the parties were at issue, and that the answer assumed to determine an essential element of the verdict. In the complaint the land is not described by course and distance, but by reference to natural objects; and, after testifying without objection that he knew the Collins grant and the boundaries of the

land in controversy, the witness said that the *locus in quo* is situated within the lines of the grant, or, in substance, that inside the grant are the natural objects called for as the boundaries of the *locus in quo*. This was evidence of a substantive fact, which, in view of the preceding evidence, was not incompetent on the ground that the witness invaded the province of the jury. This exception is without merit. Indeed, a witness for the defendant afterward testified to identically the same thing.

Exceptions 17, 18, 35, 36: The plaintiffs offered evidence tending to show that before bringing suit they built a camp on the land in controversy and put in charge of it a watchman named Sykes; that the defendant built another about fifty yards away, which was occupied by Bose Owens; and that on one occasion Abner Bryant acted as watchman in the absence of Sykes. The court permitted both Bryant and Sykes to testify that while they were serving in the capacity of watchmen for the plaintiffs, Bose Owens offered them $10 as a consideration for their surrendering possession of the land to him. To this evidence the defendant excepted on the ground that Owens was not authorized by the defendant to make such offer. It is well settled that the declarations of an agent which are made after the transaction, and are not a part of the *res gestæ*, are incompetent, and that what an agent says within the scope of his agency, characterizing or qualifying his act, is admissible as a part of the *res gestæ*. *Branch v. R. R.*, 88 N. C., 575; *Southerland v. R. R.*, 106 N. C., 104; *Hamrick v. Tel. Co.*, 140 N. C., 151. Direct testimony of the agent's authority was not necessary. The evidence relating to this subject, considered in its entirety, and particularly with reference to the circumstances under which Owens subsequently took possession of the camp and the defendant's evident approval thereof, admits of the construction that Owens, at the time of the alleged conversations, was acting in furtherance of the defendant's purpose to evict the plaintiffs' watchmen, peaceably if possible, and forcibly if necessary; and being susceptible of this interpretation, the evidence was properly submitted to the jury.

Exceptions 44, 45, 46, 47: The defendant introduced the deposition of H. L. Cohoon, and excepted to the exclusion of certain portions thereof tending to show that F. N. Hussey, in 1883, had procured the execution of the Cohoon deed by fraud. The exceptions are based upon the two propositions: (1) that the Cohoons never had title to the land, and their possession was not colorable; and (2) that Hussey's fraud, in any event, vitiated the Cohoon deed as color of title.

In *Tate v. Southard*, 10 N. C., 121, *Judge Henderson* defined color of title as a "writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or the

defective mode of conveyance that is used"; and his definition has been repeatedly accepted and approved. It is therefore utterly immaterial whether or not the Cohoons had title, for they executed and delivered to F. N. Hussey a deed which unquestionably constituted color in their grantee. Likewise, the second proposition must be resolved against the defendant. In *Seals v. Seals,* 165 N. C., 409, one of the questions was whether a deed procured by the grantee's fraud is color of title, and the Court held, *Walker, J.,* writing the opinion, that the deed was valid until set aside for fraud; that it was merely voidable at the instance of the grantor; and that the intervention of a court of equity was required to declare it invalid. In the instant case, if the excluded evidence had been admitted and the jury had found as a fact that Hussey fraudulently induced the execution of the Cohoon deed, its quality as color of title would not thereby have been destroyed.

Exceptions 50, 51: The requested instructions, which are the subject of these exceptions, are defective in that they disregard the essential element of possession up to known and visible lines and boundaries under colorable title.

Exception 52: The court declined the prayer for instruction that keeping the land continuously and conspicuously posted for seven years was such adverse possession as would ripen the defendant's title, no one else being in the actual occupation. Admitting as a general proposition that the posting of land does not constitute sufficient adverse possession, the defendant contends that the *locus* is swamp land, uninhabitable, unfit for cultivation, and not susceptible of such actual possession as is usually available. It may be observed that the prayer contains no suggestion of the number of the notices or the places at which they were posted.

It is very generally held that the prevention of a trespass, whether by a written notice or by the employment of agents for the purpose, is not such actual possession as is necessary to mature title to real property. The act of posting land is not equivalent to the *possessio pedis,* and as against the owner is nothing more than notice of a claim. To hold that title to land may be defeated, when the owner has only constructive possession, by the claimant's posting of notices which may never come to the owner's knowledge, would amount to a ruling sanctioned neither by reason nor by established precedent. *Lynde v. Williams,* 68 Mo., 360; *Lumber Co. v. Hughes,* 38 S. R. (Miss.), 769; *Cedar Works v. Stringfellow,* 236 Fed., 264.

Exceptions 34, 37, 48: These are exceptions to his Honor's denial of the defendant's motion to dismiss the action as in case of nonsuit. The ground of these exceptions, as stated in the defendant's brief, is the alleged invalidity of the deed from George A. Hussey to the plaintiff Z. V. Berry, and from Berry to his coplaintiff, S. A. Morris. In the

first of these deeds George A. Hussey and his wife are designated as parties of the first part, and Z. V. Berry as party of the second part. Following a recital of the consideration, without further mention of the names of the alleged grantors, are the words "and by these presents do bargain, sell, and convey, with general warranty unto the said Z. V. Berry and heirs and assigns." The *habendum* is "to the said G. A. Hussey, his heirs and assigns forever."

The deed was as signed by Hussey and his wife and duly probated and registered. Their names, it is true, are not in the granting clause, but they are in the premises; and it appears from the entire instrument that it was the intention of "the parties of the first part" to convey to the grantee the land described in their deed. 18 C. J., 172, sec. 54, and cases cited. We are also of opinion that the recital in the *habendum* is not a fatal defect. Certainly there must be a grantor, a grantee, and a thing granted, and when a person undertakes to convey his land there must be another to whom he may convey it, for he cannot convey it to himself. *Dupree v. Dupree,* 45 N. C., 166. The question presented here is adverted to in *Hafner v. Irwin,* 20 N. C., 570. There the grantee in the premises was Alfred Hafner, and in the *habendum,* M. W. Curry. *Daniel, J.,* said: "Dwight, in the premises of the deed, bargained and sold the property to the plaintiff, his heirs, executors, etc. However, in the same deed the *habendum* is to M. W. Curry, his heirs and assigns in trust, etc. All the parts of a deed which precede the *habendum,* taken together, are called the premises; of which it is said, the office is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. But though the grantee should first be named in the *habendum,* the grant to him will yet be good, provided there was not another grantee named in the premises (Co. Lit., 26 b, note), or if there were, provided the estate given by the *habendum* to the new grantee was not immediate, but by way of remainder. The *habendum* part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it cannot perform the office of divesting an estate already vested by the deed; for it is void if it be repugnant to the estate granted in the premises." 2 Bla. Com., 298; *Goodtitle v. Gibbs,* 5 Barn. & Cress., 709; 4 Kent's Com., 468.

The application of these principles sustains also the validity of the deed from Berry to his coplaintiff. The *habendum* is substantially identical with that in the Hussey deed, and the only difference as to the parties is this: in the Berry deed the grantee is not named in the first clause of the deed as party of the second part, but is so designated in the granting clause. In this jurisdiction it is held that a deed of conveyances shall be considered in its entirety when the question of its legal sufficiency or of the intention of the parties is to be determined. The

principle is reiterated in *Triplett v. Williams,* 149 N. C., 396. There *Brown, J.,* very pertinently said: "We concede all that is contended for as to the common-law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the *habendum* and *tenendum* as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does not regard as very material the part of the deed in which such intention is manifested." *Blackwell v. Blackwell,* 124 N. C., 270; *Rowland v. Rowland,* 93 N. C., 214.

Upon inspection of the record, we find

No error.

AUGUSTUS DAWSON v. ELIAS ABBOTT.

(Filed 18 October, 1922.)

Appeal and Error—Reversible Error—Limitation of Actions—Lands—Adverse Possession—Boundaries—Title—Intention—Instructions.

While the mistake of the owner of land in using and occupying lands beyond his fixed and established boundary line without the intention of claiming more than he has within the acknowledged confines of his deed is not such adverse possession as will ripen his title under our statutes of limitation; this principle does not apply when the owner claims a certain divisional line as his boundary, identifies it as such, and introduces evidence of his possession and claim thereto; and where such appears as the evidence in the case, with further testimony of the claimant, the plaintiff, that he had never intended to hold any land that did not belong to him, but had always claimed the *locus in quo* to the line he claimed as his own, as of right, it is reversible error for the judge to charge the jury on this testimony alone that they should find for the defendant if they should further find that the plaintiff had occupied the land beyond the boundary by mistake, and not intentionally.

APPEAL by plaintiff from *Lyon, J.,* at June Term, 1922, of LENOIR.

This is an action for land. Plaintiff claimed the land by adverse possession under color, as stated, and he testified: "I know the land described in the deed heretofore offered in evidence; it is mine; I have had possession of it and have been cultivating it for about thirty-five or forty years. My line runs, my southern line on the map, as indicated by the yellow line. I have been in possession of the land in dispute for

forty years. There is a branch running from 3 to Mr. Wallace's; the stump there is the corner and has been the corner ever since I bought it thirty-five or forty years ago. Running from the stump to Wallace's land, there is a ditch, and my line runs from there in the deep branch from 3 to 4. I have been cultivating the land in dispute ever since it has been cleared, thirty-five or forty years. I took possession up to the line that I claim now thirty-five or forty years ago. The first time the defendant Abbott claimed to go beyond that dotted line was about six years ago, and he then began to claim it. The defendant Abbott rented the land in controversy from me. He paid the rent and lived in my house. I rented the land to Abbott down to the dotted line on the map, as claimed by me. No one but him ever claimed any of the land down to the dotted line; it is cultivated land and good land."

The plaintiff was asked the following questions:

"Q. In this controversy you have not had any intention to hold any land that did not belong to you? A. I ain't never in my life, and I hope I never will.

"Q. You have not been intending to claim any land that did not actually belong to you? A. No; I always knew where the line was.

"Q. You never claimed any land that did not belong to you? A. No; only claimed what I knew to be my land."

Plaintiff further testified: "This was all one tract before the division. All the other owners on the other side of the line always admitted this stump (corner claimed by plaintiff) to be the corner; Abbott (meaning the defendant) is the first man that raised any question about it."

W. M. Whitley testified: "From what people say, I have known this stump (stump claimed by plaintiff) as a corner stump, and the line as claimed by Dawson as the line; the people have claimed and recognized it as the line and corner for twenty-five years. During all these years the plaintiff, Augustus Dawson, always went up to that ditch as claimed by him and down to that stump indicated on the map. He has worked the land in dispute ever since I have known it. I knew when the defendant Abbott lived in the plaintiff's house, and I think worked up to the stump laid down on the map. The strip in controversy has been cultivated ever since I have known it, a portion of it has been cultivated all these years, for twenty-five years, ever since I have known it."

Collie Fisher testified: "I have known the land in controversy for thirty-five or forty years. Some years ago, I was renting it from Uncle Gus (the plaintiff); the line then was as contended for by him now; I tended it two years, which was eight or ten years ago. Elias Abbott, the defendant, cultivated all of it; I suppose he rented the entire place from the plaintiff."

Augustus Rouse testified: "I know the strip of land in controversy. Augustus Dawson (the plaintiff) has been in possession of that land; he has been tending it for twenty or twenty-five years; no one claimed to the contrary along then; I never saw any one who lived on the other side try to go across the line as claimed by the plaintiff."

The defendant, Elias Abbott, testified: "I rented this tract of land from Uncle Gus (the plaintiff), about six years ago. I have been in possession of the land in dispute now this makes three years. There is a ditch part of the way on the line, as claimed by the plaintiff, toward Wallace's land. Uncle Gus (the plaintiff) was cultivating that all these years up to the ditch. I began to claim across the ditch only three years ago. If the court should allow my contention, it would give me land that I know the plaintiff has been cultivating for a number of years. As tenant of the plaintiff, I held up to that ditch, the line claimed by plaintiff."

Jeff Arnold, for the defendant, testified: "My father owned the property in question. The dividing line between us and the Dawson line was a stump there (witness indicating the stump claimed by the plaintiff to be the corner), and a rod was up there at that time. The plaintiff took in all of this tract of land at one time."

The court charged the jury, among other things, as follows: "Adverse possession, gentlemen of the jury, is such a possession as notifies the true owner and the world that the party in possession is in adverse possession, holding same as his own, so as to enable the true owner, if there be one other than himself, to bring an action. (If a man is mistaken as to where his line is, and gets over the line through mistake, and holds it thinking it is his own when in truth it is not, but without intending to claim beyond the true line, that would not be adverse possession.)"

Defendant excepted to the portion of this instruction which is in parentheses, and assigned the same as error.

Verdict and judgment for the defendant; plaintiff excepted, and appealed.

Rouse & Rouse for plaintiff.
Sutton & Greene for defendant.

WALKER, J. We have stated so much of the evidence as bears upon the question raised by the plaintiff, who it appears was claiming this land under a deed and adverse possession extending over many years—as much as twenty-five or thirty. The special exception taken by the plaintiff to the charge of the court is that relating to a holding of the land by mistake, the particular instruction being this: "If a man is

mistaken as to where his line is, and gets over the line through mistake, and holds it thinking it is his own when in truth it is not, but without intending to claim beyond the true line, that would not be adverse possession."

This instruction was erroneous in view of the evidence and the contentions of the plaintiff, and was seriously prejudicial to him if it did not turn the scales against him, even if the instruction in itself was correct. The plaintiff did not admit or concede that he ever claimed the land by mistake, and held it thinking it was his own when in truth it was not, and without intending to claim it. The evidence is directly contrary to such a construction of it. Plaintiff claimed the land as his own, without having any doubt about his right and just claim to it, while the charge of the court assumed, or strongly implied, that he was not holding the land adversely, but because of a mistake as to the lines, and that he did not intend to claim land not his own. But this last expression is very far from stating the true contention. Plaintiff did say while testifying that he did not intend to claim any land not rightfully belonging to him, but he added, very distinctly and firmly, and without the slightest equivocation, that he had not done so, but only claimed what he knew to be his land. The charge of the court was obviously calculated, though not, of course, intended, to place a wrong meaning upon what the plaintiff had said, and to produce the impression upon the jury that plaintiff was claiming the land by mistake, and not adversely and of right. The plaintiff had consistently, in the beginning and throughout the case, insisted strenuously that there was no mistake about it, but that he had asserted his title to the land, and his long adverse possession of it by actually occupying it and cultivating it, and using it in other ways to which it was adapted, and this was done for many years, far more than a sufficient time to ripen his title, and there was nothing to justify the court in presenting to the jury a view of the case which implied that plaintiff's possession and claim were asserted by mistake, and therefore not adverse.

It is said in 1 Cyc., at pp. 1036-1038: "A few decisions hold without qualification that one who, through a misapprehension as to the boundaries of his land, occupies and possesses land of another for the statutory period, thereby acquires title by adverse possession to such lands. Nevertheless, according to the great weight of authority, where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line, wherever it may be, the holding is not adverse. In cases of mistake as to the true line between adjoining lands, the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of limitations is the

intention of the party holding beyond the true line. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseizin. There must be an intention to claim title to all land within a certain boundary, whether it eventually be the correct one or not. Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another, believing it to be his own, up to a mistaken line, claiming title to it and so holding, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession." Applying these principles correctly to the case, the error of the court is apparent.

In *Mode v. Long,* 64 N. C., 433, it was held: "Where one or two coterminous proprietors of land cleared and fenced up to a line of marked trees, believing that to be the dividing line, whereas it was at some points as much as twenty-five yards over upon his neighbor's land: *Held,* that such act constituted an open and notorious adverse possession up to the marked line, and rendered a deed made by the neighbor during such possession, for that part, void." *Chief Justice Pearson* said in the body of the opinion: "In our case, clearing and fencing a field up to a line of marked trees, was certainly an open and notorious act, and the mistake was not in attempting to set a fence with a line, but in asserting another and a different line to be the true one, and making it necessary to have a lawsuit in order to show the mistake and establish the true line. Here the mistake was in regard to which of two lines was the true line of 'Smart's grant,' called for in the deeds of both parties; that depended on a question of law. There the mistake was in running the worm of a fence exactly with a straight line; a mistake as to matter of fact, from inadvertence, and with no intention to assert a claim. So note the diversity." The *Mode case, supra,* controls, except that this is stronger for the plaintiff's right to recover than was the *Mode case.* Here there was no mistake by the plaintiff, because he claimed up to the line which he asserted, all the time, to be the true one. When he said that he would not claim land that did not belong to him, he did not mean that he was doing such a thing, but only claiming that which was his. Even if there had been a mistake originally as to the location of the true line, yet if the plaintiff asserted it to be at a certain place and occupied and claimed up to it in his own right, although he may have been mistaken as to where the true line was, his possession would still be adverse. It was held in *Williams v. Harrell,* 43 N. C., 125: "The fact that the adverse possession has commenced and continued under a mistake as to the rights of the parties is not an avoidance of its legal effect."

The land in dispute contains about fourteen acres, but it is of great value to the plaintiff, and the controversy involves an important principle. The defendant had leased the land from the plaintiff, thereby acknowledging his title, and he must have known that plaintiff had claimed and occupied the land adversely for twenty-five or thirty-five years.

The cross-examination of the plaintiff as to the supposed mistake tended to prejudice him unduly, and to aid greatly in emphasizing the error committed at the trial. The plaintiff was asserting the justness, fairness, and righteousness of his claim, and had his earnest and honest statement of it, inadvertently, of course, but nevertheless strongly, turned to his disadvantage.

We are satisfied that it was the erroneous instruction of the court as to the alleged mistake which misled the jury and caused them to decide with the defendant upon a wrong impression of the case, and for this error plaintiff is entitled to another trial.

New trial.

C. H. MILLER v. DUKE SCHOOL DISTRICT, No. 1, AND E. H. BOST ET AL., SCHOOL COMMITTEE.

(Filed 18 October, 1922.)

1. School Districts—Elections—Bonds—Taxation.

A graded school district, maintained under the general statutory powers given the county board of education, having a duly appointed committee, secretary, and treasurer, etc., is one functioning by legislative authority, and comes within the privilege and power given by statute to hold an election on a specified bond issue and levy a special tax for school purposes. *Paschal v. Johnson*, 183 N. C., 129, cited and applied.

2. Same—Publication—Newspapers—Statutes.

It is now made sufficient, by statutory amendment, so far as the newspaper publication is concerned, for a school district to publish a notice of an election to vote upon the issuance of bonds for school purposes and levy a tax therefor, in some newspaper published in the county, outside of the district, when no newspaper is published therein. Laws 1921, ch. 122.

3. Same—Preliminary Notice.

The preliminary notice of twenty days for a new registration for an election provided by C. S., 5926, applies, under the general election law, to an election called by a school district to vote upon the issuance of bonds by the district for school purposes, and a tax levy to provide for the same.

4. Same.

The failure of a school district to publish the preliminary notice for a new registration of an election to vote upon the issuance of school bonds

and provide for the necessary tax levy according to C. S., 5926, does not invalidate the affirmative result of the election or affect the validity of the bonds or levy, when it appears that the new registration, as well as the election, had been given ample previous notice by publication in a newspaper circulating extensively in the district; by notice posted at the courthouse door, and three other public places therein; and that from a large vote polled only two electors had voted against the proposition, and it does not appear that any had been deprived of his opportunity to vote.

APPEAL by plaintiff from *Daniels, J.,* at September Term, 1922, of HARNETT.

Civil action, submitted on case agreed. The pertinent facts presented in the case agreed are as follows:

1. That the plaintiff is a citizen, resident, and taxpayer of the school district hereinafter referred to.

2. That at the time of the call of the election hereinafter referred to, and for many years prior thereto, that territory within the boundaries set forth in Exhibit "B" hereto attached being located within Duke Township, Harnett County, and constituting the major part of said township, had been a school district formed by the board of education under its general powers and named and designated by said board under its general policy and practice Duke School District, No. 1, in which district there had been maintained for a number of years, under the auspices of the board of education of Harnett County, a graded school, teaching all branches from the elementary grades to and including the high school grades; that said district, prior to the election hereinafter referred to, had never voted for a special tax, and no special tax had theretofore been levied therein, nor had an election ever been held in said district for any purpose.

3. That prior to and at the time of the election hereinafter referred to, the individual defendants, E. H. Bost, E. C. Geddie, and A. F. Fowler, having been duly appointed by the board of education of Harnett County, constituted the committee of said school district, and since said election R. S. Kelly has by said board been added, and said four defendants now constitute the committee of said district, of whom E. H. Bost is chairman and R. S. Kelly secretary and treasurer, which positions respectively were held at the commencement of the proceedings leading to the election hereinafter referred to by E. H. Bost and R. S. Kelly.

4. That at a regular meeting of the board of commissioners of Harnett County, held on Monday, 1 May, 1922, the committee of said district, as then constituted, filed a petition executed by them before said board praying said board to call a special election to be held in said school district on 15 June, 1922, for the purpose of voting upon the question of issuing not exceeding $75,000 of serial bonds of said school district, and

levying a sufficient annual tax to pay the same under the provisions of Laws 1920, ch. 87, Extra Session, a copy of which petition is hereto attached and marked Exhibit "A."

5. That at said session of the board of commissioners there was also filed with said board a petition of more than one-fourth of the freeholders residing in said school district, praying said board for an election to ascertain the will of the people within said district whether there should be levied in said district special annual tax of not more than 30 cents on the $100 valuation of property, and 90 cents on the poll to supplement the public school fund, which may be apportioned to said district by the county board of education, which petition was duly endorsed by the county board of education, which petition and its endorsement by the board of education of Harnett County is hereto attached and marked Exhibit "B."

6. That thereupon, at said session of the board of commissioners of Harnett County, said board adopted a resolution calling an election to be held in said district on 15 June, 1922, upon both of said questions, and appointing in said resolution a registrar and judges for the purpose of holding said election, and ordering a new registration of voters therefor, a copy of which resolution is hereto attached, marked Exhibit "C."

7. That said election was duly held on the day designated by the board of commissioners, and each of said issues was carried affirmatively, and upon returns being made to the board of commissioners of Harnett County said board canvassed said returns and judicially declared the result thereof as set forth in the minutes of said board, a copy of the board's said action, as recorded in the minutes of said board, being set forth in a copy thereof hereto attached, marked Exhibit "D," and said board caused a notice of the result of said election to be duly published.

8. That there is no newspaper published within the school district aforesaid, but the board of commissioners caused a notice of said election to be published in the *Dunn Dispatch,* a newspaper published in the town of Dunn, Harnett County, State of North Carolina, in issues of said paper dated respectively 9 and 16 May, 1922, and marked Exhibit "E." Said notice was also published for more than thirty days prior to said election by the same being posted at the courthouse door and three public places in said school district, and, in addition thereto, the registrar appointed for said election caused to be posted at the courthouse door in Harnett County, and at three public places in said school district, a notice of registration, a copy of which is hereto attached and marked Exhibit "F."

9. That there is taxable property within said school district of the assessed value for the year 1921, $2,628,186.

10. That the defendants, constituting school committee, have elected a chairman and a secretary and treasurer, and are about to adopt a common or corporate seal of said district, and have announced their purposes, and are now making preparation to issue serial bonds in the name of said Duke School District, No. 1, to the amount of $75,000, under the provisions of Laws 1920, ch. 87, Extra Session, as amended, and to request the commissioners of Harnett County to levy annually a sufficient tax to pay the principal and the interest accruing upon said bonds as the same shall become due, and have announced their intention of offering said bonds upon the general market for sale to obtain funds with which to erect school buildings for said district, a contract for the erection of which has already been entered into and pursuant to said contract the erection of one school building for said district has already been begun.

CONTENTIONS OF PARTIES.

Upon the foregoing facts, the plaintiff contends that said district, and the committee of said district, are without authority to issue said bonds; that the same, if issued, will be illegal and void, and, therefore, prays that the defendants be perpetually enjoined from issuing and offering said bonds for sale, and for such other and further relief as the plaintiff may be entitled to.

Upon said facts the defendants contend that the defendants have full and legal authority to issue said bonds, and to offer the same for sale for the purposes for which they are about to be issued; that said bonds, when issued and sold, will be legal and binding obligations upon said district, and they therefore pray the court that it may so adjudge, and for such other and further relief as to the court may seem mete and proper.

As a part of Exhibit "D," embraced in these findings, it appears that there were 264 votes in the district duly registered and qualified to vote in said election, and in same there were cast: for bond issue, 236 ballots; against bond issue, 2 ballots; for special tax, 235 ballots; against special tax, 2 ballots.

Upon these facts the court entered the following judgment:

"This cause coming on to be heard before his Honor, F. A. Daniels, judge, at chambers, in the city of Smithfield, and being heard upon an agreed statement of facts submitted to the court, and the court being of the opinion that upon said facts the defendants are authorized to issue and sell the bonds therein set forth, and that said bonds when issued will be legal and binding obligations of the defendant district:

"It is therefore considered, ordered, and adjudged that the plaintiff's prayer for injunctive relief be and the same is hereby denied, and that the defendants be and they are hereby authorized to issue and sell the

bonds of said district, as set forth in said agreed statement of facts and as authorized by Laws 1920, ch. 87, Extra Session, as amended.

"This 26 September, 1922. F. A. DANIELS, *Judge.*"

Plaintiff excepted, and appealed.

Clarence J. Smith for plaintiff.
Clifford & Townsend for defendants.

HOKE, J. We concur in his Honor's decision that no valid objection has been made to appear to this proposed bond issue, and the special tax to provide for the same.

As we understand his position, appellant excepts first that no corporate authority has been shown in the school district or its governing body to justify and uphold a measure of this character. In the recent case of *Paschal v. Johnson,* 183 N. C., 129, the various statutes appertaining to this subject were carefully considered, and it was there held that every school district functioning by proper legislative authority, and having a governing body, whether by trustees, committee, or other, would properly come within the privilege and power of holding an election on a specified bond issue and levying a special tax to provide for same. Speaking to the question, the Court, in the opinion, said: "And in ch. 87, Public Laws, special session, 1920, it is enacted that the board of trustees of any school district in this State is authorized to issue bonds for special school purposes where the measure is properly approved by the voters at an election held as the law provides. In section 9 of this statute the term 'school district' is defined to include every graded school district, high school district, township, or other school district in this State, and the term 'board of trustees' shall include the principal administrative or governing body of a school district by whatever name called. And that there may be no uncertainty to arise from the use of these broad and inclusive terms, ch. 224, Laws of 1921, superadds to 'governing body' the words 'or school committee,' thus extending the provisions of the act to these school districts, which were then in charge of local school agents under the direction of the county board of education." This case, in our opinion, is decisive against this objection of appellant.

In regard to the notice of the election, Laws 1920, ch. 87, provided that same should be published in a newspaper published in the district, but this provision was amended by Laws 1921, ch. 122, so as to provide "that if no newspaper is published in the school district, then in some newspaper published in the county in which the school district is located," and as we understand the record, the statutory requirements as to notice of the election have been strictly complied with.

And as to the preliminary notice of a new registration, the general statute on the subject, C. S., 5926, provides for such a notice of 20 days, and in the absence of any contrary provision in the special law, chapter 87, it would seem that the general law on the subject should prevail. *Comrs. v. Malone,* 179 N. C., 10. But where, as in this case, it appears that a notice of the election and of the new registration were published twice in a newspaper of general circulation in the district, and a written notice was also posted at the courthouse door in the county, and at three public places in the district for two weeks prior to the opening of the registration books, and that these books were kept open at the proper place from 15 May till 3 June prior to the election on 15 June, 1922, and there is no claim or suggestion that there was not a full registration of the voters, or that any voter in the district was denied opportunity to register and to cast his ballot. And that out of a total qualified and registered vote in the district of 264, there were 236 votes for the bonds, with two opposed, and 235 for special tax, with only two opposed, our decisions fully justify us in holding that the technical failure to give this preliminary notice of registration for the full twenty days should not be allowed to affect the result or defeat what is clearly a full and fair expression of the voters' will. On authority, this objection also must be overruled. *Hammond v. McRae,* 182 N. C., 747-752; *Comrs. v. Malone,* 179 N. C., 10; *Hill v. Skinner,* 169 N. C., 411.

We find no error in the record, and the judgment in denial of plaintiff's application and upholding the validity of the bonds and special tax is

Affirmed.

J. B. BARROW v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 18 October, 1922.)

Contracts — Breach — Damages — Railroads—Sidetracks—Warehouses—Drayage.

Damages recoverable for a breach of contract are those which were in the contemplation of the parties, and are capable of ascertainment with a reasonable degree of certainty; and where the owner of a tobacco warehouse has rented the same under an agreement to save the tenant the cost of drayage, depending upon his contract with the defendant railroad company to put in a sidetrack within a certain time, for a consideration he had performed, the defendant railroad company is answerable in damages in the owner's action in such amount as he has been required to allow his tenant for such drayage charges made necessary by reason of the defendant's failure to put in the sidetrack by the time designated, and which the defendant had agreed to with knowledge of the plaintiff's pur-

pose to thereby save the cost of drayage. The question as to unlawful discrimination in freight rates, contrary to the Federal statutes, does not arise in this case.

APPEAL by defendant from *Daniels, J.*, at May Term, 1922, of CRAVEN.

Civil action for alleged breach of contract on part of defendant company in failing to put in a sidetrack from main line of its road to the tobacco prize house of plaintiff, situate two hundred yards from defendant's road. On denial of liability, the cause was submitted and determined by the jury on the following issues:

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

"2. If so, did plaintiff perform his part of the contract? Answer: 'Yes.'

"3. Did defendant wrongfully break the contract? Answer: 'Yes.'

"4. What damage, if any, is plaintiff entitled to recover from defendant? Answer: 'Yes, $309.57, with interest from 8 November, 1920.'"

Judgment for plaintiff, and defendant excepted and appealed.

D. L. Ward for plaintiff.
Moore & Dunn for defendant.

HOKE, J. The evidence on part of plaintiff, which the jury have accepted as the correct version of the matter, tends to show that plaintiff owned a tobacco prize house, situate about two hundred yards from defendant's road, and in July, 1920, he made a contract with defendant to put a spur track from a point near its station to the warehouse, about two hundred yards distant. That defendant stipulated that same would be complete and ready for use by the opening of the tobacco season, not later than 4 September, 1920. That plaintiff was to pay for said track the sum of $1,200, or procure for the road a lot which it desired and needed in its business, and in compliance with this bargain, plaintiff bought the lot and had same conveyed to the company by proper deed. That the chief engineer, who acted for the company in the matter, was informed and understood at the time of the agreement that the purpose was to save the drayage charges for the approaching tobacco season, and relying on defendants to have the spur track ready, plaintiff, in renting his warehouse, agreed that the occupants would not have to pay any drayage charges for that season. That defendant failed to build the track within the time specified, and plaintiff was compelled to reduce his rental or make good to the occupant the drayage charges, same amounting to $309.57.

There was evidence for defendant denying that there was any definite time agreed upon, but the jury, as stated, having accepted plaintiff's version, the case is brought clearly within the established principle, and under which it was fairly submitted and determined. That on breach of contract plaintiff may recover such damages as were in contemplation of the parties, and which are capable of ascertainment with a reasonable degree of certainty. Decisions in application of the principle not dissimilar to the case presented will be found in *Thompson v. Express Co.*, 180 N. C., 42; *Rawls v. R. R.*, 173 N. C., 6.

Plaintiff having bought and paid the full contract price for putting in the spur track at a specified time, is entitled to recover the damages naturally incident to the breach, and in our opinion there is nothing in the case which presents the question of unlawful discrimination in freight rates contrary to Federal or State regulations on the subject. *Slocumb v. R. R.*, 165 N. C., 338-343.

We find no error in the record, and the judgment on the verdict is affirmed.

No error.

MATTIE B. HARPER v. OAK RIDGE SUPPLY COMPANY ET AL.

(Filed 25 October, 1922.)

Fraud—Corporations—Officers—Directors—Evidence—Verdicts—Trials.

Evidence that the directors of the defendant corporation sent an agent to the plaintiff and secured a loan of money she had received upon an insurance policy on the life of her husband; that the plaintiff was inexperienced in business affairs and relied upon the assurance of the representative that the loan would be amply secured, and the directors individually liable therefor; that theretofore the banks had lent the corporation money upon its note with the individual endorsements of the directors, but at this time had refused to further do so, and that the money obtained from the plaintiff was upon the unendorsed and unsecured note of the corporation, which was soon thereafter thrown into the hands of a receiver and its assets bought in by the directors at a small per cent of its true valuation, is sufficient to sustain a verdict of the jury finding fraud on the part of the individual directors, defendants in the action, and a judgment that the plaintiff recover of them in her action.

APPEAL by the individual defendants from *Lyon, J.*, at June Term, 1922, of LENOIR.

Civil action, instituted against the Oak Ridge Supply Company, a corporation, and its four directors, W. J. Grady, J. P. Turner, Joseph C. Maxwell, and Don Maxwell, individually, to recover the sum of $3,400, and interest thereon, as evidenced by the promissory note of the defendant corporation; the directors being individually joined as defendants

upon the alleged ground of false and fraudulent representations and conduct in the procurement of said loan and its subsequent conversion by them.

Upon denial of liability on the part of the individual defendants, there was a verdict and judgment in favor of the plaintiff, from which the individual defendants appealed.

Rouse & Rouse and Sutton & Greene for plaintiff.
H. D. Williams and Dawson & Wallace for defendants.

STACY, J. The defendants rely chiefly upon their exception to the refusal of the court to grant their motion for judgment as of nonsuit, made first at the close of the plaintiff's evidence, and again renewed at the close of all the evidence. The first exception has been waived by the defendants. *Smith v. Pritchard,* 173 N. C., 720. They had the right to rely on the weakness of the plaintiff's evidence when she rested her case; but, having elected to offer testimony in their own behalf, they did so *cum onere,* and only their exception noted at the close of all the evidence may now be urged or considered. C. S., 567. *Blackman v. Woodmen of World, ante,* 75; *S. v. Killian,* 173 N. C., 792.

Viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion of this kind, we find the following facts sufficiently established, or as reasonable inferences to be drawn from the testimony:

1. That for a long time it had been the custom and habit of the Oak Ridge Supply Company, a mercantile corporation, to borrow such money as it required in its business from banks upon the personal endorsement of its directors, defendants herein.

2. That in April, 1920, finding the company embarrassed for lack of funds, and being unable to secure further accommodations from the banks, the directors decided to endeavor to secure a loan from the plaintiff.

3. That acting upon this decision of the directors, J. C. Maxwell sent Mrs. Gertrude Rouse, who had been an employee of the Oak Ridge Supply Company, and who was acquainted with its usage and custom in borrowing money, to see if Mrs. Harper would lend the company her insurance money.

4. That Mrs. Harper told Mrs. Rouse she had $3,400 insurance money left her by her husband, and which she would lend to the company on good security. Mrs. Rouse communicated this information by letter to Mr. Maxwell.

5. That thereupon Mr. Maxwell sent Miss Jennie Maxwell, who was the secretary and treasurer of the company, to see when they could get the money.

6. That Mrs. Harper said they could get the money, and asked about the security. She wanted to know what kind of note. Miss Maxwell told her it would be an endorsed note, and that the directors would be individually responsible for its payment.

7. That the plaintiff was a widow, inexperienced in business, and did not know it was necessary for the directors to put their names on her note in order to become personally and individually responsible for its payment.

8. That Joseph C. Maxwell went to the plaintiff's house the next day and delivered to her the company's unsecured note for $3,400. On being asked by her if it was all right, he replied that so far as he knew it was.

9. That upon being thus assured, Mrs. Harper took the 6 per cent interest-bearing note and parted with her money by endorsing and delivering to Mr. Maxwell her certificates of deposit, which bore only 4 per cent interest.

10. That this money was deposited in banks to the credit of the company, and was paid out on its debts.

11. That the Oak Ridge Supply Company shortly thereafter was thrown into the hands of receivers at the instance of the defendants, Turner and Grady, and upon a sale by the receivers all the assets of the company were bought in by them at 25 cents on the dollar.

12. That appellants deliberately threw the company into the hands of a receiver and bought in the assets for much less than their true value.

13. That at the time this money was borrowed from Mrs. Harper, the Oak Ridge Supply Company was insolvent, and the directors knew, or by the exercise of reasonable and proper care could and should have known of its insolvency.

14. That the directors, defendants herein, knew this money was being obtained on the note of the insolvent corporation, although they, through their agent, had promised the plaintiff an endorsed note, and although they knew, through their agent, that the plaintiff was relying on their personal security, and although they also knew, through their agent, that the plaintiff had been promised, and was expecting to receive, good security, such as the banks had been in the habit of receiving.

Upon these "fourteen points," we think the jury were fully warranted in finding, as they did, that the plaintiff was induced to part with her money by the false and fraudulent representations of the individual defendants, or, at least, that such misrepresentations were made as to render the individual defendants personally liable in an action like the present.

We have discovered no sufficient reason for disturbing the result of the trial, and the judgment will be affirmed.

No error.

J. W. DIXON v. JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

(Filed 25 October, 1922.)

1. Pleadings — Allegation — Evidence — Fraud — Mistake — Carriers of Goods—Bills of Lading—Contracts.

Where the plaintiff has signed a livestock bill of lading for intrastate shipment, without stipulation as to time of the delivery of the shipment, and seeks to recover damages upon a contemporary verbal agreement made with him by the agent that the stock would be received at destination within a specified time, in the absence of allegation of fraud or mistake, he will not be permitted to show that he was induced to sign the livestock bill of lading by the agent instead of a different one, that he thought he was signing, and had thus signed the one excluding evidence of the parol agreement he relied upon by mistake.

2. Carriers of Goods—Bills of Lading—Agreement as to Time of Bringing Action—Limitation of Actions.

In the absence of any unusual or extraordinary circumstances, an agreement between the common carrier and its shipper may fix a reasonable period within which the shipper shall bring action for damages caused by the carrier's breach of its duty to transport the shipment, which will prevail in its enforcement over a longer time fixed by the general statute of limitations.

3. Judgments—Issues—Verdict—Carriers of Goods—Bills of Lading—Notice—Agreement as to Action.

Where, in an action by the consignor against the carrier to recover in an intrastate shipment of livestock, the issues are raised whether the provisions of a livestock bill of lading, under which the shipment was made, had been complied with by the consignor, as to giving written notice, etc., to the carrier of the damages he claims in his action, or whether he has instituted his action within the time specified in the bill of lading, it is required that both of these issues be answered by the jury upon the evidence in order that a judgment may be rendered in the consignor's favor.

4. Same—Instructions.

In an action to recover damages upon a livestock intrastate shipment, the necessity of the jury to answer the issues relating to notice to the carrier of the damages claimed, and the time of bringing the action under the agreement therein set out, is not eliminated by the jury's answer to another issue upon which the judge has instructed the jury that the defendant had waived these requirements of the shipping contract.

APPEAL by defendant from *Devin, J.*, at May Term, 1922, of WAKE.

Civil action to recover damages for an alleged negligent delay and injury in transit to a car-load shipment of livestock, consisting of 49 hogs and one pony.

Upon denial of liability and traverse thus joined, the following issues were submitted to the jury and partly answered by them as indicated:

"1. Did the defendant contract and agree to transport and deliver shipments of hogs from Raleigh to Farmville in time for sale on 28 February, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant fail to perform said contract? Answer: 'Yes.'

"3. Did plaintiff suffer loss and damage with respect to said shipment of hogs by reason of the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"4. What damage, if any, is plaintiff entitled to recover therefor? Answer: '$1,350.'

"5. Did the plaintiff contract that as a condition precedent to any right to recover any damages for loss or injury to said livestock, notice in writing of the claim therefor should be given to the agent of the carrier actually delivering said livestock whenever such delivery might be made, and that such notice should be given before said livestock was removed, or was intermingled with other livestock? Answer: 'No.'

"6. Was said provision of said contract of shipment complied with by the plaintiff? Answer: .....

"7. Did the plaintiff contract that no suit or action for the recovery of any claim for damages, loss, injury, or delay to the livestock should be brought against the carrier unless begun within ninety days from the happening thereof? Answer: .....

"8. Was said provision complied with by the plaintiff? Answer: ....."

Verdict on the judgment in favor of plaintiff, and the defendant appealed.

Douglass & Douglass for plaintiff.

R. N. Simms for defendant.

STACY, J. On Thursday, 26 February, 1920, the defendant placed a car at Edgerton's Siding, Raleigh, N. C., to be used in transporting and carrying 49 hogs and one pony for the plaintiff to Farmville, N. C. Plaintiff had advertised said hogs for sale at one o'clock on Saturday, 28 February, 1920. This fact, it is alleged, was communicated to the defendant's agent, and he assured the plaintiff that said shipment would be delivered in Farmville in ample time for the sale as advertised. The livestock did not reach Farmville until some time Saturday night, and was unloaded early Sunday morning. This action is brought to recover damages for delay in transit and resultant injury arising therefrom.

Plaintiff bases his action on an alleged oral contract made with the defendant; and the first issue is addressed to the finding of this fact,

which was denied by the defendant. *Smith v. R. R.*, 163 N. C., 143; *Hamilton v. R. R.*, 96 N. C., 402. At the trial plaintiff admitted signing a special livestock contract, containing certain limitations and provisions in regard to his right to maintain an action like the present, and the fifth, sixth, seventh, and eighth issues were directed to questions appropriately arising therefrom.

There was evidence on behalf of the plaintiff tending to show that he thought he was signing a regular bill of lading rather than a special livestock contract. He testified as follows: "I did not sign but one paper for the railroad company. They gave me a bill of lading. . . . It was different from this paper. I did not have any idea what I was signing when I signed that paper."

By the court: "Q. You say that is your signature to the paper, and you can read and write? A. Yes.

"Q. Why did you not read over the paper? A. I just did not take time to read over the paper."

As bearing upon this phase of the case, his Honor charged the jury as follows: "The plaintiff has admitted, upon being shown the paper, that he signed the paper which has been offered in evidence; but the plaintiff's contention is that he was told to sign a paper of a different character, a bill of lading, and that he was misled by the act of the agent of the defendant into signing a different paper, and, though he was able to read and write, he had no opportunity to do so, and was misled as to the character of the paper he was signing, and therefore he is not bound by the written paper which bears his signature."

Defendant excepted to this portion of the charge, and contended, first, that there was no allegation of any fraud or mistake in the execution of the contract; and, second, that the evidence offered by the plaintiff was not sufficient to warrant the foregoing instruction. We think the exception must be sustained, certainly upon the first ground (*Graves v. Trueblood,* 96 N. C., 498), if not upon the second. Proof without allegation is as unavailing as allegation without proof. *McCoy v. R. R.,* 142 N. C., 383. There was no stipulation in the written contract calling for delivery of the shipment at any particular time; and across the face of said instrument was stamped the following: "Read this contract. It is agreed that this contract contains the entire bargain between the shipper and the company, and that no conversation between owners or attendants of the livestock shipped hereunder and representatives of the company shall alter, vary, or add to said contract or be valid."

Sections 8 and 11 of the written contract were as follows:

"8. That as a condition precedent to any right to recover any damage for loss or injury to said livestock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said livestock

wherever such delivery may be made, and such notice shall be so given before said livestock is removed or is intermingled with other livestock."

"11. No suit or action for the recovery of any claim for damages, loss, injury, or delay to the livestock shall be brought against any carrier, and only against the carrier on whose line the injury or delay occurred, unless begun within ninety (90) days from the happening thereof, and if begun later the lapse of time shall be conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

It will be observed that the jury failed to answer the sixth, seventh, and eighth issues, the seventh issue being directed to the above provisions of the 11th section of the contract. This matter is not covered by the fifth issue, for the court practically instructed the jury that, under the evidence (which was not essentially unlike that in the case of *Horse Exchange v. R. R.*, 171 N. C., 65), the requirements of the provisions of the 8th section of the contract had been waived. *Schloss v. R. R.*, 171 N. C., 350; *Mewborn v. R. R.*, 170 N. C., 210; *Baldwin v. R. R.*, 170 N. C., 12, and *Kime v. R. R.*, 160 N. C., 457. The verdict, therefore, was incomplete, and, in any event, the cause must be remanded for a new trial. This was not an interstate shipment, as was the case of *Bryan v. R. R.*, 174 N. C., 177.

It is established by the clear weight of authority that the parties to a contract of shipment may fix a given time, shorter than that allowed by the general statute of limitations, within which suit for breach of the contract shall be brought, and, in the absence of any unusual or extraordinary circumstance, such a stipulation, if reasonable, will be enforced. *Thigpen v. R. R., ante,* 33, and cases there cited. The present suit was commenced by the issuance of summons on 18 December, 1920, more than nine months after the alleged breach of contract occurred.

New trial.

J. E. CRUTCHFIELD, TRUSTEE, v. Z. P. ROWE AND WIFE.

(Filed 25 October, 1922.)

1. Bills and Notes—Negotiable Instruments—Banks and Banking—Purchase—Due Course.

Where one of two partners has given his individual note to the other to be discounted at a bank, and the one thus acting as the agent for the other has placed the proceeds to the partnership credit, and has checked it out for partnership purposes, in the firm's name, the maker of the note is guilty of negligence in not notifying the bank of his partner's want of authority to thus check out the funds until after the maturity of the note;

and the bank, being an innocent purchaser for value and in due course may recover on the note, irrespective of the question of whether the maker of the note had received benefit from the transaction.

2. Same—Evidence.

Upon the question of whether a bank, discounting a note of an individual partner, at the instance of his copartner, was a purchaser in due course for value, without notice, it is competent for the cashier, as both substantive and corroborative evidence, to testify that the partner making the transaction informed him at the time that the proceeds were the contribution of the maker to the partnership funds, and in contradiction of the maker's testimony of the lack of the authority of his partner to place the proceeds to the partnership credit, and check on it in the partnership name for partnership purposes, upon which he relies in defense to the bank's action upon the note.

3. Same—Principal and Agent—Partnership.

Where a partner makes his individual note and gives it to his copartner to have discounted at a bank, it is with the ordinarily implied authority for the partner so acting to place the proceeds to the partnership credit, and check it out under the partnership name for partnership purposes; and the bank discounting the note without notice of the maker's claim to the contrary is a purchaser in due course, and may recover in its action upon the note against the maker.

4. Appeal and Error—Instructions—Reversible Error.

Where the court has erroneously instructed the jury that an innocent holder for value of the note sued on, and without notice of its infirmity, is not entitled to recover if the defendant has not received value therefor; a correct instruction elsewhere appearing in the charge is contradictory and does not relieve the error from prejudice.

APPEAL by plaintiff from *Connor, J.*, at November Term, 1922, of PENDER.

On 21 August, 1920, Z. P. Rowe and wife executed to J. E. Crutchfield, trustee for the Planters Bank and Trust Company, their note for $2,000, secured by a deed in trust of even date, duly recorded in Pender, on a one-half undivided interest in a tract of land therein described. He had conveyed the other undivided half interest in the land to J. P. Fellows for $12,500. The said $2,000 note was discounted at the said bank immediately upon its execution and delivery, and the proceeds were placed to the credit of Rowe and Fellows. Rowe and Fellows were farming as partners upon the said land, in which each owned an undivided one-half interest. The farming agreement was that each was to furnish one-half of the money to carry on said farming operations, and, prior to 21 August, Fellows had furnished his part of said money, and it had been used in the operation of a partnership farm. Rowe testified: "After wife and I signed the mortgage before a magistrate, I gave it to him to bring back here to put to my credit, and I handed the papers to

Fellows to take to the bank. When Crutchfield sent me notice that the note was 90 days past due, I think I went up there and told him I was not going to use the money, that he could cancel the mortgage." Rowe added that he did not know whether Fellows got the money or not, but he did not get it; that he decided to mortgage his half of the farm for the $2,000, and he told the magistrate to carry the note to Fellows, who was to carry it to the bank to see whether it was O.K. or not. That he never said anything to the bank officers about it; that Fellows told him he had delivered the note and mortgage to the bank, but did not tell him that he got the money; that he himself never did anything about it until the note was due, and that in the meantime he and Fellows had fallen out. Three months later he saw Crutchfield, the cashier, who told him that the money had been put to the credit of Rowe and Fellows, and had been drawn out on their checks. He asked Fellows about it, and told him he understood the money had been drawn out, and he replied, "Yes." The jury having found the issue in favor of the defendant, the plaintiff appealed.

Bland & Bland, J. J. Best, and H. L. Stevens for plaintiff.
C. E. McCullen and C. D. Weeks for defendant.

CLARK, C. J. The defendant Rowe testified that after the note had been due some 90 days he asked Crutchfield about it, who said that the proceeds of the note had been placed to the credit of Rowe and Fellows as partners, and Rowe was allowed to testify that he then told Crutchfield that he was not a partner with Fellows in that matter. This conversation was excepted to as irrelevant, the bank being an innocent purchaser for value.

It appears from the evidence that Rowe and Fellows were farming together in partnership; that Rowe and his wife executed a note to Crutchfield, trustee, which was put into the hands of Fellows, his copartner, to negotiate with the bank. Fellows, whom he trusted to negotiate for this loan, had the proceeds placed to the credit of Rowe and Fellows, and the money was checked out by Fellows by checks drawn in the name of the firm, and the bank had no notice or knowledge other than that given to it by Fellows, who brought the note to the bank. Fellows having brought the mortgage and note for discount, notified the cashier of the bank to place the same to the credit of Rowe and Fellows, who, the cashier knew, as he testified, were in partnership, and the proceeds having been drawn out by checks drawn in the name of the firm, there was nothing to put the bank on notice, and the defendant Rowe, nothing else appearing in the evidence, the plaintiff claims was bound by his acquiescence not only during the four months for which the note

was given, but for three months thereafter, and excepts that the court did not direct a verdict in favor of the plaintiff on the ground that when there is a loss in a case of this kind, it should be borne by the one whose carelessness has contributed to the misfortune.

There was no contradiction that Rowe and Fellows were farming jointly; that the note was placed in the hands of Fellows by the authority of Rowe, and carried by him to the bank; that the proceeds were placed to their joint account and the proceeds drawn out by checks in their joint name, and that Rowe made no objection and gave no notice of any dissent until at least seven months had passed. In the absence of evidence contradicting any part of this testimony, the court might have directed a verdict against the maker of the note. The defendant was guilty of gross negligence by his acquiescence for seven months, three months after the maturity of the note. On such conduct the cashier, knowing of the partnership, was not guilty of negligence in paying out the proceeds upon such checks.

The most serious error, however, is this: The cashier of the bank, J. E. Crutchfield, was asked to explain the transaction, and tell all that he knew about it. The court sustained an objection to this testimony, which was certainly relevant and competent. The record states that the cashier would have testified that Fellows stated to him that he had paid more than his share of the expenses of their joint farming, and that if Rowe would pay up what he owed him they would carry on the business; and if he could get a loan for Rowe, Rowe would pay him; that Fellows brought him this note and mortgage, which was credited to the account of Fellows and Rowe, and the proceeds were drawn out by checks signed "Rowe and Fellows"; that Rowe never came to see him nor had any conversation about it, and that the entire transaction was with Fellows. This evidence was very material, both as corroborative and substantive evidence, and the court erred in not admitting this testimony, which was also in contradiction of Rowe. *Powell v. Lumber Co.*, 168 N. C., 632.

It was also error to exclude the question to Crutchfield, whether he knew that Rowe and Fellows were in business together at that time. It was admitted that he would have testified, "They were operating a farming partnership. He (Crutchfield) never spoke to Rowe about this loan in controversy. Fellows negotiated the loan. He had the conversation with him about negotiating the loan on Rowe's note, as above stated, and two or three weeks later he returned with the paper signed, which the bank discounted." This evidence was competent in contradiction of Rowe, and competent to show that the bank was without knowledge or information that Fellows was not authorized to make the transaction.

The court also excluded the question to Fellows: "Was it the understanding between you and Rowe that the discounted loan was to pay for money you had advanced Rowe up to that time?" The record states that the witness would have replied that "It was understood that Rowe agreed to borrow the money for this purpose. Rowe and I were farming on the Moore plantation." He then stated the quantity of land and the extent of the operations and that the money was checked out to pay the bills as they came in in their farming operations, and he added: "I checked the money out to pay the bills that came up, and I gave Rowe credit." According to the testimony of this witness, as the agent of Rowe he negotiated the loan, was directed to carry the mortgage and note to the bank, and had the money placed to the credit of Rowe and Fellows, and checked the money out to pay their joint bills. The competence of this testimony is apparent, and it was error to exclude it.

There was no evidence tending to show that any fraud was practiced on the defendants, and in the placing of the proceeds of the discounted note of Rowe to the credit of Rowe and Fellows. The evidence shows that the bank was an innocent purchaser for value, and upon this evidence, if admitted, the court should have directed a verdict in favor of the plaintiff bank.

The plaintiff also excepted to the following charge: "The defendants, however, although they executed this note, and it was delivered to the bank, say they never received the proceeds of the note; now if such be the fact, gentlemen, then of course the defendants are not indebted to the plaintiff." This was erroneous, for if the bank took the note under the circumstances testified to, and according to the testimony erroneously excluded, the bank was a purchaser for value without notice, and was entitled to recover.

The court also erroneously charged as follows: "It is only in the event that it be a fact that the defendants received the proceeds of this note will they be indebted to the bank." This was telling the jury, without qualifications or explanations, that Rowe must have received the proceeds of the note; otherwise he would not be indebted to the plaintiff even though the bank received the note from his agent and the money was put to the credit of the partnership and drawn out and paid on the partnership debts.

The court also charged: "It is not necessary, however, gentlemen, for you to find that the proceeds of the note were paid directly to Z. P. Rowe and wife, or to either of them, that is, to them in person." This charge contradicts the previous instruction that if they never received the proceeds of the note the defendants were not indebted to the plaintiff, and is misleading to the jury.

It is not denied in this case that Fellows, by direction of Rowe, was entrusted with the mortgage and note, and that Fellows was told to take them to the bank, and that Rowe made no complaint or objection until many months after the note had matured. It was admitted that Fellows was Rowe's agent with respect to inquiring of the bank if it would discount this note, and in carrying the note to the bank. It was erroneous to rule out the evidence of J. E. Crutchfield and of J. P. Fellows, as above stated, which tended to show that Fellows was the agent of Rowe in having the note discounted and in placing it to the credit of the partnership of Rowe and Fellows. There were other errors assigned in the record, and which, we think, entitled the plaintiff to a new trial, but it is unnecessary further to discuss the exceptions. For the errors pointed out, there should be a

New trial.

S. P. BOSEMAN ET AL. V. W. E. MCGILL.

(Filed 25 October, 1922.)

1. Judgments.

A judgment against the bidder on lands at a public sale for the purchase price, who has failed to respond, adjudging the amount of the judgment a lien upon the lands and ordering foreclosure, is a final judgment as to matters therein embraced, and conclusive between the parties.

2. Appeal and Error—Judgments—Supplementary Proceedings—Objections and Exceptions—Case on Appeal—Certiorari.

Supplementary proceedings taken upon a final judgment not excepted to or appealed from, with exception only as to matters embraced in the order in the proceedings, does not permit a review of the judgment, but only of matters excepted to in the special proceedings; and where, upon the failure to docket the case in time in the Supreme Court, the appellant's motion for a *certiorari* is allowed, it brings up for review only the exceptions taken in the special proceedings, and appealed from.

3. Judgments—Liens—Vendor and Purchaser—Sales—Bidders—Supplementary Proceedings—Foreclosure—Examination of Debtor.

Where a judgment orders the foreclosure of lands to pay the purchase price, and the plaintiff makes it appear in proceedings supplementary to execution that the value of the land is insufficient, and that the defendant has funds in the hands of a third party, it is not required of the plaintiff that he await the result of the foreclosure sale before an order can be made that the holder of defendant's funds pay the same into court to await the court's further orders respecting it, it being made to appear that the defendant had no other funds subject to the payment of the balance that would be due on the judgment after applying the proceeds from the foreclosure sale of the lands.

4. Same—Evidence.

Where, upon the report of commissioners to sell land at a judicial sale subject to a lien, it appears that the land brought a fair and reasonable price, which was found as a fact by the clerk, and the order of sale confirmed by the judge, and it further appears that the price so obtained was less than the amount of the judgment, the judgment creditor may obtain an order, in proceedings supplementary to execution, upon proper affidavit, by showing that execution had been issued, though not then returned, and that the judgment debtor had property available in the hands of a third person, subject to the payment of the judgment debt, and which he unjustly refuses to apply thereto. C. S., 712, 719. C. S., 711, does not apply to the facts of this case.

5. Same—Actions—Remedies.

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor *in personam*, may compel payment by proceedings *in rem*, or pursue both remedies at the same time. C. S., 663.

6. Same—Order Upon Third Persons.

Where it appears, in proceedings supplementary to execution, that a third person has funds of defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the fund.

7. Same—Statutes.

Held, under the facts of this case, an order for the examination of the judgment debtor and others, in proceedings supplementary to execution, was properly made under the provisions of C. S., 721.

8. Same—Execution.

Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of the execution does not affect.

9. Same—Property Available.

Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant had no other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit, without denial. *Bank v. Burns*, 109 N. C., 105, cited and approved.

APPEAL by defendant from *Lyon, J.*, at chambers in Elizabethtown, 30 December, 1921.

In this action the plaintiffs recovered judgment for $7,690, with interest, as the purchase price in a contract to purchase certain land. The judgment was declared to be a specific lien upon the land described in the complaint, and a commissioner was appointed to sell the land and report to the court, and there were directions in the judgment as to the application of the proceeds of the sale.

The land was sold at public auction on 21 November, 1921, and was bid off at the price of $7,000, but the purchaser, a colored man, being insolvent and unable to comply with his bid, the property was again offered for sale several times, and was finally sold for $5,500, and one of the commissioners, who was also attorney for the defendant, reported to the court that "said price is fair and reasonable."

On 25 November, 1921, execution was issued and placed in the hands of the sheriff, which the clerk finds as a fact, and he further finds, upon affidavit, "the recovery of above judgment of $7,690, with interest from 5 January, 1921; that the judgment had been docketed; that execution had been issued thereon and placed in the hands of the sheriff of Cumberland, where the defendant resided; that the property upon which the plaintiff had a lien was insufficient in value to satisfy the judgment; that there was no known property of the defendant that is liable to execution, and no equitable estate in lands within the lien of the judgment; but that defendant has property, choses in action, and other things of value not exempt from execution, which he unjustly refuses to apply toward the satisfaction of said judgment; that C. G. Rose and C. J. Cooper have property of the said W. E. McGill which exceeds in value $10.00, and consists of cash and securities; and that they are indebted to the said McGill." The clerk thereupon issued an order for examination of McGill, Rose, and Cooper, directing them to appear before him to answer concerning the property of the defendant W. E. McGill, and restraining any transfer, etc., of the property.

The defendants McGill, Rose, and Cooper all failed to file answer, and, after examination of said Rose and Cooper, the court, after finding that plaintiffs had secured judgment, and that the lands upon which plaintiffs had a lien were insufficient to satisfy the same, and that execution was issued on said judgment and plaintiffs had filed the necessary affidavits, further finds as a fact that C. G. Rose has in his hands $4,300 which is the property of W. E. McGill, and after allowing $500 as his personal property exemption, adjudged that the sum of $3,800 now in the hands of the said C. G. Rose be condemned to be applied to the plaintiff's judgment in this action, and ordered that the said Rose should at once pay the same into the court to await the sale and confirmation of the land upon which the plaintiffs have a specific lien in this action, and retained the cause for further orders. The defendant appealed, and the entire record was transmitted to Lyon, J., at the request of the appellant and by consent of the appellees, the defendant's counsel having appeared by brief, the court "considered and adjudged that the judgment of the clerk is hereby affirmed with the modification that said sum of $3,800 be held by said clerk subject to the further orders of this court, and this cause is retained for further orders." The settlement of the

case on appeal having been delayed, *certiorari* was applied for in apt time, and ordered to bring up this judgment which had been entered in the supplementary proceedings.

H. L. Brothers and Henry E. Williams for plaintiffs.
Rose & Rose for defendant.

CLARK, C. J. The judgment at September Term, 1921, was a final judgment, the debt being ascertained and foreclosure by sale being adjudged. *Johnson v. Roberson,* 171 N. C., 194; *Davis v. Pierce,* 167 N. C., 135; *Williams v. McFadyen,* 145 N. C., 157. In this last case, *Mr. Justice Hoke* said: "Such judgment is final as to the amount of indebtedness so adjudicated, and it is also final for purposes of appeal as to all debated and litigated questions between the parties preceding such decree."

The appeal not having been served in proper time, a *certiorari* in lieu thereof was applied for in apt time and granted upon cause shown. This necessarily brings up only the order in the supplementary proceedings, there being no exception taken to the judgment upon the indebtedness. Indeed, the exceptions filed by the defendant abandon any appeal, if there had been any, from the judgment as to the indebtedness and excepts only to the order in the supplementary proceedings.

C. S., 663, provides: "Where a judgment requires the payment of money, it may be enforced in those respects by execution as provided in this article." A long line of cases hold that, "The vendor has two remedies that he may adopt to collect his debt—one *in personam,* to compel the vendee to pay it—the other *in rem,* to subject the land to its payment, and he may prosecute both these remedies at the same time." *Allen v. Taylor,* 96 N. C., 37.

The judgment in this action decrees that plaintiff "recover judgment against the defendant W. E. McGill for the sum of $7,690, with interest from 5 January, 1921, and for the cost of this action."

It appeared that the defendant had no property liable to execution, and no equitable estate in lands within the lien of the judgment except the real property described in the complaint, and that this was insufficient in value to satisfy the judgment. In *McKeithan v. Walker,* 66 N. C., 95, it was said: "We see no reason why the proceedings given by section 266 may not be commenced before the sale of the property levied on, on an affidavit or other proof of its insufficient value, just as a subsequent levy may be made after a previous insufficient one; but clearly no final order can be made appropriating to the creditor any property discovered under this section, until the property previously levied on is exhausted, for until that is done it cannot be known whether

anything is still owing. Until the property levied on can be brought to sale by a proper proceeding, the property discovered by the garnishee may be levied upon as a security for the deficiency." This is exactly the proceeding pursued in this case. The clerk's order required the money to be paid into the court, to await the sale and confirmation as to the land upon which plaintiffs have a specific lien, as security.

The defendant's attorney, one of the commissioners, having reported to the court that $5,500, the price for which it had been sold, was a fair and reasonable one for said land, it was confirmed by the court, which sustained the finding of fact by the clerk that the land was of insufficient value to satisfy the judgment. A plaintiff who has a lien upon lands which he knows to be of insufficient value to satisfy his judgment is not required to stand helplessly by and see the defendant make way with a fund which could make good the deficiency in the value of the land while the statute of limitations was running against his judgment, as stated in *McCaskill v. McKinnon,* 121 N. C., 194. Both as a matter of law and of equity the execution and supplementary proceedings were properly had in this case.

The appellant's argument seems to be based upon the mistaken impression that the supplementary proceedings herein were brought under C. S., 711. In fact, they are authorized by C. S., 712 and 719, and under the construction placed thereon in *Bank v. Burns,* 109 N. C., 105, in which the headnote sustains the action herein taken: "An affidavit by a judgment creditor, his agent, or attorney, that an execution has been issued upon his judgment, though it has not been returned, and that defendant has not sufficient property 'subject to execution' to satisfy the judgment, but has property 'not exempted from execution' which he unjustly refuses to apply to its satisfaction, is sufficient to support an order for the examination of the debtor, and persons alleged to be indebted to him; and, also, an order forbidding the disposition, by the latter, of any effects belonging to the judgment debtor," distinguishing *Hinsdale v. Sinclair,* 83 N. C., 338.

The order of examination having been authorized by law as above stated, the order of condemnation made by the clerk was within the scope of C. S., 721, which provides: "The court may order any property, whether subject or not, to be sold under execution, in the hands of the judgment debtor or any other person to be applied towards the satisfaction of the judgment."

The defendant contends that the execution was never placed in the hands of the sheriff, but that contention is negatived by the affidavit of plaintiffs in support of the order of examination, which states that the execution was duly issued and at once delivered to the sheriff of the county of Cumberland, where the defendant then resided, and the clerk

found as a fact that execution had been issued upon said judgment. The lack of return of execution is not conclusive against such finding, for after its issuance it might have been handed to the party or to his agent. *McKeithan v. Blue,* 149 N. C., 95.

The defendant further contends that it might be that the defendant has other property out of which this execution could have been made, but this is negatived by the affidavit of plaintiffs in support of the order of examination, which is not denied, and there was no evidence produced that the defendant had other property. *Bank v. Burns,* 109 N. C., 105, in which the affidavit was to the same purport.

The order of the clerk, as modified by Lyon, J., must be

Affirmed.

BANK OF PROCTORVILLE v. DR. G. H. WEST.

(Filed 25 October, 1922.)

1. Banks and Banking—Cashier—Principal and Agent—Deposits—Overdrafts.

Where a cashier of a bank, in his individual capacity, and for his own private use, purchases an automobile and promises to deposit the purchase price to the seller's credit at the bank, to meet his draft therefor; but the cashier fails to make the deposit and carries the amount on the books of the bank as an overdraft of the seller, and this is done without the knowledge of the directors or other proper officers of the bank: *Held,* the seller is responsible, on the failure of the cashier to make the deposit as promised, for the amount of his overdraft in an action by the bank.

2. Same—Want of Authority—Knowledge Imputed.

Knowledge of a transaction by a cashier of a bank made with a depositor for the cashier's sole benefit against the interest of the bank will not be imputed to the bank, and the bank will not be bound thereby in the absence of actual knowledge.

3. Banks and Banking—Overdrafts—Notice—Knowledge of Depositors—Notice Imputed—Principal and Agent—Antagonistic Interests.

A cashier of a bank cannot bind the bank by permitting a depositor to overdraw his account for the sole personal interest of the cashier, for the agent's interest is antagonistic to that of his principal. The depositor is affected with knowledge of the status of his own account with the bank and the fact that the bank fails to notify him of the overdraft cannot defeat the latter's recovery upon the overdraft, even if there is no fraud.

APPEAL by plaintiff from *Connor, J.,* at April Term, 1922, of ROBESON.

E. J. Britt and McIntyre, Lawrence & Proctor for plaintiff.

McLean, Varser, McLean & Stacy and S. Brown Shepherd for defendant.

CLARK, C. J. A jury trial was waived, and this case was submitted on facts agreed: On 28 May, 1920, N. C. Blue, cashier of the plaintiff bank, in his private capacity as an individual, and for his individual uses and purposes, purchased an automobile from the defendant at the price of $540. Blue instructed West, who was a customer of the bank, to draw a check upon the bank for the purchase price, and promised that when it was presented he, Blue, would deposit sufficient funds to the credit of the seller in the said bank to make the draft good. Pursuant to this agreement, West drew his check upon the plaintiff bank, which was duly charged to his account, but Blue failed to place funds to the credit of West to meet the same when presented and paid, but simply charged up the amount on West's account, creating an overdraft for the whole amount.

This action is brought by the bank to recover said overdraft of $540. None of the officers or directors of plaintiff bank had any knowledge whatever of any of the transactions. In October, 1920, about four months after the above transaction, on an examination of the bank by the officers of the State Banking Department, it was discovered that cashier Blue was a defaulter for a large amount, and he was removed. No notice was given to West of the overdraft until after the removal of Blue as cashier, because the other officers and directors of the bank had no knowledge of the overdraft. Upon ascertaining the fact, a demand was made upon the defendant for payment of the overdraft, and refused, and this action was brought. Blue was insolvent when he purchased the automobile, and is still insolvent. He was the only salaried officer connected with the bank.

Independent of the purchase of the automobile, and the other circumstances mentioned, the defendant is liable to the bank for payment of the overdraft by him. The fact that the cashier had promised to put a sum there to meet it, which was not done, does not affect the fact that the defendant has gotten $540 in money from the bank by the overdraft, and his liability therefor. If the promise had been carried out by the cashier actually putting the money of the bank to the credit of West, the cashier would have been guilty of embezzlement in applying $540 of the money entrusted to his care and custody and converting it to his own use, an offense for which the doors of the penitentiary would have swung open. As he failed to so place the money, either his own or of the bank, it was simply a case where the cashier promised, as any other person could have promised, to place a sum to the credit of the drawer of the

check and did not do so. The liability of the drawer to the bank is due to the fact that he has gotten $540 of the bank's money by means of an overdraft, for which the drawer is responsible to the bank, and it was his misfortune that he accepted the assurance of Blue that he would place that much money to his credit.

West knew, as a matter of course, that the transaction in effect was that the cashier, without any authority from the bank, was to loan him $540 without any note or security given by him to the bank, and without payment of interest. He knew that the cashier had no authority to make such transaction, and he sold the automobile to him for the sake of the profit in such sale, relying upon the promise of Blue to place money in the bank to the defendant's credit, which promise the cashier did not keep. The failure to do so was the loss of the defendant, and not the loss of the bank, for the cashier had no authority to use the bank's funds for his own purposes. Even if, as cashier, he had actually paid the check of the bank in the utmost good faith, it was none the less an overdraft, for which West was indebted to the bank. The cashier's promise to West to make it good in no wise released West from payment of the overdraft when the cashier failed to place the money to the credit of the drawer. This case is almost identical with that of *Grady v. Bank, ante,* 158.

In *Dowd v. Stephenson,* 105 N. C., 467, the Court held that when the president of a bank authorized a transaction to pay debts due by himself, though with the knowledge of the cashier of the bank, it was no defense, the Court saying that the president and officers of the bank other than the directors, have no authority to appropriate its moneys. As said in that case, "The defendant got the benefit of the bank's money in a way not authorized or intended by it, and very certainly it can recover that money by proper action," citing Moss on Banking, sec. 360, and cases.

The agreement between the cashier, Blue, and the defendant West was a fraud upon the plaintiff bank, and it can recover the amount of an overdraft created as the result of such fraudulent agreement.

In *Hier v. Miller,* 68 Kansas, 258; *S. c.,* 63 L. R. A., 952, it was held: "The cashier of a bank has no implied authority to pay his individual debts by entering the amount of them as a credit upon the pass-book of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks which are paid, the bank having received nothing of value in the transaction. If the cashier of a bank, without actual authority to do so, should undertake to pay his individual debts in the manner stated, the bank may recover of his creditor the amount of money it paid out upon the faith of the unauthorized pass-book entries. The fact that the cashier is personally in-

terested in a transaction of this character is sufficient to put the creditor upon inquiry as to the actual extent of the cashier's powers." In *Cobe v. Hardware Co.*, 31 L. R. A. (N. S.), 1126, it was said: "Devlin and the cashier, acting in connivance with him, could no more appropriate the funds of the bank to pay the individual debts of Devlin without the sanction of the board of directors than could the cashier of the bank in the cited case, and it was incumbent upon the appellee, as it was upon the creditor in that case, to inquire whether the officers of the bank were acting within the scope of their authority."

In *Bank v. Wilson*, 124 N. C., 568, it was said: "The alleged agreement was beyond the scope of the agency of the cashier, and without consideration, and therefore void. . . . A cashier cannot, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note already held by another bank as collateral."

The decision in *Dowd v. Stephenson, supra,* is fully sustained by the following authorities: Notes to 1 A. L. R., 699; notes to 31 L. R. A. (N. S.), 1126, *supra; Bank v. Gunhus,* 9 L. R. A. (N. S.), 471; *Bank v. Otterbach,* 131 Iowa, 160; *Langlois v. Gragnon,* 123 Louisiana, 453; *Campbell v. Bank,* 67 N. J. L., 301; *Bank v. Drake,* 29 Kansas, 311; *Bank v. Bank,* 95 U. S., 557; *Bank v. Lennon,* 170 N. C., 10.

The agreement was a fraud upon the plaintiff bank, and the knowledge of Blue, the conniving cashier, will not be imputed to the bank. *Roper v. Ins. Co.*, 161 N. C., 157, where it is said: "The rule that notice to an agent is notice to the principal being based upon the presumption that the agent will transmit his knowledge to his principal, the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty, and, accordingly, where the agent is engaged in the transaction in which he is interested adversely to his principal, or is engaged in a scheme to defraud the latter, the principal is not charged with the knowledge of the agent acquired therein. . . . This principle of imputed knowledge does not apply when it would be against the interest of the agent to make the disclosure." To the same purport, *Commission v. Bank,* 164 N. C., 358; *Brite v. Penny,* 157 N. C., 110; *Bank v. School Committee,* 118 N. C., 383; *Bank v. Burgwyn,* 110 N. C., 267.

The fact that no notice was given to the defendant West of the existence of the overdraft until some time after the draft was cashed does not prevent the plaintiff from recovery. It would not have this effect even in cases where there was no fraud, for the liability to the bank for the overdraft arises upon the obligation to pay money had and received, but in this case it is admitted in the facts agreed that none of the officers or directors of the plaintiff bank, except the guilty cashier, had any

knowledge or notice of the transactions between the cashier and the defendant West until some four months after the draft was cashed, and that immediately upon discovery of the facts, notice was given to the defendant and demand for payment made. Even when there is the utmost good faith, there is no authority nor principle which sustains the proposition that unless the bank promptly notifies a depositor of the existence of an overdraft that it cannot recover the amount thereof from the customer. The customer is fixed with knowledge of the condition of his account as fully as the bank, and has the same knowledge that he has overdrawn his account.

As was said by us at this term, upon a similar statement of facts, in *Grady v. Bank, ante,* 158, citing *Hier v. Miller,* 63 L. R. A., 952, *supra,* the mere fact that the cashier was personally interested in the transaction was sufficient to put the creditor upon inquiry.

Upon the facts agreed, judgment should have been entered in favor of the plaintiff.

Reversed.

W. E. BYRD AND K. U. BRYAN, TRADING AS BYRD & BRYAN, ET AL. v. GEORGIA CASUALTY COMPANY.

(Filed 25 October, 1922.)

1. Insurance—Accident—Indemnity—Risks Covered.

A policy indemnifying the owner against loss on account of injuries received by a workman while engaged in the erection of a building covers only accidents occurring in the work described, and cannot be construed to apply to those incurred in the process but not described in the application, or within the terms of the policy; and an injury to a workman caused by the tearing down of a dividing wall between an old building and an addition thereto, the latter only being the one covered by the policy, does not come within the terms of the policy expressly excluding injuries received in wreckage.

2. Actions—Attorney and Client—Attorney's Fees—Costs—Appeal and Error.

The recovery of counsel fees for the prosecution of an action is not permissible. *Semble,* if otherwise, a finding would be necessary on appeal that the fees thus claimed were reasonable for the services rendered by the counsel.

APPEAL by J. R. Cannady, surviving partner of Gibson & Cannady, plaintiff, from *Daniels, J.,* at March Term, 1922, of DURHAM.

This case was heard by *Daniels, J.,* upon agreed facts. The only parties before the court are J. R. Cannady, surviving partner of the

firm of Gibson & Cannady, and the defendant company. The defendant insured the plaintiff Gibson & Cannady against loss arising on account of injuries suffered, including death resulting therefrom, at any time by any employee of the assured in the operation of the work described in the statements attached to said policy and agreed to defend any suit therefor on behalf of the assured, and to pay all expenses, legal and otherwise, incurred by the company in defending such suit. Judgment for defendant, appeal by plaintiff.

William G. Bramham for plaintiff.
Fuller, Reade & Fuller for defendant.

CLARK, C. J. One Potts, an employee of Gibson & Cannady, was injured by the falling of a wall, and instituted an action against them and the owners of the building; the defendant insurance company denied liability for the injury, and refused to defend the suit brought by Potts, alleging that the injury was not sustained in the work which was within the terms of the policy. The policy specified that the injury insured against was any which should occur in "the erection of any building, including foundations." The construction described was "an addition to their store building, known as the old Phipps building," three stories in height, which was to be placed in the rear of such building attached to it, but at the time of the collapse of the wall, which resulted in the injury to Potts, the work which was being carried on was not on the addition, but in tearing down a partition wall in the old building, and not in the part covered by the contract, which specified insurance against injuries sustained in the "erection of any building," and the policy provided that no wrecking was to be done.

The agreed statement of facts sets out that the injury sustained "was in removing the brick partition wall heretofore mentioned on the first floor of the old Phipps building in order to convert two storerooms above mentioned into one storeroom. A steel pillar had been set at the end of said wall in front of said building, and a steel pillar had been set about the middle of said wall, and a steel pillar at the rear of said partition wall; steel pillars were to be installed to support said building, and to incorporate said two storerooms into one." The work which was being done at that time was wrecking and not construction. The old Phipps building consisted of two stores, which it was the desire of the owners to convert into one by removing the brick partition wall. In order to do this they were demolishing that partition wall, and this was the cause of the collapse of the building. The agreement in the policy that no wrecking must be done was violated, and the work specified in

the terms of the policy, "the erection of frame, brick, and concrete buildings," was not the work which was being done at the time of the injury to Potts, nor was he engaged in such work.

Where a policy insures against claims for damages by reason of injuries incurred by employees in certain designated operations, it cannot be extended to include claims for injuries happening to employees while engaged in work other than that specified. A policy issued to indemnify against injuries caused by certain things used in a particular business, and described in the application, covers only accidents occurring in such described work, and does not cover those occurring in work or acts which may be employed in the process but not described in the application. 15 Cyc., 1037. *Wollman v. Fidelity Co.*, 87 Mo. App., 677.

In addition to seeking to recover one-half of the amount paid to satisfy the judgment recovered by Potts against the original plaintiffs in this suit, the appellant Cannady is seeking to recover $500, the amount paid to his attorney for his services in connection with the Potts suit, and also to recover a reasonable allowance for attorney's fees for prosecuting this action.

There is no finding of fact, nor agreement, that the $500 paid to the counsel for the appellant was reasonable, nor is there any finding or agreement as to what his services consisted of. In the absence of a finding or agreement that $500 was a reasonable fee for the services rendered by plaintiff's counsel, plaintiff is not entitled to recover anything on that account.

Counsel fees in this action cannot be allowed as a part of the costs. This action is not different from any other. The defendant had the legal right to contest plaintiff's claim, and it has done so in good faith, and cannot be required to pay the fee referred to. *Midgett v. Vann*, 158 N. C., 128.

If Potts had been engaged in the work which the policy covered, namely, "the construction of the addition to the old Phipps building," he would not have been injured. The parties agreed that the defendant should not be liable for injuries occurring elsewhere, and its terms cannot be enlarged or extended. He was not erecting the building referred to in the policy, but on the contrary, was engaged in wrecking a portion of the old building, which was not within the terms of the contract of indemnity.

No error.

LEAKSVILLE COTTON MILLS v. COMMISSIONERS OF ROCKINGHAM COUNTY ET AL.

(Filed 25 October, 1922.)

1. Highways—County Commissioners—Notice to Owner—Principal and Agent—Roads.

One who has an agent present before the board of county commissioners resisting the relocation of a county highway upon his lands has notice, implied from the agency, of the action of the board in taking his additional lands in determining the matter contrary to his contentions.

2. Highways—County Commissioners—Discretionary Powers.

The judgment of the county commissioners in taking the land of one adjoining owner in preference to that of another in relocating and widening a highway will not be reviewed by the courts, unless bad faith or manifest abuse of discretion has been established, or it is clearly made to appear that the commissioners have acted in the promotion of some personal or private end, and not in the interest of the public.

3. Same—Injunction—Evidence.

Where the plaintiff seeks injunctive relief against the commissioners of the county for taking additional land from him in the location of a public highway, and alleges that the commissioners have acted solely in the interest of an adjoining owner, which the commissioners deny, and there is no evidence to support the plaintiff's allegation, it is insufficient in impeachment of the action of the board, and a permanent injunction should be denied.

4. Same—Contracts.

Where the board of county commissioners, acting within their sound discretion and for the public interest, have determined upon widening a public highway, in its relocation, so as to take in an additional width of the plaintiff's land, injunctive relief will not be granted the plaintiff upon the ground that it had entered on a contract with the commissioners, upon a consideration that the road should be located at a certain place when there is nothing in the contract to sustain such contentions, or to limit the powers of the board accordingly.

5. Same—Surveyor—Principal and Agent.

The county engineer has no implied authority from the board of county commissioners, by virtue of his position, to bind it in the exercise of its reasonable discretion as to relocation or widening a county highway.

APPEAL by plaintiff from *Harding, J.*, at chambers, 30 March, 1922, from ROCKINGHAM.

Civil action to restrain the defendants from relocating a public road and thus taking approximately five feet of plaintiff's property, in alleged violation of the following contract:

"Whereas, the county of Rockingham has ordered the road from the canal bridge at the Danville and Western Railroad, near the Imperial

Bank and Trust Company building, in the town of Spray, to Dillon's store in said town, said road known as the Morgan Ford road, to be rebuilt, regraded, and paved with sheet asphalt, as per specifications of the county engineer; the said order being made upon conditions that the undersigned corporations, to wit, the Spray Water Power and Land Company and Leaksville Cotton Mills pay one-half of the cost of said work, and the said corporations having consented and agreed to do this:

"Therefore, this agreement made and entered into this 21 October, 1921, for and in consideration of the foregoing premises, the Spray Water Power and Land Company, a corporation duly chartered, and the Leaksville Cotton Mills, a corporation duly chartered, do hereby contract and agree with the county of Rockingham that if said county will proceed at once with the regrading and paving the said road in the manner as above set forth, that they will pay one-half of the cost thereof. The same to be paid as called for upon the estimates of the county engineer as the work on said road progresses.

SPRAY WATER POWER AND LAND COMPANY,
By E. V. Hobbs, *Asst. Treasurer.*
LEAKSVILLE COTTON MILLS,
By E. V. Hobbs, *Asst. Treasurer.*"

The road as originally located had the effect of closing the only driveway or outlet to the mill property of the Leaksville Woolen Mills, situate on the opposite side of the road from the plaintiff's property, and this was ordered to be changed on 9 November, as follows:

"At a special meeting of the board of county commissioners at Spray, the following members present: R. B. Chance, chairman; M. L. Heiner, James R. Martin, and R. J. Martin. It was ordered that the road between the Leaksville Cotton Mills and the Leaksville Woolen Mills be narrowed so as not to interfere with the present driveway of the Leaksville Woolen Mills."

Later, after again viewing the premises, the commissioners came to the conclusion that the road, as laid out by the engineer and as modified by the order of the board on 9 November, was not wide enough, either from the standpoint of service or safety, and at a meeting of the board on 5 December, 1921, the following resolution was passed:

"On motion of M. L. Heiner, seconded by R. J. Martin, it was ordered to make the street 5 feet wider opposite the drive of the Leaksville Woolen Mills, and on the side of the Leaksville Cotton Mills office in Spray, N. C."

In order to circumvent this resolution, C. R. McIver, who was acting for the plaintiff in the matter, at an early hour on the morning of 6 December, 1921, constructed an embankment on the side of the Leaks-

ville Woolen Mills, and this was ordered removed in the case of *Woolen Mills v. Land Co.,* 183 N. C., 511. See this case, also, for fuller statement of the facts.

On 6 March, 1922, the board passed a resolution ordering the contractor to go forward with the construction of the road at the point where it passes the property of the Leaksville Woolen Mills and the Leaksville Cotton Mills, and to construct it "five feet wider than the concrete just laid on the east side of said road where it passes said Leaksville Woolen Mills, beginning and ending at such point on the east side thereof as will make a proper road, and it shall be constructed on the west side thereof without interference with the driveway of the Leaksville Woolen Mills as it was when said road was first ordered built with asphalt." This order precipitated the present suit, summons having been issued 7 March, and the plaintiff seeks to enjoin the defendants from taking its property for the alleged reason that same would now be in violation of the above contract. The temporary restraining order was dissolved, and plaintiff appealed.

Brooks, Hines & Smith for plaintiff.
Manly, Hendren & Womble for commissioners.
Johnston, Ivie & Trotter for construction company.

STACY, J., after stating the case: The general authority of the commissioners of a county to condemn land for road purposes is found in C. S., 3667. The plaintiff in the instant case had knowledge of the order directing the contractor to take the five feet of land in question, as its agent, C. R. McIver, was present at the meeting of the board on 5 December, 1921. The building of the road, in violation of this decision of the board of county commissioners, has been properly arrested. *Woolen Mills v. Land Co.,* 183 N. C., 511.

The judgment of the commissioners, with respect to the location and construction of the instant road, and particularly the determination of the board to take the land of the Leaksville Cotton Mills rather than close the only driveway or outlet to the property of the Leaksville Woolen Mills, will not be reviewed by the courts, unless bad faith or a manifest abuse of discretion has been established, or unless it is clearly made to appear that the commissioners have acted, not in the interest of the public, but in promotion of some personal or private end. *Edwards v. Comrs.,* 170 N. C., 451, and cases there cited.

True, the complaint alleges that several members of the board of commissioners are acting solely in the interest of the Leaksville Woolen Mills, but this is specifically denied by the individual members of the board, and the record is wanting in any sufficient evidence to support the

charge. The chairman of the board, who took McIver's view of these matters in the case of *Woolen Mills v. Land Co., supra,* is now acting in entire accord with the other members of the board in the present controversy.

The above general propositions are not controverted by the plaintiff, but it says the defendants are now proceeding in violation of their contract to locate the road "as per specifications of the county engineer." It is alleged that the location, as originally proposed, had been surveyed and staked out by the engineer at the time of the signing of the contract, and that such became a part of the inducement and consideration for its execution. This is denied by each and every member of the board of commissioners. They say there was no agreement for any particular location of the road, and that nothing was said in the negotiations pointing to this end.

But it is further alleged that the county engineer and C. R. McIver, prior to the execution of the contract with the commissioners, had an understanding as to the precise location of the road. This was not known to the commissioners, and it is denied that the county engineer was authorized to enter into any such agreement on behalf of the county or the commissioners.

Upon the record, plaintiff has failed to make out a case calling for injunctive relief; and we think the judgment dissolving the temporary restraining order should be upheld.

Affirmed.

RAY HENDERSON v. J. L. FORREST AND SARAH FORREST; AND J. L. FORREST AND SARAH FORREST v. B. F. HAGOOD, RAY HENDERSON, AND HAGOOD REALTY COMPANY.

(Filed 18 October, 1922.)

1. Actions—Consolidation—Courts.

During the pendency in the same court of two causes of action that involve practically the same issues, the court may consolidate them if this can be done without confusion or prejudice to the right of any party to either action, and under the facts appearing in these cases, they were not improperly consolidated.

2. Contracts, Written—Evidence—Parol Evidence.

Where a contract is not required to be in writing by the statute of frauds, and is partly written and partly rests in parol, evidence of the unwritten part is permissible, if it does not contradict the written part, to establish the contract in its entirety.

3. Same—Collateral Agreements—Principal and Agent.

Where a real estate agency has taken an option on the plaintiff's lands, it may be shown by parol that as a part of the consideration for the option, the agency would pay off a certain note given by the plaintiff to another, before maturity, either by exercising this option themselves or making sales to another as the plaintiff's agent, the consideration being sufficient to support both the principal and collateral contract.

4. Same—Statute of Frauds.

Where the optionee in a written option to purchase lands has agreed by parol either to take the land within the time required, and pay off an obligation of the owner, or sell the same to another with the same result, the parol or collateral agreement does not come within the meaning of the statute of frauds, and is enforceable.

5. Same.

The two individual defendants composed the defendant realty company. The plaintiff entered into a written contract with the realty company, giving it an option to purchase his certain lands within a stated time, which it did not exercise, and there was evidence tending to show that the plaintiff had bought through the said realty company a tract of land it had for sale for another, that he had received the deed therefor and executed his note to the seller, secured by a deed in trust: *Held,* parol evidence was competent, in the plaintiff's behalf, tending to show, as against the realty company, that the realty company, at the time of the execution of the note, had warranted that it should be paid out of the proceeds of the sale of the plaintiff's land, upon which they had taken the option, the parol evidence not being within the meaning of the statute of frauds or contradicting or varying the terms of the written contract.

APPEAL by realty company from *Cranmer, J.,* at February Term, 1922, of CRAVEN.

On 17 December, 1920, Ray Henderson brought suit against J. L. Forrest and his wife Sarah to recover $6,500 due on a promissory note for this amount, executed to him 29 April, 1920, and on 25 January, 1921, he made Herman D. Forrest and Howard L. Forrest, sons of J. L. Forrest, defendants, and alleged that their father had conveyed to them certain real estate with intent to defraud the plaintiff, and that they had participated in the fraud. On 31 January, 1921, J. L. Forrest and his wife instituted suit against Ray Henderson, B. F. Hagood, and the Hagood Realty Company (a copartnership composed of Henderson and Hagood), and alleged in their complaint that H. W. Armstrong had given the realty company an option on a tract of land in No. 8 Township, and the realty company had contracted to sell it to Forrest at the price of $31,000; that Forrest owned a farm in No. 1 Township of the value of $20,000, and the defendants contracted to see that Forrest was paid $19,500 for his farm if he would purchase the Armstrong land, and that the price offered him should go in part payment for the Armstrong tract. Forrest alleged that Armstrong executed and, through the realty

company, delivered to him a deed for the tract in No. 8 Township on 8 May, 1920, and he executed notes and a deed of trust to secure the purchase price, and that the note in suit was executed to enable the realty company to make the first payment to Armstrong, and was not to be paid by Forrest, but by the realty company out of the sale of the Forrest land. Forrest alleged that these representations were made by the realty company through Henderson and Hagood, and that he and his wife were thereby induced to execute the note in question. Henderson alleged that the realty company had no connection with the purchase or sale of the Armstrong land, but the trade was made with Henderson alone; that Armstrong demanded a payment of $5,000 cash, and Forrest, not having the money, executed the note for $6,500 to pay this amount, and Henderson's profits for negotiating the sale, and instructed Henderson to have the note discounted at the bank; and that Armstrong accepted this payment and executed his deed to Forrest. In answer to the issues submitted, the jury found that the note in controversy was not to be paid out of the purchase price of the Forrest land; that Forrest and his wife were indebted to Henderson on said note in the sum of $6,000, that the deed from Forrest to his sons was made with intent to defeat Henderson's claim, and the grantees accepted the deed with notice of the fraud; that the realty company guaranteed to purchase or sell the Forrest land at the price of $19,500, and that Forrest was entitled to recover of the realty company the sum of $4,000.

Judgment; appeal by the realty company.

Guion & Guion for appellee.
Moore & Dunn for appellant.

ADAMS, J. All the issues, except the fifth and the sixth, were answered by the jury in favor of the appellants, and several of the exceptions relating to these two present the same question. For this reason the merits of the controversy do not require extended discussion.

The appellants first except to the order consolidating the cases on the ground that such consolidation resulted in confusion which was prejudicial to the appellants, and that the court had no authority to make the order. In *Hartman v. Spiers,* 87 N. C., 28, it is held that the consolidation of actions is not authorized where they are essentially unlike, and the parties in each are not the same; and, in *Wilder v. Greene,* 172 N. C., 94, it is said that the power to consolidate actions is one that is often required in order that different suits involving practically the same issues may be joined, where it can be done without serious prejudice, for the purpose of preventing confusion and a conflict in verdicts. We think the principles stated in the latter case are applicable here. It is

admitted that the realty company, at the time the note in controversy was executed, was a copartnership composed of Henderson and Hagood. In their complaint, Forrest and his wife allege that the note for $6,500 was executed for the purpose of enabling the realty company to make the first payment on the purchase price of the Armstrong land under the company's option; and in his complaint Henderson alleges that the note was executed to himself, and that the realty company had no connection with or interest in the negotiations for the purchase of the Armstrong tract. It therefore appears, according to the appellee's contentions, that the actions were pending in the same court, at the same time, between the same parties, and that they involved substantially the same subject-matter, and that service of process on the grantees named in the appellee's alleged fraudulent conveyance was ancillary to the main cause of action. The issues were framed to meet the contentions of all the parties, and the fact that several of them were answered against the appellee is not legal cause for holding that the consolidation was either unauthorized or improvident. *Sumner v. Staton*, 151 N. C., 203; *Morrison v. Baker*, 81 N. C., 76; *Glenn v. Bank*, 70 N. C., 192.

On the day the note was given, Forrest and his wife executed a written instrument giving the realty company an option to purchase the Vanceboro land on or before 15 December, 1920, upon paying the purchase price, namely, $19,000, of which $5,000 was to be paid in cash and the remainder in three years, the deferred payments to be secured by a mortgage on the land. This instrument, executed under seal by Forrest and his wife for a valuable consideration, contains the following stipulations: "It is understood and agreed that the said sale is to be made at the option of the said Hagood Realty Company or his heirs or assigns, to be exercised on or before 15 December, 1920. It is further understood and agreed that if the said Hagood Realty Company and his heirs and assigns shall not demand of me a deed herein provided for and tender payment as herein provided for on or before 15 December, 1920, then this agreement be null and void, and we are to be at liberty to dispose of the land to any other person as we may desire, as if this contract had never been made; but otherwise this contract is to remain in full force and effect." The realty company did not exercise its election to make the purchase. Before the contract and the note were executed, Forrest told the realty company that his purchase of the Armstrong land was dependent on a sale of the Vanceboro place; and he contended that as an inducement to his execution of the note and contract the realty company warranted or guaranteed a sale of the Vanceboro place before the payments were to be made to Armstrong. In support of this contention he testified that Hagood said in the presence of Henderson: "We will guarantee you a sale of your Vanceboro farm in time to pay this note

and to make Mr. Armstrong's next payment." This and other evidence of like character was excepted to on the ground that it contradicted the terms of the written contract.

The evidence, we think, is not subject to this objection. We have no disposition to modify or disregard the settled rules—intended for the "protection of the provident" and not for the "relief of the negligent," which prohibit the admission of parol evidence to contradict, add to, or vary the terms of a written contract, even where a part of the contract is in writing and a part is in parol (*Moffitt v. Maness,* 102 N. C., 457); but we must adhere to the long line of decisions which hold that where the contract is not one which the law requires to be in writing, and a part of it is written and a part is not, evidence of the unwritten part, if it does not contradict the writing, is admissible for the purpose of establishing the contract in its entirety. *Twidy v. Sanderson,* 31 N. C., 5; *Manning v. Jones,* 44 N. C., 368; *Daughtry v. Boothe,* 49 N. C., 87; *Braswell v. Pope,* 82 N. C., 57; *Cumming v. Barber,* 99 N. C., 332; *Palmer v. Lowder,* 167 N. C., 333. It will be noted, then, that the two instant questions are whether it is necessary that the alleged promise, or contract of warranty (not a technical guaranty), should have been in writing, and if not, whether the evidence excepted to contradicted the written contract or option. Each must be answered in the negative. The promise or warranty alleged to have been made by the appellant is not within the statute of frauds and may be assimilated to a contract of brokerage, or to a collateral or ancillary contract made by an agent who has been appointed by parol to make sale of his principal's land, one consideration being sufficient to support both the principal and the collateral contract. *Abbott v. Hunt,* 129 N. C., 403; *Lamb v. Baxter,* 130 N. C., 67; *Smith v. Browne,* 132 N. C., 365; *Palmer v. Lowder, supra; Green v. Thornton,* 49 N. C., 230; *Partin v. Prince,* 159 N. C., 554. As to the alleged contradiction of the written contract, it will suffice to say that the terms of the option conferring upon the appellants the right to elect whether they would take title to themselves are neither varied nor contradicted by their promise to see that another should purchase if they did not, for their agreement to warrant a sale was entirely collateral to the principal contract, and an allegation of fraud or mistake as a basis for the rescission or correction of the option was not necessary.

The greater number of the exceptions relate directly or indirectly to the subjects we have discussed, and the others present no question that demands special consideration. We have given the entire record a careful examination, and find

No error.

ELSIE LANIER, AS GUARDIAN OF PENNIE LANIER, v. W. H. BRYAN.

(Filed 25 October, 1922.)

1. Witnesses — Qualification — Oath—Mental Capacity—Courts—Discretion—Appeal and Error.

It is the question of the mental capacity of a witness to understand and appreciate the solemn obligation imposed on him by oath to tell the truth, and his ability to correctly narrate the facts involved in the controversy, that determines his eligibility as a witness; and his youth and adjudged imbecility of mind are only evidentiary in the determination of the question by the judge; and his decision thereon, in the absence of a special finding of the facts, is not reviewable on appeal.

2. Appeal and Error—Harmless Error—Witnesses—Qualification—Evidence—Courts—Erroneous Opinion.

Where the mental capacity of a witness is the question before the trial judge to determine his eligibility as such, and upon the testimony of a medical expert he has, as a matter of law, erroneously adjudged the witness to be a competent one, this error is cured, or rendered immaterial by his subsequently making the same finding after hearing the testimony of other witnesses, and the testimony of the witness sought to be excluded, which supported his former ruling.

3. Witnesses — Qualification — Courts— Rulings—Evidence—Findings—Presumptions.

Where the trial judge has heard competent evidence sufficient to sustain his ruling, and adjudges that the witness is competent to testify in the action, it will be presumed, on appeal to the Supreme Court, that he has found facts sufficient to sustain his rulings, when it is silent in that respect.

APPEAL by defendant from *Lyon, J.*, at April Term, 1922, of ONSLOW.

Civil action to recover damages for the seduction of the plaintiff. When the plaintiff was called as a witness the defendant objected to her examination on the ground that she was incapable of understanding the obligation of an oath and mentally incapable of testifying to the occurrences set forth in the complaint. His Honor then heard the testimony of Dr. McNairy, an expert in mental diseases, who had treated her in the Caswell Training School, and therefrom found the following as facts:

1. The plaintiff, who was over the age of 21 years at the trial, had been adjudged in a proceeding instituted and conducted before the clerk of the Superior Court of Onslow County to be of unsound mind.

2. She was incapable of any sense of moral obligation and of understanding the nature of an oath.

3. Mental defectives are idiots, imbeciles, or morons, and the plaintiff is a member of the second class, and has a mentality not in excess of a normal child ranging from three to six years of age.

Upon these facts, and what appeared from Dr. McNairy's testimony, his Honor held as a matter of law that the plaintiff was a competent witness, and permitted her to be examined. The defendant excepted.

The plaintiff was then examined, and his Honor, at the conclusion of her evidence, without specifically finding the facts, held upon all the evidence, of course including her own testimony, that she was competent to testify as a witness. The defendant again excepted. The issues were answered in favor of the plaintiff.

Judgment, and appeal by the defendant.

Cowper, Whitaker & Allen, George R. Ward, and Duffy & Day for plaintiff.

Shaw & Jones, Frank Thompson, and McLean, Varser, McLean & Stacy for defendant.

ADAMS, J. The tests that have usually been applied to determine the competency of a person offered as a witness are those of age, mental power, religious belief, and capacity to understand the nature and obligation of an oath. Particularly with reference to the first three of them the decisions have not been uniform. At one time the age of competency was fixed at fourteen, and children over that age were examined as a matter of course; but in some of the earlier decisions it was held that children under nine years of age were incompetent to testify, and that the competency of those between nine and fourteen was dependent upon their understanding and moral sense. With respect to age, it is now generally held that no precise minimum limit can be fixed, and that as to mentality the controlling factor is the strength of the witness's understanding, or the degree of his intelligence. *S. v. Edwards,* 79 N. C., 650; *S. v. Meyer,* 14 A. & E., Anno. Cas., 3, n.

In a number of American cases decided in the first half of the nineteenth century it was held that idiots and insane persons were not competent to be witnesses; but subsequently the courts, "keeping pace with the progress of science" and the demands of a more enlightened period, relaxed the rigor of these decisions and modified the former strictness of the rule. It may be said that the substance of the modern doctrine was adopted in England in 1851, and announced by *Lord Campbell* in *Reg. v. Hill.* There a patient in a lunatic asylum was offered as a witness for the crown to testify on the trial of the defendant, who was prosecuted for homicide. When called and objected to he said, in part, upon examination as to his competency: "I am fully aware I have spirits. . . . I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the

rheumatics; all are now in my body and round my head; they speak to me incessantly, particularly at night. . . . They are speaking to me now; they are not separate from me. . . . They can go in and out through walls and places which I cannot. I go to the grave; they live hereafter. . . . My ability evades me while I am speaking, for the spirit ascends to my head. . . . It is perjury, the breaking of a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn and gave a collected and rational account of a transaction which he said he had witnessed.

Discussing his competency, *Lord Campbell* said: "Various authorities have been referred to which lay down the law that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The just investigation of truth requires such a course as has been pointed out to be pursued. . . . It has been contended that the evidence of every monomaniac must be rejected. But that rule would be found at times very inconvenient for the innocent as well as for the guilty. The proper test must always be, Does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. In a lunatic asylum the patients are often the only witnesses to outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information were not to be heard." 5 Cox Cr. Law Cas., 266. The prevailing doctrine is in accord with this decision, and the principle is generally recognized that a lunatic or a person affected with insanity is competent to be a witness if he has sufficient mind to understand the nature and obligation of an oath and correctly to receive and impart his impressions of the matters which he has seen or heard. *People v. Enright,* 226 Ill., 221; *Coleman v. Com.,* 25 Gratt., 865; 18 A. R., 711; *Worthington v. Mencer,* 17 L. R. A., 407; *S. v. Myers,* 37 L. R. A., 423, and note; *S. v. Pryor,* 46 L. R. A. (N. S.), 1028, and note; *S. v. Simes,* 9 A. & E., Anno. Cas., 1217; *Dis. of Col. v. Armes,* 107 U. S., 519.

But the defendant contends that Pennie Lanier was not influenced by any religious belief, and was not capable of comprehending the solemnity, nature, and purpose of an oath. It is conceded that a witness should be sensible to the obligation of the oath that he assumes, but

apparently the interpretation of the expression has not been uniform. In *Shaw v. Moore,* 49 N. C., 26, *Judge Pearson* said: "The law requires two guaranties of the truth of what a witness is about to state: he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction of his oath. In reference to the first, no question is made; but it is insisted that the religious sanction required is the fear of punishment in a future state of existence.

"This position is not sustained by the reason of the thing, for, if we divest ourselves of the prejudice growing out of preconceived opinions as to what we suppose to be the true teaching of the Bible, it is clear that, in reference to a religious sanction, there is not ground for making a distinction between the fear of punishment by the Supreme Being in this world, and the fear of punishment in the world to come; both are based upon the sense of religion." In *S. v. Pitt,* 166 N. C., 270, two boys, aged respectively eleven and twelve, were challenged on the ground of their incompetency, and upon examination each of them said if he swore to a lie he would be imprisoned—one of them saying, in addition, that he intended to tell the truth, and was going to tell what he knew, and the other, that when he kissed the Book it meant that he would tell the truth. There was no further reference to religious sanction, and the trial judge admitted them as witnesses. On appeal the ruling was sustained, and the *Chief Justice,* citing with approval *Shaw v. Moore,* 49 N. C., 26, said that the finding of the court was conclusive on the question both of the intelligence and of the moral and religious sensibility of the witnesses.

This decision seems to have been based on the principle that where the trial judge, without particularly determining the facts, adjudges a person competent to be a witness, his judgment is not subject to review because it implies a finding of the requisite facts; and by an application of the principle to that case it appeared from the judge's finding that the witnesses had a sufficient comprehension of the obligation of an oath and the way in which they expressed their conception of such obligation was of secondary importance. The decision approves the doctrine that the witness should have due appreciation of a moral duty to tell the truth, and conforms to the general rule that the judgment of the trial judge on the question of the competency of a person who is offered as a witness is a matter of discretion and will not be disturbed on appeal, unless there is an abuse of discretion, or unless the order admitting or rejecting the witness involves the erroneous construction of a legal principle. *S. v. Perry,* 44 N. C., 333; *S. v. Manuel,* 64 N. C., 601; *S. v. Edwards,* 79 N. C., 650; *S. v. Finger,* 131 N. C., 781; *S. v. Pitt,* 166

N. C., 270; *People v. Enright,* Anno. Cas., 1913 E, 328, note; *S. v. Meyer,* 14 Anno. Cas., 7, note.

It is true that the order made by his Honor at the conclusion of Dr. McNairy's testimony involves the construction of a legal principle, and it would demand serious consideration if it were the only order relating to the competency of the plaintiff. But immediately after this order was made the plaintiff was examined as a witness, and after hearing her testimony and considering it in connection with other evidence his Honor, without finding the facts, entered of record a general order adjudging the plaintiff competent to testify, and thus practically reversed and nullified the second finding of facts and so much of the third as may suggest want of capacity from immaturity of age, and brought the case within the general rule stated above, freed from the exceptions. The defendant's assignment of error as to the plaintiff's competency is therefore overruled. The motion for nonsuit was properly dismissed, for the evidence, considered independently of plaintiff's testimony, was sufficient to warrant its submission to the jury. We find no error in the record which entitles the defendant to a new trial.

No error.

J. P. TEMPLE v. THE EADES HAY COMPANY, CITIZENS BANK AND TRUST COMPANY, GARNISHEE.

(Filed 25 October, 1922.)

1. Attachment—Process—Courts—Amendments.

An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff.

2. Attachment—Garnishment—Conflicting Claims—Stakeholder—Parties—Statutes.

Where the funds of a nonresident defendant are attached in the courts of this State in the hands of a local bank, an agency for collection only, and the garnishee bank answers, setting forth this fact and claiming absolute ownership in its forwarding bank, and asks that the latter be made a party to the suit, and, in effect, alleging that it, the garnishee, is a mere stakeholder without interest in the funds attached: *Held,* it is the policy and express purpose of our Code of Procedure that all matters should be settled as far as possible in one and the same action; and the forwarding bank, being a necessary party, the refusal of the court to make it a party was of the substance of the controversy, and constituted reversible error. C. S., 460.

3. Attachment—Garnishment—Stakeholder—Parties—Statutes.

Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. C. S., 826.

4. Same—Bond.

The bond required of an intervener by C. S., 840, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants.

5. Same—Title—Procedure.

Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure.

6. Same—Issues.

The requirement of C. S., 821, that an issue shall be made up and determined by the jury where the garnishee in attachment denies owing the principal defendant, should be construed with C. S., 460, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court.

STACY, J., not sitting.

APPEAL by garnishee from *Cranmer, J.*, at December Term, 1921, of NEW HANOVER.

Civil action to recover of defendant, the Eades Hay Company, $2,125 damage for shortage on shipment of hay sold by said company to plaintiff, said Eades Hay Company, being a nonresident corporation, service of summons was had only by publication. At the instance of plaintiff company, process of attachment was sued out and levied by the sheriff of New Hanover County, or a duly authorized deputy, on certain moneys held by the Citizens Bank and Trust Company of Wilmington, alleged to belong to the principal defendant. The warrant of attachment issuing from the Superior Court was addressed to any constable or other lawful officer of New Hanover County—greeting, and the garnishee, making special appearance for the purpose, moved to discharge the

warrant and dismiss the suit, because same was not addressed to the sheriff of the county. The court, Daniels, J., presiding, allowed an amendment to the process causing same to be addressed to the sheriff, and thereupon overruled the motion, and garnishee excepted. The garnishee then filed an answer duly verified as follows: "The Citizens Bank and Trust Company, garnishee, reserving its rights in the motion heretofore filed, and reserving its exception to the ruling of the court thereon, says that the Eades Hay Company has not forwarded us any drafts for collection, and we have no funds that we are holding for their account. It has the money from five drafts sent to it by the Interstate National Bank of Kansas City, on J. P. Temple, which were paid by him, for $359.35, $310.12, $316.95, $375.35, and for $305.35, respectively; that these drafts were sent to the Citizens Bank and Trust Company by the Interstate National Bank to collect as its agent, and said funds are held subject to the order of the Interstate National Bank, unless this Court order otherwise hereafter."

Subsequently, at December Term, 1921, before his Honor, G. W. Connor, application was made that the Interstate National Bank of Kansas City, referred to in the answer of the garnishee, be made a party and allowed to assert its claim to the debt. The application was denied and the garnishee and the Interstate Bank excepted. Thereupon, on issues submitted, the jury rendered the following verdict:

"1. Is the Citizens Bank and Trust Company, garnishee, indebted to the Eades Hay Company, and, if so, in what amount? Answer: 'Yes, $1,667.12.'

"2. What sum, if any, is the plaintiff entitled to recover of the Eades Hay Company as damages for the breach of contract for the delivery of hay? Answer: '$2,125.'"

Judgment was entered for the damages assessed against the Eades Hay Company, and that the amount of money in the hands of the garnishee be applied to the payment of said judgment to the extent of $1,667.12. Garnishee excepted, and appealed.

J. O. Carr, L. J. Poisson, and J. D. Bellamy & Sons for plaintiff.
Wright & Stevens for garnishee.

HOKE, J. Under the statute applicable, the process of attachment issuing from the Superior Court should be addressed to the sheriff of the county and executed by him or one of his duly authorized deputies. *Carson v. Woodrow,* 160 N. C., 144. It appearing, however, that the writ was in fact executed by a duly authorized deputy of the sheriff, the case is well within the powers of amendment possessed by the court, and which should always be liberally exercised with a view of permitting a

determination of the cause on the real issues involved in the controversy. *Page v. McDonald,* 159 N. C., 38; *Vick v. Flournoy,* 147 N. C., 209. In *Carson v. Woodrow, supra,* a case much relied upon by appellant, the process of attachment issuing from the Superior Court had been executed by a constable, and the Court holding that under the laws applicable, a constable was without power to execute the writ it would seem that an amendment in form of the process could not have cured the defect. As a matter of fact, in that case the question of amendment was not presented. On appellant's second exception, we are of opinion that the Interstate National Bank of Kansas should have been made party defendant, and allowed to assert and maintain its rights to the money in the possession and control of the Citizens Bank and Trust Company and the refusal of the trial court to permit this should be held for reversible error. In various and well considered decisions of this Court on the subject, it is recognized as the policy and expressed purpose of our present system of procedure that all matters in a given controversy should, as far as possible, be settled in one and the same action. *Guthrie v. Durham,* 168 N. C., 573. In furtherance of this position, in C. S., 460, it is provided: "That the court, either between terms or at a regular term, according to the nature of the controversy, may determine any controversy before it when it can be done without prejudice to the rights of others, but when a complete determination cannot be made without the presence of other parties, the court must cause them to be brought in, etc." And in our decisions construing the statute it has been held that the refusal and failure to bring in necessary parties is of the substance and constitutes error. *Guthrie v. Durham, supra; Rollins v. Rollins,* 76 N. C., 264. In addition, the right to interplead in attachment proceedings is recognized and provided for in the laws, C. S., 826, and this, we think, should always be allowed when it is necessary to protect an innocent stakeholder by having conflicting claims to the property or proceeds held by him authoritatively determined before he is required to pay it over to the claimant. Shinn on Attachment, sec. 672 *et seq.* It is contended for appellee that this regulation regarding the right of interpleader in attachment proceedings is referred to section 840, in claim and delivery proceedings, and when an affidavit of claim or title, and also a bond, is required of the intervener. But this requirement as to bond is restricted to cases where the intervener is seeking to take the property from the custody of the court, and on the affidavit of claim or title it already appears, from the garnishee's answer, that the Interstate Bank claims the property, and, in any event, this as a mere matter of procedure can now be cured by an affidavit of title to be made by the claimant. We are not unmindful of section 821 of the article on Attachment Proceedings, to the effect that where a garnishee denies

owing the principal defendant, an issue shall be made up and determined by the jury, but this must be construed in connection with C. S., 460, heretofore cited, and which requires that all persons necessary to a full determination of the controversy must be made a party. And on the facts of the present record, both right and justice require that the Interstate Bank be made a party, in order to protect the garnishee before payment is required, by direct service of process if found within the jurisdiction, or by publication, which, on being properly made, would bind for all purposes of determining the right to the funds in the custody of the court. *Vick v. Flournoy,* 147 N. C., 209, and authorities cited. We are confirmed in this view of the case by the facts appearing on the record, that on denial of the bank's application to become a party, it has instituted an independent suit against the Citizens Bank and Trust Company, asserting its title to the money, and unless the course suggested is pursued, it may come about that in the same court, in a controversy involving claims to the same funds, there may be a judgment against a mere stakeholder, innocent of any wrong, compelling him to pay the money held by him to the plaintiff in the present suit, and to the Interstate Bank in its independent suit for the same money against the garnishee. Such a result may not be permitted in this jurisdiction and under our system of procedure, and this will be certified that the verdict and judgment in the case be set aside, and the Interstate Bank be made party and allowed to maintain its claim as it may be advised.

New trial.

STACY, J., not sitting.

INTERSTATE NATIONAL BANK OF KANSAS CITY v. CITIZENS BANK AND TRUST COMPANY.

(Filed 25 October, 1922.)

Actions—Consolidation—Appeal and Error—New Trial—Stakeholder—Courts.

Where two actions have been brought in the same court, involving the payment of the funds by one of the parties to the other parties claiming it, who himself claims no interest in the disposition of the funds, it is proper for the trial judge, when the trial of one of them has been had and appeal therefrom perfected, to deny a motion for consolidation; but where a new trial on appeal has been awarded in one of them, and the other remains pending in the Supreme Court, this Court will dismiss this second appeal, so that the actions may be joined in the Superior Court for the protection of the mere stakeholder, when this appears to be necessary.

STACY, J., not sitting.

BANK *v.* BANK.

APPEAL by defendant from *Devin, J.*, at September Term, 1922, of NEW HANOVER.

Civil action, heard on motion to consolidate the present action with another now appearing on the docket of the Superior Court of New Hanover County, in which J. P. Temple is plaintiff and the Eades Hay Company defendant. The present is a suit by plaintiff against defendant to recover certain moneys collected by defendant bank on drafts sent to said defendant by plaintiff bank. The suit of *Temple v. Eades Hay Co.* is one to recover damages for breach of contract in sale of hay by defendant to said Temple, and in which said suit this same money collected by defendant bank was attached as the property of the Eades Hay Company. In the *Temple case* there has been a verdict and judgment for plaintiff, and appropriating the money attached in satisfaction of plaintiff's recovery. Appeal taken in that case and apparently perfected. Motion to consolidate denied, and defendant bank excepted and appealed.

John D. Bellamy & Sons and George H. Howell for plaintiff.
Wright & Stevens and C. D. Weeks for defendant.

HOKE, J. There is doubt if any order of consolidation should be made with the suit of *Temple v. Hay Co., ante,* 239, after verdict and judgment in the latter case. As now advised, we concur in his Honor's view, that an order of consolidation could not be made with a cause which was in the Supreme Court by a perfected appeal, and must hold, therefore, that the present appeal be dismissed without prejudice. Since appeal taken, it appearing, however, that a new trial has been ordered in the suit of *Temple v. Hay Co., supra,* we consider it right to say that there should be a consolidation of these two suits, to the end that the court thus acquiring full jurisdiction, both of the *res* and person of the claimant, may be able to dispose of the entire controversy and enter judgment awarding this money to the rightful owner, and thus protect defendant bank, which is without fault in the premises, from a double liability for the same fund.

Appeal dismissed.

STACY, J., not sitting.

OSCAR GALLOWAY ET AL. V. BOARD OF EDUCATION OF BRUNSWICK COUNTY ET AL.

(Filed 25 October, 1922.)

1. Constitutional Law—Racial Discrimination.

Held, on this appeal, there was no evidence to sustain an allegation that the constitutional inhibition against race discrimination in the distribution and use of the public school funds had been violated.

2. Constitutional Law—School Districts—Local Legislation—Statutes.

Since the enforcement of the amendment to our Constitution, Art. II, sec. 29, a special act of the Legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void.

3. Taxation — School Districts — Statutes—Limitation of Powers—Void Levy.

The power of the county board of education to levy a tax under an election called by the county commissioners, for the purpose of erecting, enlarging, altering, and equipping buildings, etc., for school purposes, under Public-Local Laws of 1920, ch. 87, sec. 1, Extra Session, is expressly therein limited, "unless or until" the qualified electors have voted for the proposition; and a levy of such tax contrary to this restriction as to the time thereof is void under the express statutory inhibition.

4. Same—Void Levies—Elections—Ratification.

Where the levy of a tax by a county for school purposes is originally invalid because in violation of an express provision of the statute under which the levy is proposed to be made, requiring that the levy shall not be made unless and until the approval of the voters at an election held, etc., and which has never been modified or changed, the subsequent approval thereof by the voters cannot have the effect of relating back and curing the defect, or render the levy a valid one.

5. Injunction—Taxation—Acts Accomplished—Statutes—Remedy of Taxpayer.

Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to this suit. *Semble*, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. C. S., 7979.

APPEAL by plaintiffs from *Lyon, J.*, at February Term, 1922, of PENDER.

Civil action, heard on return to preliminary restraining order.

The action is to obtain an injunction against collecting a tax for school building purposes in the Southport High School District. From the facts in evidence, it appeared that under a special act of Legislature, Pr. St., ch. 251, Laws 1921, an election was held in said alleged dis-

trict in June, 1921, on a proposition for a bond issue for school building purposes, after a new registration was had pursuant to the provisions of the act, and the measure was approved by a large majority of the voters. There being some question as to the validity of the special legislation, and with a view and purpose of securing a tax levy for building purposes for the year 1921, the commissioners ordered another election on the subject under ch. 87, Public-Local Laws, Extra Session, 1920. An election was held on 2 November, 1921, and the measure was again approved by a large majority of the voters. That the election was ordered on 6 September, 1921, by board of county commissioners, the tax was levied on 8 September, a new registration was held as provided by the said act, chapter 87, and the election, as stated, being on 2 November. Present action was instituted in March, 1922, by plaintiff citizens and taxpayers of the district to restrain collecting a tax on ground of levy was illegal, being made prior to election. Second, that there was an unlawful discrimination against colored race in the proposed bond issue and disposition of the proceeds. At the hearing, and before us, the second ground of objection was abandoned as not sufficiently sustained by the facts pertinent, and considering the question on the first ground, as stated, the court found certain relevant facts, and entered judgment as follows:

"1. That the taxes complained of were levied by the board of commissioners on 8 September, 1921, at the time of levying the other taxes for 1921.

"2. That the election was ordered on 6 September, 1921, and regularly held on 2 November, 1921.

"3. That the tax books for the collection of said tax and the general taxes were placed in the hands of the sheriff of said county for collection on 5 December, 1921.

"4. Said election, held on 2 November, 1921, was under and by virtue of ch. 87, Public Laws 1920, Extra Session.

"It is considered and adjudged that the restraining order and injunction heretofore granted in this action be and the same is now dissolved and vacated. And it is further considered and adjudged that the sheriff shall proceed to collect said tax."

It was subsequently made to appear of record that after the judgment dissolving the restraining order, the tax was collected by the sheriff, settlement had with the county commissioners for all the taxes collected by that officer for the years 1920-21, including the tax complained of. Said tax was distributed to the different funds for which they were collected, etc.

John D. Bellamy & Sons for plaintiffs.

J. W. Ruark and C. Ed. Taylor for defendants.

HOKE, J. The decisions of this court have been very insistent in upholding the constitutional guarantee against race discrimination in the distribution and use of the public school funds, and it is gratifying that in the present case there were no facts in evidence to sustain such an allegation. *Williams v. Bradford,* 158 N. C., 36; *Bonitz v. School Trustees,* 154 N. C., 375; *Lowery v. School Trustees,* 140 N. C., 33; *Riggsbee v. Durham,* 94 N. C., 800; *Puitt v. Comrs.,* 94 N. C., 709. On plaintiff's other ground of impeachment, and as we understand the record, it appears that the first election in these proceedings was under Private Laws 1921, ch. 251, and this being a special act attempting to establish or change the lines of a school district, is in violation of the recent amendments to our Constitution appearing chiefly in Art. II, sec. 29, and the act itself, and any attempted proceedings under it, are null and void. *Sechrist v. Comrs.,* 181 N. C., 511; *Trustees v. Trust Co.,* 181 N. C., 306; *Robinson v. Comrs.,* 182 N. C., 591; *Woosley v. Comrs.,* 182 N. C., 433. As to the validity of the tax levy under and by virtue of the second election, that as his Honor finds and the evidence shows, was held under Public-Local Laws of 1920, ch. 87, Extra Session, and it appearing that the levy of this tax was made on 8 September, the last month in which such a levy could be made under the revenue laws of 1921, and the election purporting to ratify the levy was not held until 2 November following. Being held under the statutes referred to, the limitations contained therein should ordinarily be allowed to prevail, and on perusal of first section of chapter 87, it appears that while a bond issue and a tax levied therefor are authorized "for the purpose of erecting, enlarging, altering, and equipping school buildings and acquiring land for school buildings of the school district, or for any or more of *said purposes,*" said section also provides: "That no bonds shall be issued under this act, nor any special tax levied, unless and until the question of such issue and levy shall have been submitted to the qualified voters of such school district at a special election to have been held for the purpose, and a majority of the qualified electors shall vote in favor of issuing said bonds and levying said tax." In *Mann v. Allen,* 171 N. C., 219, the Court has held that "unless a statute from its language, purpose, and context clearly requires the contrary, the term 'levy,' when applied to question of taxation of the kind signified, the levying or imposition of the tax by legislation or under legislative sanction," and the statute therefor in terms too plain to admit of construction, prohibits a tax levy for the designated purpose, "*unless* and until" the qualified electors have voted for the proposition. True, we have held that an act which could have been originally authorized may be ratified, and that the principal, in proper instances, applies both to legislative bodies and the electorate as well. *Board of Education v. Comrs.,* 183 N. C.,

300; *Hammond v. McRae,* 182 N. C., 747. But the position, in our opinion, has no application to the facts presented here, where the only statute under which the electorate acted, and which expresses the lawful limit to its powers, forbids that any levy be made until the electors of the district shall have approved the same by their vote. While we are thus constrained to differ with his Honor as to the validity of the tax levy, we are of opinion that his order dissolving the injunction should not be now disturbed for the reason that it further appears by affidavit received as pertinent to the inquiry and without objection noted that the tax in question had been collected, accounted for on settlement with the municipal authorities, and paid over to persons not parties to the record, and in such case our decisions hold that the appeal should be dismissed, for, on the facts as presented, relief by injunction is no longer available to the parties. *Griffith v. Board of Education,* 183 N. C., 408; *Allen v. Reidsville,* 178 N. C., 513; *Sasser v. Harriss,* 178 N. C., 322; *Moore v. Monument Co.,* 166 N. C., 211; *Pickler v. Board of Education,* 149 N. C., 221. It would seem that in a case like the present, and assuming that the facts contained in the additional affidavit are accepted or established at the hearing, the only remedy for an injured taxpayer is to pay the illegal tax under protest and sue to recover the same as provided in C. S., 7979, a relief, however, that is not within the scope and purview of the present action.

For the reasons heretofore given, the appeal is dismissed at the appellees' cost.

Dismissed.

THOMAS BOWEN, ADMINISTRATOR OF ELIZA BOWEN, v. M. F. SCHNIBBEN.

(Filed 25 October, 1922.)

1. Instructions—Prejudicial Omissions—Appeal and Error—Statutes.

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it will be held for reversible error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. C. S., 564.

2. Same—Prayer for Instruction.

Where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent on the trial judge, in his charge to the jury, to apply to the various aspects of the statute such principles of the law of negligence as may arise under the evidence in the case.

3. Same—Negligence—Automobiles.

An instruction in an action to recover damages for the alleged negligence of the defendant in running upon and killing the plaintiff's intestate while a pedestrian upon the highway that fails to charge specifically as to the speed, the lookout, the signal, or control of the machine, or the other requirements of the driver of the automobile prescribed by the statutes, C. S., 2116, 2118, and arising from the evidence in the case, is not cured by a general charge upon the rule of the prudent man, as to speed, or lookout, or the management of the car; and the omissions to charge specifically upon the statutory obligations is reversible error, without the tender of a prayer for more specific instructions by the plaintiff.

APPEAL by plaintiff from *Bond, J.*, at May Term, 1922, of NEW HANOVER.

Civil action to recover damages for the intestate's death, alleged to have been caused by the negligence of the defendant while operating an automobile on a public highway. The first issue, Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? was answered in the negative. Judgment, and appeal by plaintiff.

John D. Bellamy & Sons for plaintiff.
Herbert McClammy, J. C. King, and K. O. Burgwin for defendant.

ADAMS, J. On 22 July, 1920, between 3 and 4 o'clock in the afternoon, James Ballard and Eliza Bowen, the plaintiff's intestate, were walking in or near the village of Villa View along the principal thoroughfare which extends from Wilmington to Wrightsville. At about 3:30 the defendant, driving a Chalmers car, left Wilmington in company with his father to call on the operator of the substation at Wrightsville. The defendant, the intestate, and Ballard were going in the same direction. The speed at which the car was moving was variously estimated by the witnesses. One witness said that before it came in sight he heard "a rumbling and a roar" that sounded like an aeroplane. Another likened the speed to that of flying. There was evidence tending to show that every time they struck a "bump" in the road the wheels of the car jumped three or four inches, and that the speed was not less than fifty miles an hour. Norma Craft, 11 years of age, testified that she was going toward Wilmington on a bicycle along the right side of the road, "almost in the grass and looking ahead," when the automobile struck her rear wheel and destroyed it. The defendant knew nothing of this collision at the time, but learned of it afterward. Immediately after striking the bicycle, the machine swerved to the right—two wheels going off the hard surface into the sand—and got beyond the defendant's

control. The defendant testified that he was running not more than fifteen miles an hour, and that he turned to the right to avoid a collision with Norma Craft, who was going across the road, and in doing so lost control of his steering wheel and found himself unable to get back into the road as quickly as he thought he could. At this time Ballard and the deceased were some distance in advance. The defendant said that they were on the hard road, and Ballard said they were off the road and in the sand; at any rate, they were at the right side of the highway. There was evidence tending to show that the klaxon was not sounded and no signal of approach was given. With slight abatement of speed, if any at all, the automobile struck both Ballard and the deceased. Ballard was thrown over the top of the car, and the deceased, hurled twenty feet in the air, fell on the radiator. Within two hours she died; Ballard survived. The defendant did not deny that the death of the intestate was caused by the collision.

This outline of the evidence will serve to explain the cause of action and the ground of the plaintiff's exception. After stating the contentions of the parties, his Honor instructed the jury on the first issue as follows: "Was this defendant operating his machine, as to speed and as to lookout, and in all other respects, in such a way as a person of reasonable care and prudence, considering the deadly nature of an automobile, would have done under the same circumstance? If you say you find he was, and that there was no negligence on his part, your answer to the first issue should be 'No.'"

To this instruction the plaintiff excepted, and assigned as error not so much its inaccuracy as its limited or restricted scope. In C. S., 2116, it is provided that upon approaching a pedestrian who is upon the traveled part of any highway, . . . every person operating a motor vehicle shall slow down and give a timely signal with his bell, horn, or other device for signalling; and section 2618, not including the recent amendment, is as follows: "No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: *Provided,* that a rate of speed in excess of eighteen miles per hour in the residence portion of any city, town, or village, and a rate of speed in excess of ten miles per hour in the business portion of any city, town, or village, and a rate of speed in excess of twenty-five miles per hour on any public highway outside of the corporate limits of any incorporated city or town, shall be deemed a violation of this section: *Provided further,* that no person shall operate upon the public highways inside the corporate limits of any incorporated city or town of this State a motor vehicle with muffler cut-out open."

In giving a charge to the petit jury, the judge shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon. C. S., 564. It is true, under the provisions of this statute, that when a judge has charged generally on the essential features of a case, a litigant who desires a more direct application of the law to some particular phase of the evidence should bring it to the attention of the court by prayers for instructions, but where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by the common law. *Orvis v. Holt,* 173 N. C., 233; *Matthews v. Myatt,* 172 N. C., 232. We think the court failed to comply with this requirement. When the judge so charges as to eliminate from the case a substantial part of it, which would necessarily prejudice one of the parties, it will be reversible error. *Matthews v. Myatt, supra.* True, the jury were further instructed that if the defendant did not observe the rule of the prudent man as to speed, or lookout, or the management of the car, the issue should be answered in favor of the plaintiff, but they were not specifically instructed as to the law of negligence with reference to the speed, the lookout, the signal, or the control of the machine. If the defendant exceeded the legal rate of speed, or failed to slow down or give a timely signal when approaching the deceased, if she was on the traveled part of the highway, or operated his car recklessly or at a greater rate of speed than was reasonable and proper under the circumstances, or in such way as to endanger life, limb, or property, he was negligent, and if his negligence was the proximate cause of the intestate's death, the answer to the first issue should be in the affirmative. Of course, in connection with the plaintiff's contentions as to the alleged breach of the statute those of the defendant should receive due consideration.

We are of opinion that the controversy should be submitted to another jury with more specific instructions on the question of negligence.

New trial.

J. P. TEMPLE v. H. LABERGE.

(Filed 25 October, 1922.)

1. **Courts—Attachments—Amendments of Warrant—Process—Service—Statutes.**

A warrant of attachment served by the sheriff of the county and addressed to "any constable or other lawful officer of the county," may be allowed by the court to be amended to conform to the statutory requirement. C. S., 547.

2. **Interpleader—Title—Parties—Merits—Right of Interpleader—Appeal and Error.**

An intervener, claiming title to the funds in litigation, is only interested in the question of title as it affects his claim, and cannot be prejudiced upon the refusal of the court to permit him to interfere in the matter in litigation as it affects only the rights of the original parties.

3. **Banks and Banking—Interpleader—Drafts—Burden of Proof—Agency for Collection—Questions of Law—Trials.**

Where the proceeds of a draft have been attached in the hands of a local bank, a forwarding bank that intervenes and claims independent title has the burden of proof of its right to the fund; and where the draft has not thereon been endorsed to it, and there is no evidence in its behalf to show that it had not reserved the right to charge it against the drawer's account, if returned unpaid, but only a conclusion of law to that effect testified to by an officer of the intervener, a judgment against it by the trial judge, as a matter of law, will be upheld on appeal, upon the principle that the intervening bank has not disproved it was an agency for collection only.

STACY, J., did not sit.

APPEAL by intervener and garnishees from *Cranmer, J.*, at April Term, 1922, of NEW HANOVER.

The facts are stated in the opinion.

J. O. Carr and L. J. Poisson for plaintiff.
Wright & Stevens for intervener and garnishee.

ADAMS, J. The plaintiff prosecutes this action to recover damages for breach of contract. He alleges that he and the defendant entered into a contract by the terms of which the defendant was to sell at sundry dates certain cars of hay at an agreed price; that the defendant knew that the purchase was made with a view to a resale of the hay at a profit; that the defendant shipped only a part of the hay ordered by the plaintiff, and thereby failed to comply with the terms of his contract, in consequence of which the plaintiff suffered loss. The defendant, who was a resident of the Dominion of Canada, filed no answer. Service of

process was made on him by publication and a warrant was issued under which certain funds in possession of the Murchison National Bank and the Citizens Bank and Trust Company were attached. These funds were alleged to be the property of the defendant. Each of the banks filed an answer denying that it held any funds of the defendant, and alleged that the money referred to was subject to the order of La Banque Nationale of Valleyfield, Province of Quebec. This bank intervened in the cause, and claimed the funds referred to, and upon the trial introduced evidence in support of its claim. At the close of the evidence, his Honor held that La Banque Nationale was not entitled to recover the funds in question as intervener, and submitted an issue to the jury in response to which they found the defendant indebted to the plaintiff in the sum of $4,572.25. Judgment was thereupon rendered for the plaintiff in the sum of $2,836.81, the amount of the funds attached, and the intervener and the garnishee appealed.

The garnishee moved to dismiss the action on the ground that the warrant of attachment, which was issued from the Superior Court, was addressed to "any constable or other lawful officer of said county." In *Carson v. Woodrow,* 160 N. C., 144, it is held that the remedy by attachment is special and extraordinary, and that the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms. There the warrant of attachment was served by a constable of one of the townships of Edgecombe County, and the Court concluded that the writ of attachment and the seizure of the property under it were invalid. But in the case at bar the warrant was served by the sheriff, and on motion the court permitted an amendment, changing the address of the warrant to "the sheriff or other lawful officer of New Hanover County." The service having been made by the proper officer, and the court having permitted the amendment, the warrant of attachment and the seizure of the property thereunder are not invalid merely because the warrant was originally addressed to "any constable" and not to the sheriff. C. S., 547; *Page v. McDonald,* 159 N. C., 40.

We see no just ground for the intervener's exception to its exclusion from participating in the trial on the merits of the plaintiff's claim against the defendant. If the intervening bank was not the owner of the funds in question, upon what principle should it be permitted to interfere with litigation between the original parties to the suit? The only issue in which it had any legal interest was that of title to the funds attached. In *Dawson v. Thigpen,* 137 N. C., 468, it is said: "It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not

affect such titles. *McLean v. Douglass,* 28 N. C., 233. He does not, speaking with accuracy, become a party to the action in the same sense and with the same status as the original parties, or those made so pending the action either by the court *ex mero motu* or upon application." *Bank v. Furniture Co.,* 120 N. C., 477; *Mfg. Co. v. Tierney,* 133 N. C., 638; *Blair v. Puryear,* 87 N. C., 102; *Cotton Mills v. Weil,* 129 N. C., 455.

We are likewise of the opinion that his Honor was correct in holding upon all the evidence that the intervener was not entitled to recover the funds in controversy. The drafts were not endorsed, and the intervening bank carried the burden of showing by the greater weight of the evidence that it had title to the attached property.

The manager testified, it is true, that La Banque Nationale is the sole owner of the drafts, and if they were paid the amount would go to the bank and not to the defendant; but the first statement is in the nature of a legal conclusion, and evidently the defendant may be charged back with the amount of the drafts, although the money attached is not recovered. Indeed, the evidence in its entirety seems to be susceptible of only one construction—that is, that the drafts were discounted in the regular course of business for the benefit of the defendant with the right to charge back to him any amount not recovered by the discounting bank. There is no evidence that the defendant was to be held liable by reason of his indorsement of the drafts, for they were not indorsed. The principle applicable is stated as follows: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the indorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the indorsement, the bank is an agent for collection and not a purchaser. *Packing Co. v. Davis,* 118 N. C., 548; *Cotton Mills v. Weil,* 129 N. C., 452; *Davis v. Lumber Co.,* 130 N. C., 176, and *Bank v. Exum,* 163 N. C., 202." *Worth Co. v. Feed Co.,* 172 N. C., 342.

We find no error that entitles the intervening bank or the garnishee to a new trial.

No error.

STACY, J., not sitting.

MANGUS OUTLAW v. N. B. OUTLAW, LLOYD OUTLAW, AND MRS. EVA HOUSE.

(Filed 25 October, 1922.)

1. Parties—Tenants in Common—Voluntary Partition—Purchasers for Value—Owelty.

Tenants in common made a voluntary division of their lands among themselves by metes and bounds, and in their mutual conveyances specified the number of acres of each division. There was nothing in the conveyances providing a payment of owelty to any one receiving a tract of less value. The plaintiff introduced evidence tending to show mistake by the surveyor and the mutual mistake of the parties whereby he had received an appreciably less number of acres than called for in his deed, amounting to a considerable decrease in value. There was evidence that one of the defendants had sold his tract to an innocent purchaser, for value and without notice of the plaintiff's claim of equitable interference: *Held*, such purchaser is a proper if not a necessary party in order to clear the title to the lands. The legal and equitable principles relating to owelty, under the circumstances of this case, discussed by WALKER, J.

2. Judgments—Appeal and Error—Tenants in Common—Owelty—Parties.

Under the facts of this case, it appearing that a personal judgment was properly entered against the defendants to equalize in value the lands voluntarily partitioned among themselves and the plaintiff as tenants in common, for mutual mistake, but erroneously allowed a charge or lien for owelty against the tracts of greater value, where a proper or necessary party had not been brought in, the judgment, on appeal, is accordingly modified that such party be made in the Superior Court, or the matter proceeded with by independent action, as the parties may be advised.

3. Tenants in Common—Owelty.

Owelty of partition, when allowable, is a sum paid or secured, in case of partition in unequal portions, by him who received the larger and more valuable portion, to him who has received the less, in order to equalize values of the tracts apportioned among tenants in common of the lands in question.

APPEAL by defendant N. B. Outlaw from *Ferguson, J.*, at March Special Term, 1922, of LENOIR.

Action to recover a sum of money as owelty, for the purpose of equalizing a partition of lands among tenants in common, and to have the said sum made a charge on the property from which it is alleged to be due.

1. John E. Outlaw owned the land, situated in Trent Township, and adjoining the lands of G. W. Rouse and others, and at his death it descended to his three brothers as his only heirs at law, namely, N. B. Outlaw, James A. Outlaw (the father of defendants, Lloyd Outlaw and Mrs. Eva Rouse), and the plaintiff Mangus Outlaw.

2. That the tenants in common executed to each other deeds for their several portions of the land, the deed of N. B. Outlaw and James A. Outlaw to the plaintiff reciting that the tract described in it contained 160 acres, which were otherwise described merely by metes and bounds, the deed of plaintiff and James A. Outlaw to N. B. Outlaw reciting that the said tract of land contained 150 acres, and the deed from plaintiff and his brother N. B. Outlaw recited that the tract therein described contained 130 acres, all the tracts being otherwise described by metes and bounds.

3. That by mistake of the surveyor and the mutual mistake of the parties, the tract conveyed to plaintiff for his share contained 111 71/100 acres instead of 160 acres. That plaintiff, on 14 December, 1918, conveyed his tract of land to one K. E. Sutton, who contracted with the Atlantic Coast Realty Company to sell the same for him, K. E. Sutton, and when it was being surveyed for that purpose the mistake as to the acreage was first discovered, as above set forth.

4. When the mistake was thus revealed, it was agreed between plaintiff and E. E. Sutton to rescind their transaction, the plaintiff surrendering all papers or liens taken by him from Sutton for the balance of the purchase money due to the plaintiff, and the latter paying back to Sutton the part of the purchase money he had already received.

5. Certain allegations appear in the complaint, which, with the prayer for judgment, are as follows: that the said 48.29 acres of land, the deficiency recited as aforesaid, is reasonably worth the sum of $3,138.85, one-half of which amount plaintiff is entitled to recover from the defendant N. B. Outlaw, and the other one-half thereof from the defendants Lloyd Outlaw and Mrs. Eva Rouse. That the defendant Lloyd Outlaw has, pending this action, conveyed his interest in said lands to his sister, the defendant, Mrs. Eva Rouse, who now claims title to the entire tract, so quitclaimed as aforesaid to her father, the said James A. Outlaw, deceased. That the defendant N. B. Outlaw, prior to the institution of this action, conveyed the share of said land so conveyed to him as aforesaid to his son, N. W. Outlaw. Wherefore, the plaintiff demands judgment: (1) That the portion of the lands so quitclaimed and conveyed as hereinbefore recited to James A. Outlaw, deceased, be charged with the payment of one-third of the value of the deficiency hereinbefore recited, that is, one-third of the value of 48.29 acres of land, that is, with the amount of $1,046.28, and that said amount be declared a lien thereon. (2) That the share quitclaimed and conveyed to N. B. Outlaw be charged with the payment of one-third of the value of the deficiency hereinbefore recited, that is, one-third of the value of 48.29 acres of land, that is, with the amount of $1,046.28, which amount be declared a lien thereon. (3) For judgment against the defendant N. B. Outlaw

for $1,046.28, the value of one-third of said 48.29 acres, the deficiency hereinbefore recited, upon the payment of which amount by said N. B. Outlaw the lien against the share so quitclaimed and conveyed to him to be discharged.

6. An answer was filed by defendants, and issues made up, upon which the jury returned the following verdict:

"(1) Did the plaintiff accept the deed for the portion of land conveyed to him and the money paid to him by reason of a mutual mistake between himself, N. B. Outlaw, and J. A. Outlaw, deceased, as alleged? Answer: 'Yes.'

"(2) If so, what sum is the plaintiff entitled to recover of the defendant N. B. Outlaw? Answer: '$680.'

"(3) If so, what sum is the plaintiff entitled to recover of the defendant, Mrs. Eva Rouse? Answer: '$108.'"

7. Judgment was entered upon the verdict for the sums found to be due, and they were severally charged as liens upon the two shares, that allotted to N. B. Outlaw and the share allotted to Mrs. Eva Rouse, respectively, for the sums found to be due by each of them.

The defendant N. B. Outlaw assigned the following errors:

(1) To so much of the judgment as declares that the share of land belonging to N. B. Outlaw was subject to a lien in favor of the plaintiff for the payment of $680, with interest.

(2) For that said attempted lien declared by judgment could in no view bind any one except N. B. Outlaw, and could not bind purchasers.

He thereupon appealed from the judgment.

Rouse & Rouse for plaintiff.
Hood & Hood and Cowper, Whitaker & Allen for defendants.

WALKER, J. The contention of the plaintiff is that while the partition was accomplished by the consent and agreement of the parties, and there is no provision therein for any charge for owelty or equality of division, such a stipulation or understanding is implied from the very nature of the transaction, it being a proceeding for partition, in which it is generally, if not universally, the rule to charge the larger or more valuable share with a sum to be paid to the one of less value, in order to effect an equal or equitable partition of the land. It has been said that owelty of partition is a sum paid or secured, in the case of partition in unequal proportions, by him who has received the larger and more valuable portion to him who has received the less, for the purpose of equalizing the portions. The power of awarding owelty of partition formerly rested in the court of chancery, and a court of law could not award it in a case of compulsory partition by writ. 21 A. & E. (2 ed.),

p. 1179. *Justice Hall* said for this Court: "I think the lands on which such sums are charged are not only securities for the moneys so charged, but are themselves the debtors. This appears to be just and fit, in a case where partition is made of lands between persons possessed of no other property. The law cannot contemplate the injustice of taking property from one person and giving it to another, without an equivalent, or a sufficient security for it." *Wynne v. Tunstall,* 16 N. C., 28. There is no difficulty where the partition is a compulsory or judicial one, for in that case there is express statutory authority for the more valuable shares to be charged with sums to be paid to those of inferior value for the purpose of owelty or equality of division. C. S., 3222. But here the partition was made under an agreement between the cotenants, and the statute has no application, as the case is not within its terms. There is no provision in the agreement itself for a charge of owelty. Some courts intimate that perhaps it may be made in the absence of such an express stipulation. *Long v. Long,* 41 Pa. (1 Watts), at 269. Nor is there any trouble in deciding such a question where the parties are proceeding in equity to effect a partition of their lands held in common. "In regard to partitions, there is also another distinct ground upon which the jurisdiction of courts of equity is maintainable, as it constitutes a part of its appropriate and peculiar remedial justice. It is that courts of equity are not restrained, as courts of law are, to a mere partition or allotment of the lands and other real estate between the parties according to their respective interests in the same, and having a regard to the true value thereof. But courts of equity may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality. This a court of common law is not at liberty to do; for when a partition is awarded by such a court, the exigency of the writ is that the sheriff do cause, by a jury of twelve men, the partition to be made of the premises between the parties, regard being had to the true value thereof, without any authority to make any compensation for any inequality in any other manner." 1 Story Eq. Jur. (13 ed.), sec. 654, p. 661, etc.

But where there is an agreement for partition, that is, a voluntary proceeding, some question may be raised as to whether a charge for owelty in partition can be made without being sanctioned by the parties in their agreement, and about this there seems to be some discordance in the authorities. Some courts hold that there can be, for they treat the partition as in effect a sale of land and the charge of owelty as purchase money, and allow the charge as being in the nature of a vendor's lien, which has not been adopted in this State (*Womble v.*

Battle, 38 N. C., 182), or as an extension of that doctrine. We have not been able to find any case decided by this Court precisely on the question here involved, nor were we cited to any such case. The plaintiff in his brief offered us no authority for his position that he is entitled to have the amount due to him charged upon the land, from which it is due for owelty, and we imagine there was none to be found, else his counsel, by his usual and great diligence, would have given us the benefit of it. But however that may be, the law may still be with him, but we would not decide the question at this time, as there is one party, at least, who is vitally interested in such a decision, and who is not a party to this action, and that is N. W. Outlaw, the vendee of N. B. Outlaw. It is alleged in the complaint, and so appears to be, that before this suit was commenced, N. B. Outlaw sold and conveyed his share of the land as tenant in common to N. W. Outlaw, and as plaintiff's principal if not his only equity is founded upon a mistake discovered in the acreage of the plaintiff's share, it may be that N. W. Outlaw purchased the land for value and without notice of the alleged equity, and is entitled to take and keep his land altogether discharged of it. There is, at least, some allegation, if not proof, that he is a purchaser of that kind. This Court would not proceed to adjudge as to the rights of such a purchaser without having him a party to the record, so that all persons interested in this share of the land may be bound by the decree and thereby clear the title. He would be a proper party if not a necessary one.

We will not, therefore, decide as to the charge or lien upon the share for owelty, or upon the other questions that may be involved, but modify the judgment so as to let it stand, as to the personal obligation of the defendant N. B. Outlaw, for the amount allowed as owelty because of the surveyor's mistake as to the acreage (*Henofer v. Realty Co.,* 178 N. C., 584), and vacate it as to the charge upon the land for equality of division until N. W. Outlaw is either brought into this suit as a party or until by a separate action the share of N. B. Outlaw, purchased by him, is properly charged with the payment of the money, if liable for it. If N. W. Outlaw were a party, the case would present a most interesting question, which should be determined only upon the most careful and fullest consideration.

Costs of this appeal to be paid by the plaintiff, there being really no contest as to the debt, but only as to the lien.

Modified and affirmed.

DAILEY MOTOR COMPANY, INC., ET AL. v. CHARLES H. REAVES, BEAULAH REAVES, AND SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, INC.

(Filed 25 October, 1922.)

1. Courts—Jurisdiction—Statutes—Demurrer—Special Appearance—Plea to Merits of Action—Waiver—Judgments.

Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject matter, it is to be taken as a general appearance as to the merits, waiving the objection as to proper service, and he will be bound by the adverse judgment of the court having jurisdiction over the subject-matter of the action. C. S., 511 (1).

2. Same.

The intent of the nonresident defendant to enter a special appearance and demur to the jurisdiction of the court upon the ground of insufficient service of summons on him, is ineffectual when it appears that he further denies in his demurrer the jurisdiction of the court over the subject-matter of the action, and thus goes to the merits of the controversy.

3. Appeal and Error—Courts—Jurisdiction—Modification of Judgment—Pleadings.

Where the Superior Court judge has properly overruled the defendant's demurrer to the court's jurisdiction, and has omitted from his judgment an order allowing the defendant to plead over, the Supreme Court, on appeal, will modify the judgment to the end that the Superior Court judge may supply this omission with the proper order.

APPEAL by defendant from *Devin, J.*, at April Term, 1922, of WAKE.

E. J. Wellons for plaintiff.
N. Y. Gulley for defendants.

WALKER, J. This is an action upon a note for $1,500, given as the price of an automobile, possession of which it is alleged was obtained by false and fraudulent representations of Charles H. Reaves, one of the defendants. It is alleged that after getting possession of the car at Graham, in this State, the defendants left the State, taking the automobile with them, and changed their residence to Roanoke, Va., where they now are and have been ever since. They have now no property in this State, and there has been no personal service of process upon them, or either of them, and no attachment of their property, for they had none here, and, of course, no publication for them. The defendant demurred, under C. S., 511, subsec. 1, because it appeared that the court

had no jurisdiction of the persons of the defendants, and further, because the court has not jurisdiction of the subject-matter.

It is said in *Ogdensburg & R. R. Co. v. Vermont R. R. Co.,* 16 Abbott's Practice (N. Y.), 249, at p. 254: "It was urged that by interposing their demurrer defendants had conferred on the court jurisdiction of their persons, and this would be true had the demurrers been upon any other ground; but being solely on the ground that the court had not jurisdiction of their persons, and that they made a qualified appearance for the purpose of testing that question, and for no other purpose, it had no such effect. A defendant in an action has the right to appear specially for the purpose of raising the question of jurisdiction, and by so doing does not confer jurisdiction generally in the cause. *Allen v. Malcolm,* 12 Abb. Pr., N. S., 335; *Sullivan v. Frazee,* 4 Robt., 616; *Seymour v. Judd,* 2 N. Y., 464, 8; *McCormick v. Penn. Cen. R. R. Co.,* 49 Ind., 303, 9; *Cumb. Coal Co. v. Sherman,* 8 Abb. Pr., 243. The Code permits a defendant to demur on the ground that the court has no jurisdiction of the person when this fact appears upon the face of the complaint; and when it does not so appear, to take the objection by answer (Code, sec. 144-147). But such objection is not to be deemed waived, even if not taken by demurrer or answer (Code, sec. 148); much less is it to be deemed waived by an appearance for the sole purpose of raising it in the exact method provided by the Code (4 Robt., 616). This objection to the jurisdiction of the court does not mean that the suit has been irregularly commenced, but that the person named as defendant is not subject to the jurisdiction or order of the court (*Nones v. Hope Ins. Co.,* 5 How. Pr., 96). Hence, the inquiry is not as to the irregularity of the proceedings by which service of the summons has been made, but whether the defendant is such a person as can be subjected by process to the court's jurisdiction. One over whose person the court has no jurisdiction is not bound to wait until final judgment and then seek relief by motion to set it aside. The Code gives him the right to present that contingency by pleading, and by appearing to exercise that right he does not waive it, nor in any way impair the force of the objection. To hold otherwise would make the means provided for presenting that issue destroy the issue itself. In my judgment, the issue was properly taken by demurrer, and such demurrers present issues of law for the decision of the court (Code, sec. 249; *King v. Poole,* 36 Barb., 242, 7)." The objection, therefore, was properly taken by demurrer by the express words of C. S., 511, subsec. 1.

It will be observed that in the case just cited, decided under the Code of New York, which is substantially like ours, the defendant did not simply demur because the court had no "jurisdiction of the persons" of defendants, but they first entered a special or qualified appearance for

the purpose of raising that question by the court as having important significance in its bearing upon the case.

The fact that there should be a special or qualified appearance instead of a general one does not deprive the defendant of the right to demur on the particular ground assigned by them, for by appearing specially they could still demur on the same ground, or for the same reason, but they must not appear generally. In the latter part of the extract we have made from the *Ogdensburg case, supra,* the Court is manifestly referring to such a qualified appearance as will confer upon defendants the right to demur specially, as distinguished from a general appearance, which takes away that right. The right to demur for one of the special reasons assigned by defendants, that is, "want of jurisdiction of the person," is not destroyed, or even impaired, by this construction or interpretation of the statutes, but is preserved both in its full integrity and its efficiency. This, at least, is the substantial result. The defendant in the *Ogdensburg case supra,* would not take the risk of a general appearance, but qualified its appearance twice, so that in the end it amounted, in that case, to little more, if anything, than a motion to dismiss under a special appearance.

There is another view that may be taken of this matter. It appears by the demurrer that three objections are urged by defendants: first, that the court has no jurisdiction of the persons of defendants; second, none of the subject of the action; and, third, that the cause of action upon the policy of insurance is not maintainable because the policy was issued in the State of Virginia and the loss thereunder occurred in that state. The second and third grounds are considered *in law* as taken to the merits and not merely to the jurisdiction of the court over the persons of the defendants, and the appearance is in form and in truth a general one, which waives any defect in the jurisdiction arising either from want of service of process on defendants or from a defect therein. The demurrer as to the second and third grounds was addressed to the merits. *Ins. Co. v. Robbins,* 59 Neb., 170. Said an able and learned judge (*Justice Mitchell*), in *Gilbert v. Hall,* 115 Ind., 549: "A special appearance may be entered for the purpose of taking advantage of any defect in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion, which pertains to the merits of the complaint or petition, constitutes a full appearance, and is hence a submission to the jurisdiction of the court. Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a 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." There are cases where the

defendant may make a *quasi* appearance for the purpose of objecting to the manner in which he is brought before the court, and, in fact, to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court, and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. *Nichols v. The People,* 165 Ill., 502; 2 Enc. Pl. and Pr., 625.

We must hold, upon principle and authority, that the defendants have made a full appearance in the case, and will be bound in all respects by the orders and decrees of the court. This result follows because they have not confined themselves to a special appearance for the purpose of raising the question of jurisdiction of the person, but have gone beyond that and asked for a hearing upon matters not relating solely thereto, but including other matters, as to the plaintiff's legal rights and their own in regard to the policy of insurance, and still further, they have challenged the jurisdiction of the court as to the subject-matter of the action, and thereby waived any defect as to the jurisdiction of the person, the appearance being considered by all the authorities as a general one. This question is fully discussed in *Scott v. Life Association,* 137 N. C., 515, where, at pages 518 and 519, we said: "The case was argued before us as if the defendant had entered a special appearance, and the plaintiff's counsel insisted that having done so, the defendant could not have the relief it seeks, nor could it appeal to this Court, citing *Clark v. Mfg. Co.,* 110 N. C., 111. The argument of both counsel was based upon a misconception of the true nature of the appearance entered by the defendant. In the first place, it does not on its face purport to be a special appearance. It is true the defendant appeared solely for the purpose of moving to set aside the judgment, but as such a motion involves only the merits of the case, and is not confined to the one objection that the court is without jurisdiction, it follows that an appearance entered solely for the purpose of making that motion is essentially a general appearance. The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., pp. 502, 503. The question always is what a party has done and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. *Ibid.,* 508, 509. 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. An appearance for any other purpose than to question the jurisdiction of the court is general," citing 2 Enc. of Pl. & Pr., 632.

Any course that, in substance, is the equivalent of an effort by the defendants to try the matter and obtain a judgment on the merits, in any material aspect of the case, while standing just outside the threshold of the court, cannot be permitted to avail them. A party will not be allowed to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of his action for want of jurisdiction of the person, or proceeding, and at the same time seek a judgment in his favor on the ground that there is no jurisdiction of the cause of action. To illustrate the matter, they ask for an adjudication as to whether this court has jurisdiction, not merely of the person, but also of the subject-matter of this action.

We repeat what is said in *Scott v. Life Association, supra:* "An appearance for any other purpose than to question the jurisdiction of the court over the person is general."

Examining the question presented in this case, though, in the light of actual authority, or decision upon it, we find this statement of the law in Enc. of Pl. and Pr., vol. 2, p. 621, a work of great merit and high authority, and devoted especially to subjects of this character: "But an objection to jurisdiction over the person, to be availing, must not be raised in connection with denial of jurisdiction over the subject-matter. An appearance to deny the jurisdiction of the court over the subject-matter is, according to the weight of authority, a general appearance. It is a familiar rule that a general appearance waives any defect in the process, and confers jurisdiction of the person. To avoid the effect of this rule, it is the common practice, when it is desired to take advantage of any defects in process and to deny jurisdiction over the person, to appear specially for that purpose only. A special appearance is only proper when a party seeks to deny the jurisdiction of the court over his person." We are there cited to *Fitzgerald v. Fitzgerald,* 137 U. S., 98, and other cases, in confirmation of the text, and they strongly and undoubtedly uphold it. *Chief Justice Fuller* said in the *Fitzgerald case, supra,* at p. 106: "By the amendment to its answer, its plea and motions, the defendant insisted that the court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service, and submitted itself to the decision of the court in respect to jurisdiction over the subject-matter, which jurisdiction, it is entirely clear, the court possessed. These proceedings were taken by defendant after discovering the alleged ground of objection to the service, and there was no

action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt, and the rule to that effect seems well settled in those states having similar Codes (which are like ours)," citing *Elliott v. Lawhead,* 3 Ohio St., 171; *Porter v. Chicago & Northwestern Railroad,* 1 Nebraska, 14; *Aultman v. Steinan,* 8 Nebraska, 112; *Meixell v. Kirkpatrick,* 29 Kansas, 679. See, also, *Handy v. Insurance Co.,* 37 Ohio St., 366; *Elliott v. Lawhead, supra; Lowe v. Stringham,* 14 Wisc., 222. As well said of pleading to the merits, in any way, after objecting to jurisdiction over the person, "although the objection was good, we think the defendant waived it in several ways. The record of the justice shows that the parties appeared by their counsel, which, of course, in the absence of any qualification, must be construed to be a general appearance. And it is a familiar rule that a general appearance waives any defect in the process. This is too well settled to need the citation of authorities. To avoid the effect of this rule, it is the common practice, when it is desired to take advantage of such defects, to appear specially for that purpose only. We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all." If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. *Lowe v. Stringham, supra; Caughey v. Vance,* 3 Chand., 315, 316; *Thayer v. Dove,* 8 Blackford, 567. But *Reed v. Chilson,* 142 N. Y., 152, comes nearer to the precise facts of this case and to a practical application of the principle now being considered. It there appeared, in an action to recover money, brought upon a Michigan judgment, that the summons was served out of the state, pursuant to an order of publication, upon defendants, who were nonresidents. A warrant of attachment was also issued, but no property was levied upon. Defendants entered a general appearance by an attorney, who served a general notice of retainer. An answer was served alleging that neither of the defendants were residents of the state nor had they any property therein, and that the court had no jurisdiction. The Court held that a general appearance in an action by an attorney for a nonresident defendant is equivalent to personal service of the summons and gives the court jurisdiction of the person of such defendant. It seems, when a nonresident does not intend to submit himself to the jurisdiction of the court, he may either appear specially for the purpose of raising the

question of jurisdiction by motion, or he may allow the plaintiff to take judgment by default; the question of jurisdiction will be available if he has not waived it by his own act. The appearance and notice gave jurisdiction, and a personal judgment was properly rendered. We might cite cases and authorities almost indefinitely to the same purpose and effect, but those to which we have briefly referred will suffice to show how firmly and unquestionably it is established, that it is not only dangerous, but fatal, to couple with a demurrer, or other form of objection based upon the ground that the court has no jurisdiction of the person, an objection in the form of a demurrer, answer, or otherwise, which substantially pleads to the merits, and, as we have seen, such an objection is presented when the defendant unites with his demurrer for lack of jurisdiction of the person, a cause of demurrer for want of jurisdiction of the cause or subject of the action, and that is exactly what was done in this case.

The demurrer, so far as it relates to the cause of action on the policy of insurance, is another instance where the same rule was violated.

To restate the matter more precisely, the defendants demurred on two grounds: (1) Want of jurisdiction of the person; (2) want of jurisdiction of the subject-matter.

If they had confined themselves to the first ground all might have gone well with them, but when they asked the court to adjudge as to the second ground, they converted their special appearance, if it was such, into a general one, as they asked for a decision on the merits and thereby waived the other ground, as the above citations prove.

It follows that defendants, by their demurrer, in the respects indicated, have appeared generally in the action, and therefore submitted themselves to the jurisdiction of the court. The judgment upon the cause of action was consequently properly entered, and must stand, as the court had general jurisdiction of it (an ordinary action of debt), but the defendants are entitled to answer over, and no doubt would have been permitted to do so had it been called to the attention of the court, the failure to insert such permission in the judgment being clearly an inadvertence. The court will grant such leave, when the case goes back, if defendants desire to avail themselves of it, and, with this slight modification, the proceedings of the court, including the judgment, are without error.

Affirmed.

R. H. OWEN ET AL. v. BOARD OF EDUCATION OF CUMBERLAND COUNTY ET AL.

(Filed 1 November, 1922.)

Injunction — Taxation — School Districts—Final Judgment—Hearing—Trials.

On this appeal: *Held*, the trial judge properly dissolved a temporary order restraining the county board of education from levying a special tax for school purposes, pursuant to an election held upon the question in the district; but erred in adjudging that the defendants "go without day," such being permissible only when the facts are admitted for the purpose or fixed and established at the final hearing. *Davenport v. Board of Education*, 183 N. C., 570.

CIVIL ACTION, heard on return to preliminary restraining order, before *Connor, J.*, on 12 June, 1922, from CUMBERLAND.

The action is to challenge the formation of Seventy-first Consolidated School District in said county. To restrain a proposed bond issue, and the levying of a special tax to provide for same, pursuant to an election held in said district. And also the present location and erection of the school buildings within said district as now planned and intended by the school authorities. On the hearing the court made a full and comprehensive finding of the pertinent facts, and entered judgment in terms as follows:

"1. That the restraining order heretofore issued in this case be and the same is hereby dissolved.

"2. That the election held in that part of the 71st Consolidated School District, excluding Kornbeau, is hereby declared valid and sufficient to authorize, and does authorize, the levying and collection of the special tax as asked for in the petition.

"3. That the election held in the Kornbeau territory is hereby declared valid and sufficient to authorize, and does authorize, the levying and collection of the special tax as asked for in the petition.

"4. That the two said districts were properly consolidated, and now constitute the 71st Consolidated School District.

"5. That the bond election held in the 71st Consolidated District is hereby declared valid, and said bonds a legal and binding obligation when issued upon and against the 71st Consolidated School District, and the property therein.

"And the proper authorities are hereby authorized and directed to take such further steps as may be necessary for the levying of said tax and the issuing of said bonds, and it is further decreed that the defendants go hence without day and recover their costs of the plaintiff and his surety."

Rose & Rose, J. O. Tally, and Bullard & Stringfield for plaintiff.

Oates & Herring, Shaw & Shaw, and Sinclair, Dye & Clark for defendants.

HOKE, J. The facts in evidence as they now appear of record are fully sufficient to support and justify the conclusions of the trial judge. As to the proper formation of the school district in question, the legality of the election and proposed bond issue and tax levy to provide for same, and the lawful selection of the proposed school site as contemplated by the authorities in control of the matter, and the judgment dissolving the injunction must be upheld. But we think his Honor went beyond the powers conferred upon him in undertaking to make a final determination of the rights of the parties, and adjudging that defendants "go without day." Except where the facts are agreed upon or admitted for the purpose, such a judgment in a case of this kind may only be had at the final hearing and on the facts as they may be then fixed and established. This was virtually held in the recent case of *Davenport v. Board of Education,* 183 N. C., 570, and the ruling is in accord with the prevailing decisions on the subject. *Galloway v. Board of Education, ante,* 245; *Davenport v. Board of Education, supra; Moore v. Monument Co.,* 166 N. C., 211.

This will be certified that the judgment of the lower court be modified in accordance with this opinion.

Modified.

FRED D. WILLIAMS v. FIREMAN'S FUND INSURANCE COMPANY.

(Filed 1 November, 1922.)

1. Insurance, Fire — Automobiles — Dealers—Possession—Principal and Agent.

An open dealer's policy, insuring automobiles the insured has for sale against loss by fire, etc., from the time such automobiles "become the property of the assured, and continues (unless canceled) until said property is delivered to the purchaser, or until the same otherwise passes out of the possession of the assured," does not include within its intent and meaning an automobile that had been stolen and destroyed by fire when in the possession of the thief, but only those when so destroyed while in the possession of the assured, or some of his employees or agents having control thereof in the prosecution of the business of the assured.

2. Same—Larceny.

A policy against the dealer's loss of automobiles by fire, while in his possession, etc., does not include within its protective terms a stolen automobile which was destroyed while in the possession of the thief, the essential feature of larceny being a felonious transfer of possession, and contradictory to the intent and meaning of the terms of policy contract.

APPEAL by plaintiff from *Connor, J.*, at the Fall Term, 1922, of CUMBERLAND.

Civil action to recover on an insurance policy on an automobile, covering risk of destruction by fire and lightning. At the close of the testimony, and on motion made in apt time, there was judgment of nonsuit, and plaintiff excepted and appealed.

Sinclair, Dye & Clark for plaintiff.
Tillett & Guthrie for defendant.

HOKE, J. The facts in evidence tended to show that on 24 April, 1920, plaintiff had an open dealer's policy of insurance on automobiles held by him for sale, covering risks of loss by fire and lightning to an amount not to exceed $5,000, and at said date, covering the machine in question here and its value. That on 9 May, 1920, said machine was stolen from plaintiff's garage in Fayetteville, N. C., and on 23 June, forty-six days thereafter, the charred remains of the automobile were found near Greenville, S. C., possession of same never having been recovered by plaintiff, the true owner.

From a perusal of this policy it applies, and is intended to apply, to machines properly designated and held by the insured for sale in his business at the time, and in section 5 of the policy, provision is made as follows: "This insurance, subject to the conditions and limitations of the policy of which this form is a part, covers such automobiles from the time they become the property of the assured, and continues (unless canceled) until said property is delivered to the purchaser, or until same otherwise passes out of the possession of the assured, this period in no event to exceed twelve months, or to extend beyond the termination of the policy."

It thus appears that by the express stipulation of the contract the policy extends its protection to machines only while in possession of the insured, or some of his employees or agents having control of same in the prosecution of his business, and on the facts presented in this record, the machine could in no sense be considered as coming within the descriptive terms of the policy. An essential feature of the crime of larceny is a felonious transfer of possession, and both the language of the contract and provision, and the nature of the risk forbids that any recovery can be had for this loss.

The cases of *Lummus v. Ins. Co.*, 167 N. C., 654, and *Lancaster v. Ins. Co.*, 153 N. C., 285, and others, are in general approval of his Honor's judgment directing a nonsuit, and same is

Affirmed.

MARY E. HORNER ET AL., HEIRS AT LAW OF SOPHRONIA MOORE HORNER, v. THE SOUTHERN RAILWAY COMPANY AND THE OXFORD AND HENDERSON RAILROAD COMPANY.

(Filed 1 November, 1922.)

1. Judgments by Consent—Contract—Consideration—Pleadings.

A consent judgment may be made effective and extended to any matters that may be agreed upon by the parties that are within the general jurisdiction of the court, and the position is untenable that, as in case of an adversary judgment, it is restricted to the matters presented in the pleadings.

2. Railroads — Carriers — Right of Way — Consent Judgment — Depot Terminals—Heirs at Law—Reverter.

In plaintiff's action to recover from a railroad company upon a consent judgment entered in a suit brought by their ancestor to compel the running of trains over the lands of her predecessor in title, to an old depot, the terminal lands having been acquired by the defendant by *mesne* conveyances in fee, a judgment was entered by the court upon the consent of the parties, that purported, in express terms, to apply to and include both the lands used for a right of way exclusively, and for the location of a station: *Held*, the term "right of way," applied to railroad companies, may include the depot site and grounds ordinarily used in the operation of a railroad; and the judgment in question evinced the intent of the parties that the depot site and grounds should revert upon the final cessation of its use for railroad purposes; and the plaintiffs in the present action, as heirs at law of the plaintiff in the former one, are entitled to recover it. This position is fortified by the fact that the *locus in quo* was the only land acquired by the defendant by *mesne* conveyances from the predecessor in title of the plaintiffs' ancestor.

CLARK, C. J., did not sit.

APPEAL by plaintiffs from *Kerr, J.*, at the April Term, 1922, of GRANVILLE.

Civil action, tried by consent of the parties before the judge. The action is principally to determine the ownership of two acres of land formerly used by defendant roads for its terminal station, in the town of Oxford, N. C., and on the hearing it was properly made to appear that on 13 September, 1879, James H. Horner, now deceased, conveyed to the Oxford and Henderson Railroad a right of way eighty feet in width through all the lands of said grantor situate in Granville County, and extending from one-half mile beyond present junction to the point on the map now known and designated as Williamston Street. That later, on 31 October, 1879, said James H. Horner conveyed to W. F. Beasley ten acres of his land in said county abutting on Williamston Street, and said Beasley, acting in promotion of the railroad enterprise, conveyed two acres of said ten acres to the Oxford and Henderson Rail-

road for a terminal station, which said two acres included part of the eighty feet right of way extending from the Tanyard Branch to Williamston Street. That subsequently the property rights and franchises of the Oxford and Henderson Railroad were acquired and used by the Southern Railway, and after using said right of way for some time, the Southern Railway evinced a purpose to abandon the said terminal station and right of way acquired from James H. Horner and W. F. Beasley, from Williamston Street through the lands of said Horner to the present junction point, now used for terminal station in said town. Thereupon, Mrs. Sophronia Horner, sole devisee of James H. Horner, and ancestor in title of present plaintiffs, in 1896 instituted a civil action in the Superior Court of Granville County against the Southern Railway and the Oxford and Henderson Railroad to compel the exercise of its railroad franchise along and upon the right of way and station obtained through deeds of J. H. Horner or forfeit all right and title thereto to the plaintiff, Sophronia Horner. This cause was settled by a consent judgment in terms as follows:

"This cause coming on upon complaint and answer, and the matters in controversy having been adjusted between the parties by consent of all the parties hereto. It is ordered and decreed that the defendant, the Southern Railway Company, pay to the plaintiff herein the sum of $150 in full satisfaction of all the claims set up in the complaint, and of all other arising out of the occupation of any part of the land of the plaintiff as right of way and of any and all change of route by defendant of any railroad operated by it in or near Oxford, N. C. It is further ordered that upon the removal by the defendants, or either of them, of the railroad track from any part of the right of way conveyed to or obtained by either defendant from the late James H. Horner and wife as right of way for the location of a station or upon the final cessation to use the same, the title to so much of said right of way as the track shall be removed from, or the use of which shall have been finally abandoned shall revert to the plaintiff herein, the defendant having the right to use the right of way for railroad purposes only (this decree in no wise to affect any right of way between Oxford and Henderson, but only to affect the spur track which now runs to the old depot). This decree shall also be operative in respect to any part of this right of way which was conveyed to the Oxford and Henderson Railroad Company by *mesne* conveyances from the late James H. Horner and wife. Defendant to pay costs. No witness fees for plaintiff; $12.54 costs.

"HENRY R. BRYAN,
"Judge Superior Court, Presiding."

Under and by virtue of this judgment, it is contended by plaintiffs that they own the said abandoned right of way from the junction to Williamston Street, and including the two acres formerly used for a terminal station, and for defendant it is insisted that the two acres used for the station did not pass to plaintiffs. On the facts in evidence, and admissions of the parties, there was judgment for defendant as to the old depot site, and plaintiff excepted and appealed.

A. W. Graham & Son and Robert C. Strong for plaintiffs.
Hicks & Stem for defendant.

HOKE, J. In *Holloway v. Durham,* 176 N. C., 551, it is said that in case of an adversary judgment the jurisdiction of the court is restricted to the matters presented in the pleadings, but that a consent judgment under our decisions may be made effective and extended to any matters that may be agreed upon by the parties, and which are within the general jurisdiction of the court.

In reference to the latter position, the Court further said: "The decisions of 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," citing *Bank v. McEwen,* 160 N. C., 414; *Bunn v. Braswell,* 139 N. C., 139, and other cases.

Recurring, then, to the terms of this consent judgment on which the rights of these parties must depend, it is clear, we think, that the parties intended to pass to Sophronia Horner, ancestor in title of plaintiffs, the entire right of way obtained from J. H. Horner, her husband, whenever the same was abandoned by the companies, and extending from the junction to Williamsboro Street, and including the two acres formerly used for a terminal station. The term "right of way," when applied to a railroad company, may, in proper instances, very well be extended to include the depot site ordinarily used in the operation of the road. 22 R. C. L., p. 847; 33 Cyc., p. 643.

And in this instance the judgment purports, in express terms, to apply to and include both the land used for a right of way and for the location of the station. And to put the matter beyond all question, the judgment closes with the provision that the same shall be operative also in respect to any part of the right of way which was conveyed to the Oxford and Henderson Railroad Company by "*mesne* conveyances from the late James H. Horner and wife."

The only *mesne* conveyance is that through the deed from W. F. Beasley for this two acres for a terminal station, and the judgment, therefore, in our opinion, contemplates and provides that as this part of the road shall be abandoned it shall revert to the Horner heirs, both the right of way which came to the road directly from James H. Horner and indirectly through the *mesne* conveyance to W. F. Beasley. There is error, and this will be certified that judgment be entered for plaintiff.

Error.

CLARK, C. J., did not sit.

FRANK BROTHERS AND COMPANY v. A. LEFKOWITZ.

(Filed 1 November, 1922.)

Principal and Agent — Evidence — Ratification—Issues—Questions for Jury—Trials.

Defendant, a storekeeper, denied the authority of his clerk to purchase goods from the plaintiff in his behalf, and refused to receive them upon their delivery at his store. The clerk sold a part of the shipment to a third person, turned the proceeds over to the defendant, who gave his clerk his check, which the latter mailed to the plaintiff, and it was returned because of the words written thereon "in full to date." The defendant had shipped the goods to the plaintiff. On the defendant's appeal, from the county court, from a judgment directed against him: *Held*, the Superior Court judge correctly set aside the judgment and ordered a jury trial upon the issues of agency and ratification, under the conflicting evidence in the case.

APPEAL by plaintiffs from *Harding, J.*, at May Term, 1922, of FORSYTH.

This action was begun before *Starbuck, J.*, of the Forsyth County Court, and was heard on appeal by *Harding, J.*, in the Superior Court. In September, 1920, S. R. Reymer, a clerk of the defendant Lefkowitz, in Winston, N. C., purchased of the plaintiffs, doing business in New York, a consignment of shirts amounting to $758.88, representing that he was the purchasing agent for the defendant. The goods were shipped to the defendant at Winston. The defendant testified that the clerk had no authority to make such purchase, and that he knew nothing of it until the box containing the shirts was delivered in front of his store in October, 1920. The defendant testified that as soon as he found that the box of merchandise was there he refused to have anything to do with it, and told Reymer that he had no authority to buy them. There was evidence that Reymer took some of the shirts out of

the box and sold them to a local merchant, Teichman Brothers, for $153. The box was then nailed up and shipped back to New York the same day. About sixty or ninety days thereafter, Reymer handed to the defendant the money received for the shirts sold to Teichman Brothers, and defendant gave him his check for $153, which was mailed to plaintiffs. There is no controversy that Reymer bought the goods representing that he was a buyer for Lefkowitz, and that the quantity and price of the goods were as stated. The plaintiffs, on receipt of the $153, returned it because there was written on it the words, "In full to date." There was correspondence and evidence introduced upon the disputed question whether Reymer was authorized to purchase the goods, and also upon the question of ratification. On the trial before Judge Starbuck, he instructed the jury that if they believed the evidence to return a verdict in favor of the plaintiffs for $758.88. On appeal to Judge Harding, he set aside the judgment below, and ordered a new trial, to the end that issues might be submitted to the jury as to the authority of Reymer to make the contract, and upon the question whether the contract had been ratified by the conduct of the defendant, from which judgment the plaintiff appealed.

Hastings & Whicker for plaintiffs.
J. E. Alexander for defendant.

CLARK, C. J. There is a conflict of evidence upon both these points which, we think, is sufficient to justify and require that these issues should be submitted to the jury, as directed by the judge of the Superior Court, and his judgment to that effect is

Affirmed.

ALEX. F. BURNEY ET AL. v. COMMISSIONERS OF BLADEN COUNTY ET AL.

(Filed 1 November, 1922.)

1. School Districts—Consolidation—Taxation—Elections—Constitutional Law.

Where a school district has been made of consolidated special tax and nonspecial tax territory, by the county board of education, and thereafter, at an election held for the purpose, according to law, the question of taxation for school purposes has been submitted to each of the old districts comprising the new or consolidated one, and they each have voted favorably upon the question, the result is not the levying a tax upon the nonspecial tax district without the legal approval of the voters therein, and the taxation so approved is constitutional and valid.

2. Same—Statutes—Ratification—Curative Acts.

A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by Article II, section 29, or the amendments of 1920 to the State Constitution, as to general legislation upon local or private affairs in "establishing or changing the lines of school districts"; and the Legislature, having the authority to enact a law of this character, when an election has been held approving this proposition, even if without warrant of law, may cure the defect by subsequent ratification and confirm the results of the election previously held.

3. Constitutional Law—Amendments—School Districts—Poll Tax—Appeal and Error—Costs.

Since the constitutional amendment of 1920, a tax by a school district upon the poll with the property tax, under a statute authorizing it, is unconstitutional as to the poll tax, and where the property tax is legal and valid, the taxation upon the poll will be eliminated, and the valid part upheld by the courts. On this appeal the cost is taxed equally between the parties.

APPEAL by plaintiffs from *Bond, J.*, at chambers, 18 September, 1922, from BLADEN.

Civil action to restrain the defendants from levying and collecting certain special school taxes in Brown Marsh Township School District, Bladen County, upon the alleged ground that the elections under which said taxes were approved by a majority of the qualified voters resident within the district were illegally held, and are therefore void.

From an order denying the application for injunctive relief, plaintiffs appealed.

R. D. Dickson for plaintiff.
Henry L. Williamson for defendants.

STACY, J. It is alleged in the complaint and admitted in the answer that on 25 April, 1921, the whole of Brown Marsh Township, Bladen County, comprising four nonspecial tax districts and one special tax district, was consolidated by the board of education of said county into one township high school district. Thereafter, on 6 June, 1921, an election was ordered in said consolidated district, or township, to ascertain the will of the people in regard to levying "a special annual tax of not more than 30 cents on the $100 valuation of property and 90 cents on each poll within said district to supplement the public school funds, which may be appropriated to such district by the county board of education for the maintenance and running of a proper school therein."

At the same time another election was ordered to be held in said district for the purpose of ascertaining whether or not a majority of the qualified voters resident in the district wished to approve a bond issue

to the amount of $25,000 for the purpose of building, rebuilding, and repairing the schoolhouses therein, and furnishing the same with suitable equipment, and thereupon to authorize the levy and collection of an annual tax of not more than 30 cents on the $100 valuation of property and 90 cents on each poll in said district for the purpose of paying the interest on and creating a sinking fund for the retirement of said bonds at maturity.

These elections were held together on 12 July, 1921, and both resulted in a favorable majority vote, not only in the territory of the original special tax district and nonspecial tax districts voting separately, but also in the entire consolidated district, or township, voting as a whole. The taxes authorized by these elections have been levied and collected for the year 1921, levied for the year 1922, and the bonds in question have been issued and sold.

The defendants contend that the first election was properly held under the law then in force, whether tested by the requirements of C. S., 5473, as amended by Public Laws 1921, ch. 179, C. S., 5511, or C. S., 5526 and 5530, as construed by this Court in *Hicks v. Comrs.*, 183 N. C., 394; *Perry v. Comrs.*, 183 N. C., 387, and *Riddle v. Cumberland*, 180 N. C., 321; and that the second election was clearly authorized by C. S., ch. 95, art. 39. On the other hand, both of these propositions are controverted by the plaintiffs.

It will be observed that the consolidation of the districts, which occurred on 25 April, 1921, is not specifically attacked by the plaintiffs; but, even if it were, we think the present consolidation should be approved under the decisions in the *Hicks, Perry,* and *Riddle cases, supra.* The voters have had a free and untrammeled opportunity to pass upon the questions submitted for their approval, both in the original special tax territory and the nonspecial tax portion of the district, counting the votes in each separately, and then counting them in the entire district as a whole; and this with substantial conformity to the requirements of the statutes bearing upon the subject. Both of the propositions met with but little opposition at the polls. The bonds have been issued and sold, and they are now in the hands of innocent purchasers for value. Under these circumstances, we should be slow to impair their validity, unless the defect were such as to require us to do so.

But the gravamen of the complaint is that the elections subsequently held in the already consolidated district or township were called and held without proper warrant of law, and are therefore void. Regardless as to how the technical regularity of these elections may be viewed, conceding the district was properly established under the general law then in force, we think it was within the power of the Legislature to ratify and to confirm the results of these elections, and to validate the

issuance of said bonds, and thus cure any defect, if such existed, as it did by ch. 32, Private Laws, Extra Session, 1921. *Board of Education v. Comrs.*, 183 N. C., 300. Barring certain exceptions, the general rule is that the Legislature may validate retrospectively any proceeding which it might have authorized in advance. *Anderson v. Wilkins*, 142 N. C., 157. In a very recent case, *Charlotte Harbor & Northern Ry. Co. v. Welles et al.* (decided 16 October, 1922), the United States Supreme Court, speaking to this question, said: "In support of the contention of the petition, plaintiff in error makes a distinction between a *curative* statute, which it is conceded a Legislature has the power to pass, and a *creative* statute, which, it is the assertion, a Legislature has not the power to pass. The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail. The general and established proposition is that what the Legislature could have authorized, it can ratify if it can authorize at the time of ratification," citing *U. S. v. Heinszen*, 206 U. S., 370; *Wagner v. Baltimore*, 239 U. S., 207; *Stockdale v. The Insurance Companies*, 20 Wall., 323.

The act we are now considering nowhere undertakes to establish a new school district, nor to change the lines or boundaries of one already existing. Its only purpose was to ratify and to confirm the results of certain elections which previously had been held in the then existing districts. It is clear, we think, that the present act is not in conflict with Article II, section 29, of the State Constitution, prohibiting, as this section does, among other things, any local, private, or special legislation in regard to "establishing or changing the lines of school districts." Here, it will be noted, the inhibition is against establishing or changing the lines of school districts by any local, private, or special legislation, but not against providing ways and means for the general prosecution of educational work in the district already established. *Roebuck v. Trustees, ante*, 144; *Honeycutt v. Comrs.*, 182 N. C., 319.

We observe, however, that a tax of 90 cents on the poll was approved in each election, and that this has been levied along with the property tax in both instances. This is not a county tax, but a special district tax. Hence, the poll tax must be held to be invalid under the constitutional amendment of 1920. *Hammond v. McRae*, 182 N. C., 754. See, also, concurring opinion in *Ballou v. Road Com.*, 182 N. C., 473. The property tax will be upheld.

As thus modified, the judgment of his Honor denying the plaintiffs' application for injunctive relief is approved.

The costs of this appeal will be divided equally between the parties.

Modified and affirmed.

G. E. WILSON ET AL. V. COMMISSIONERS OF BLADEN COUNTY ET AL.

(Filed 1 November, 1922.)

(For digest, see *Burney v. Comrs.*, next preceding.)

APPEAL by plaintiffs from *Bond, J.*, at chambers, 24 June, 1922, from BLADEN.

Civil action to restrain the defendants from levying and collecting certain special school taxes in a high school district composed of French's Creek Township and a part of Colly Township, Bladen County, upon the alleged ground that the elections under which said taxes were approved by a majority of the qualified voters resident within the district were illegally held, and are therefore void.

From an order denying the application for injunctive relief, plaintiffs appealed.

R. D. Dickson for plaintiffs.
Henry L. Williamson for defendants.
Reed, Dougherty & Hoyt appearing as amici curiæ.

PER CURIAM. The pertinent and controlling facts in the instant case are substantially the same as those in *Burney v. Comrs., ante,* 274, and for the reasons assigned in that opinion, just rendered—the two cases being governed by the same principles—it follows that his Honor below was correct in denying to the plaintiffs the relief sought. The poll tax, however, must be held to be invalid, while the property tax will be upheld.

Let the costs be divided.

Modified and affirmed.

IN THE MATTER OF NATALIE BLAKE.

(Filed 1 November, 1922.)

1. Divorce—Husband and Wife—Parent and Child—Habeas Corpus—Courts—Jurisdiction—Juvenile Courts.

The Superior Court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, C. S., 1664, and though by proceedings in *habeas corpus* under the provisions of C. S., 2241, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or suing for a

decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. *Quere*, whether the statutes relating to the juvenile courts confer jurisdiction in such instances.

2. Constitutional Law—Supreme Court—Supervisional Powers—Remedial Writs — Habeas Corpus — Divorce—Custody of Children—Courts—Jurisdiction—Motions—Notice.

Where a parent erroneously seeks the custody of a minor child of the marriage by proceedings in *habeas corpus*, after decree of divorce has been entered upon suit in the court of a certain county, without providing therefor, the Supreme Court, on appeal, having regard for the best interest of such child before the motion can be made in the court having granted the divorce, may exercise its powers given by Const., Art. IV, sec. 8, to generally supervise and control the proceedings of the inferior courts by remedial writ, or process; and on this appeal from an order of the Superior Court judge, erroneously hearing the matter upon proceedings in *habeas corpus*, the Supreme Court adjudges that the custody of the child shall remain with the mother, as directed by the judge hearing the same, until the mother can properly seek her relief upon motion made in the action granting the divorce at the next term of the said court, or as soon thereafter as the judge may hear the same, upon giving the respondent ten days previous notice of her application.

3. Appeal and Error—Costs—Habeas Corpus.

On appeal from the order of the Superior Court judge erroneously hearing proceedings in *habeas corpus* and awarding the custody of a child of the marriage, after a decree of divorcement had been entered: *Held*, the petitioner will pay the costs of this appeal, and the proper judge hearing the motion to be made in the said cause will determine its ultimate payment as between the parties.

APPEAL by defendant from *Bond, J.*, in *habeas corpus* proceedings, heard at December Term, 1921, of WAKE.

D. E. Henderson, Evans & Eason, and Murray Allen for respondent, appellant.

No counsel for appellee.

WALKER, J. This is a petition for a writ of *habeas corpus* to determine the custody of a child eight years of age, heard by his Honor, W. M. Bond, at December Term, 1921, of Wake Superior Court. The petition was filed by Mrs. Christine Muse, mother of the child, Natalie Blake, against Hubert M. Blake, the child's father.

The court rendered judgment awarding the custody of the child to the mother, and directing the payment of $15 per month by the father to the mother to be applied to the child's support. The respondent excepted to this order, and appealed. The order is set out in full in the record.

The court finds, among other facts, that on 28 April, 1919, the petitioner was granted an absolute divorce from the respondent, Hubert M. Blake, in the Superior Court of Mecklenburg County, North Carolina, and that no order has ever been made in said action for the custody of the child, Natalie Blake.

The exceptions to the order entered in this cause are based upon the following grounds:

1. Want of jurisdiction to determine the custody of the child.

2. Want of power to order respondent to contribute to the support of the child.

By C. S., 1664, it is provided that, "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent, and so alternately: *Provided,* that no order respecting the children shall be made on the application of either party without five days notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court." See *Howell v. Howell,* 162 N. C., 287. Except as between parents, the right of custody of a child cannot be determined by writ of *habeas corpus.* C. S., 2241; *In re Parker,* 144 N. C., 170. And it is essential that the parents must be living in a state of separation "without being divorced" before the court has power in a *habeas corpus* proceeding to determine the custody of a child. Such power is based upon C. S., 2241, which provides: "When a contest shall arise on a writ of *habeas corpus* between any husband and wife, who are living in a state of separation, *without being divorced,* in respect to the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary, or modify the same." (Italics ours.)

When this statute is considered in connection with C. S., 1664, quoted *supra,* it becomes apparent the Legislature intended that the custody of children, where there had been a divorce of the parents, shall be determined by the court in which the divorce is granted, and, where there is no divorce, by proceedings in *habeas corpus.* Jurisdiction of the court in which a divorce is granted to award the custody of a child is exclusive and continuing. *In re Krauthoff* (Mo.), 177 S. W., at p. 1118. The Court held in the case of *In re Morgan,* 21 S. W. (Mo.), 1122, construing a divorce statute similar to ours, that pending a suit for divorce in a court having jurisdiction of the parties and subject-matter, another court will not interfere by writ of *habeas corpus* with either party's possession of their children, "notwithstanding Rev. Stat., sec. 5415, which provides that in all proceedings on *habeas corpus* between husband and wife, for the custody of their children, the court may award the custody to the complainant or other guardian as shall be deemed best."

Under our statute, C. S., 1664, a divorce suit is pending for the purpose of an order as to the custody of children after as well as before final judgment. This statute expressly vests in the divorce court the power to award the custody of children, and from time to time to modify or vacate its orders, and the necessary implication is that this jurisdiction is exclusive. It is said in Corpus Juris, p. 341, that "this jurisdiction continues during the state of minority, and is subject to be invoked at any time within that period, and will not be interfered with by process issuing out of other courts." In *Page v. Pope,* 166 N. C., 90, an action for divorce from bed and board was pending between the parents of an infant child and a dispute arose as to the custody of the child. The mother filed a petition for a writ of *habeas corpus.* In holding that the remedy was by motion in the divorce cause, the *Chief Justice* said: "Indeed, if for any reason the plaintiff had been entitled to an order for the custody of the child, pending the appeal, and had been living in this State, she should have proceeded by a motion in the cause before the court below, and a writ of *habeas corpus* did not properly lie in any event." It was suggested on the argument, and it may be with some show of reason, that if jurisdiction to pass upon the custody of the child is not exclusively in the court in which the divorce decree was granted, it would appear to reside in the juvenile court under the provisions of C. S., 5039 *et seq.,* the appellant relying strongly on *In re Hamilton,* 182 N. C., 44.

In general, the only object of a writ of *habeas corpus* is to set at large the person illegally restrained of his liberty. But in the case of a child, the court is permitted to go further and fix the custody of the child. We do not find that the power of the court has ever been held to extend beyond this limit, and to give other relief for its advancement and bene-

fit (*In re Samuel Parker,* 144 N. C., 170; 12 Ruling Case Law, p. 1253), and its special powers with respect to controversies relating to children, their custody, support, etc., comes to it from statutory provisions, for, as was well and wisely said by *Justice Hoke,* in the case of *In re Samuel Parker, supra,* at p. 175, in his opinion (the writer of this opinion having concurred therein): "Section 1853, Revisal, was enacted to enable the court to make proper regulations as to the care and custody of children as between husband and wife who are living in a state of separation without being divorced. It seems to be confined to such cases, and has, to my apprehension, no perceptible bearing on the case before us."

While we therefore arrive at the conclusion that the judge below had no jurisdiction or power to proceed in this matter, but that the jurisdiction belonged solely to the Superior Court of Mecklenburg, where the parents were divorced, by force of the express provisions of the statute, we must decide what should be done with the child until the court which granted the divorce can assume its proper jurisdiction and award its custody, provide for its support, and make such other orders and directions for its care and protection as may be called for in the premises.

It is further pertinently said by *Justice Hoke,* in the *Samuel Parker case, supra:* "The authorities are to the effect that in this country the disposition of the child rests in the sound legal discretion of the court, and that it will be exercised as the best interest of the child may require. *Newsome v. Bunch,* 142 N. C., 19; Tiffany on Persons and Domestic Relations, p. 308; Shouler on Domestic Relations, sec. 240. The best interest of the child is being given more and more prominence in cases of this character; and, on special facts, has been made the paramount and controlling feature in well considered decisions. *Bryan v. Lynn,* 104 Ind., 227; *In re Welsh,* 74 N. Y., 299; *Kelsey v. Greene,* 69 Conn., 291. Again, I think it is well established that while, in *habeas corpus* proceedings concerning the custody of children, the power of the court is ordinarily restricted to freeing them from illegal restraint and allowing them to select their placing, or go where they please, that this is only true where the child, in a given case, is of years of discretion and sufficient intelligence to determine the question for itself; and where it is otherwise, when the child is not of proper age or sufficient intelligence to determine for himself, the court must decide for him, and make orders for his being placed in proper custody," citing *Musgrove v. Kornegay,* 52 N. C., 73; *In re Wollstonecraft,* 4 Johnston Chan., 79; *Mayne v. Baldwin,* 5 N. J. Eq., 454; Church on Habeas Corpus, sec. 439; 15 A. & E., p. 185, note 5.

We are of the opinion, therefore, that under our general powers, as defined in the Constitution, Art. IV, sec. 8, which confers jurisdiction upon

this Court to issue any remedial writs (or process) necessary to give it a general supervision and control over the proceedings of the inferior courts, we are not compelled, while reversing the judge's order in this case—for want of special jurisdiction to make and enforce—to transfer the custody of the child to the respondent, but having the good of the child constantly before us, we may make such order for its custody and care temporarily, and until proper application may be seasonably made by the petitioner, the mother of the child—which child is of tender years, and too young to act discreetly for itself—to the Superior Court of Mecklenburg County for such order as it may see fit to make regarding the custody and support of the child; and, meanwhile, we direct that the mother retain custody of the child until her application can be heard and passed upon by the said court. The mother's application to the said court will be made on the first day of the next term of the Superior Court of Mecklenburg County, or at such other time and place as that court may then direct it to be heard, but at least ten days notice of said application shall be given before the first day of the next term of said court to the respondent.

The judgment of the court below will be reversed, subject to the temporary provision herein made for the custody of the child, pending the further litigation of the matter.

The plaintiff will pay the costs of this Court in the appeal, but without prejudice to any application she may make to the Superior Court of Mecklenburg County to determine the ultimate payment of the same, and to make any other orders or provisions which may be proper and according to law.

Error.

C. M. SOLES, ADMINISTRATOR OF D. S. SOLES, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 November, 1922.)

1. Carriers—Railroads—Commerce—Federal Law.

Where a common carrier is sued in the courts of this State for damages for personal injury alleged to have been caused by the defendant while employed in interstate commerce, our courts apply the rule for the ascertainment of defendant's actionable negligence recognized and enforced in the Federal courts.

2. Same—Evidence—Questions for Jury—Nonsuit—Trials.

In an action to recover damages of carrier in interstate commerce for the negligent killing of its flagman sitting asleep or apparently unconscious on the rail of defendant's track in front of an approaching train, the liability on the part of the defendant for the negligence of its engineer,

on the issue of negligence, depends upon whether he had exercised due care after discovering the perilous condition of the plaintiff's intestate, and the evidence in this case was sufficient to take the case to the jury. The difference between the rule as applied under the State and Federal decisions discussed by WALKER, J.

APPEAL by plaintiff from *Connor, J.*, at November Term, 1921, of COLUMBUS.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by defendant's negligence.

We will first state the material portion of the evidence, it being partly the defendant's statement of it, but principally the part taken by us from the record itself.

It seems necessary to give the substance of the testimony fully, as the court below nonsuited the plaintiff upon it.

The defendant, through its agent, David Faulk, trestle foreman, employed plaintiff's intestate, who was a boy about fourteen years of age, after having been forbidden by the boy's father and mother to do so, for the reason that the employment was dangerous and the father and mother were not willing that the boy should be exposed to the risk; and, notwithstanding the agent had been so informed, the boy was employed at Tabor, N. C., on Saturday or Sunday, and carried to a point near Smithfield, N. C., on defendant's line, where he was killed the following Tuesday, while sitting on the right-hand side of the rail with his feet toward the center of the southbound track of defendant's railroad, and with his elbows on his knees, something like this (witness indicating), with his head in his hands, dropped over like that (witness indicating), and apparently asleep. It was a bright, warm, sunshiny day.

The train was a freight, and had exploded two torpedoes on the track five or six hundred yards from where the boy was killed, and, notwithstanding this noise, and the sounding of the whistle and other noises, the boy did not move from the time the train came in sight until he was struck by the engine (having a cowcatcher), run over, and his body severed, the upper part of it being left on the outside of the rail and the legs on the inside, without any bruises.

C. M. Soles testified: "I am the administrator of my son, D. S. Soles; his mother is now living. He was 14 years old and five months, lacking 7 days. We had him in school most of the time. He had done some work around there. He worked for me. I never paid him anything when he worked for me. He worked all the way from 50 cents down to something like 25 and 50 cents an hour for other people. He was perfectly healthy. As healthy a boy as I have ever seen. I have never had to call a doctor for him but once, and that was a little bilious attack, but he was up the next day sitting around the house. I live in

Mount Tabor, in Columbus County. To Smithfield from Tabor the fare on the railroad is $4.98. I don't know what the distance is. My boy went off on Sunday evening and Tuesday morning I got the news about the middle of the day, I suppose somewhere between twelve o'clock and maybe one, of his death. He was working under David Faulk, trestle foreman. He spoke to me about employing the boy. Mr. Faulk employed hands. This is the same trestle foreman who had a talk with me, under whom he was working at the time he was killed, while in the employ of the Atlantic Coast Line Railroad Company. He asked me and his mother if he could carry this boy back with him to Enfield. I think, if I am not mistaken, he was stationed at Enfield at that time. He asked me if he could take the boy up there. The boy, I guess, knew we wouldn't let him go. We told him that he could not go. His mother asked him if that wasn't dangerous work, and he said it was. She said he simply could not go, and I told him I didn't want him to go. We went off to the farm. We had a farm out there, nine miles. Faulk came after him after we went there, and said that the boy had written him a letter and told him if he would let him know when he came back he would go back with him, that his mother and I (his father) had agreed for him to go back. I told him if the boy had written that, he had written something not so; that we didn't agree for him to go. I did not know until he was killed the actual time he was employed. He went off Sunday evening; we missed him Monday morning, and Tuesday about one o'clock I got the telegram. The only way I knew he had gone off with Faulk was what his little brother said about it. This boy had no legal guardian appointed by the court. I did not see the boy after he was killed. I have been to where they said he was killed. I am about 52 years old. I will be 52 the first day of December. My son, D. S. Soles, was not married. My wife is a year younger than I am. I had older children, they were all married and moved away. He contributed to the support of myself and wife. All of the work he did he did with us. He did work around the house when he was not in school. He worked around the house before and after school. The character of the work when he was not in school was principally plowing and working on the farm. He did the same work I was paying $2.50 a day to have done. When he worked out for other people, we used the money in the family. He had not done much work off. I am unable to work. I have a kidney trouble that works me and am unable to do any work at all, unless it is light work, mighty light. I don't know what kind of kidney trouble I have. The doctor told me I had kidney trouble. He told me I was seriously afflicted with kidney trouble; that my time was short, and I wouldn't live very long. I have six children older than this boy. The married children do not contribute anything to my sup-

port. I don't know whether he would contribute anything to my support or not, but he wasn't married. I don't know whether he would have gotten married or not. He was an intelligent boy and weighed about 125 pounds and did whatever I told him to."

J. Y. Baker testified: "I live in Johnston County, between Four Oaks and Smithfield. I was 700 or 800 yards from D. S. Soles when he was killed on the main line, which was well graded and double-tracked. The train was going up the grade and the boy was a little bit over the tip of the grade. From the north track was straight 66 rails. I counted them. I saw the boy before he was killed walking around on the track. I saw him about fifteen minutes after he was killed. The boy was cut in two across the lower part of his body. His head lying on outside of rail, his feet on inside of outside rail on southbound track, he had no bruises at all. Eight or ten cars had passed over his body. You can see about 60 rails a man lying down on the track. It was up-grade. Mr. Soles had me to count the rails with Mr. Stanley. My place is about four hundred yards from where the boy was killed. My grist mill about one hundred yards. From Neuse River going south, the main Atlantic Coast Line track runs up-grade and then down to Black Creek. This train was a freight train, and I guess it runs from Rocky Mount, N. C., to Florence, S. C. I did not see this accident, but I saw the boy about fifteen minutes before the accident and he was walking about. I was too far off to tell whether he had the flag in his hand or not, but I knew he was up there and I saw him walking around."

C. G. Norris testified: "At the time the boy was killed I was working on the trestle force of the Atlantic Coast Line in Johnston County under D. M. Faulk, the foreman, with D. S. Soles. I was on top of the trestle at the time he was killed, about four hundred yards north of him. He was flagging. He took a flag when he left us. I heard the train blow before it came around the curve. I looked up and saw the boy. It looked as if he was sitting on the right-hand rail on the southbound track. It looked as though he might have been sitting on the railroad on the side of the rail with his elbows on his knees, something like this (witness indicates), with his head in his hands, dropped over like this (witness indicates). He was facing the inside of the track. I said on the rail on the right-hand side going south. He didn't move that I could tell. I was looking at him when the train hit him. He was sitting down and they blowed three or four short blows at him. It looked like it knocked him off the track on the outside. The engine had a cowcatcher coming to a point in front. I went down to where he was killed. The track was straight and up-grade for three or four hundred yards, I guess. When he left the construction force he carried a flag and some torpedoes. I saw him place the torpedoes. Five or six hun-

dred yards north of where he was killed. They were placed cross-ways the rail with little fasteners bent under the rail. They make a noise when the train strikes them. I heard a noise like the torpedoes but couldn't say it was that. Mr. Faulk, the trestle foreman of the railroad, employed me, and he was in charge of the gang. He employed others before and after me. I am 23 years old and a native of Columbus County. We left him along the track as we were going to work with his flag and torpedoes. I was in the car with Mr. Faulk and this boy when Mr. Faulk took him out and dropped him at the place where he was to flag, and the balance went on down to the trestle in the motor car. We left him at a certain place with a flag and some torpedoes for the purpose of flagging the train. He was to protect the people working on the trestle. Mr. Faulk told him carefully about flagging the train. He told him he must flag it and that he must, under no circumstances, go to sleep. I heard him tell part of it. I heard him tell him that if anything whatever came down there to flag it until he called him in. He told him he must be very careful to flag it. He gave him a flag. I heard the train blow a signal whistle before I saw it strike him. And just a short while before he was struck, I heard the engine make sharp warning signals. I heard the brakes. They made considerable fuss. I was on the trestle. From my estimate it is 4 or 5 hundred yards from where the boy was struck. The boy was north of Black Creek, a little south of the top or peak of the grade, about twenty-five yards. When the engine came over the peak and sounded the warning, the boy looked to be sitting there with his hands on his knees. If he moved I didn't see him. Faulk went to the boy immediately."

D. J. Stanley testified: "I live about one mile from where the boy was killed. I was about 75 yards away when he was killed. I heard the train blow on the other side of the trestle. I heard it cross the draw bridge, and then it commenced blowing. I heard the torpedoes. The train kept blowing and continued to blow. I was at the edge of the right of way. I saw the boy when he was run over. He was cut right in two. His head was on the right-hand side of the rail and his body on the inside. Eight cars passed over his body after the engine and tender. It was a warm, sunshiny day. It was hot. I saw the boy out there the day before. He was flagging. Some gentleman was out with him the day before who looked to be instructing him. I saw him about nine or ten o'clock. I saw him about 20 minutes before he was killed. I saw him from time to time that morning. I saw him walking up and down the track with a flag in his hands. I am a carpenter and was working by the track that day. It was a through freight train. I saw him often while going to the spring. I spoke to him something like half an hour before he was killed. He was standing up then. I didn't

see the accident. After the train crossed the river it exploded two torpedoes close to the curve, it then blowed as if blowing for signals. I heard the engineer put on the brakes, they were severe, but he waited until he got on him to put them on. I went there immediately and helped to get him out, and counted the cars that passed over him. There was a bunch of bushes between where I was working and where he was killed, and I could not see him."

Mrs. C. M. Soles testified: "I am the mother of D. S. Soles, deceased. He was too young to be married. I know the trestle gang foreman he was working for when killed. I told him 'No, sir,' when he asked me about the boy working for him. He told me that it was dangerous. I am fifty years old. He was the oldest boy at home, and the largest one and the healthiest one, was the reason why I depended on him.

"Q. How, in regard to being able to work, was he? A. Why he was perfectly healthy and able as any boy I have ever seen to know anything about, of his age.

"The court: You mean you were depending upon him? A. I depended upon him for anything he could make.

"The court: What I mean is, you were depending on him because he was a boy and until he was 21 you expected him to stay at home? A. Yes, sir; I certainly did.

"The court: After he was 21, what would you expect? A. I would expect him to stay with me until he got married or wanted to go out for himself.

"He could read and write. He was a truthful boy. I depended on what he told me. I did not tell him he could go with Faulk. If he wrote to Faulk that I didn't object to him going, I undoubtedly did not agree to it. If he wrote the letter it was a mistake somewhere. I cannot be positive about his handwriting. I found him a truthful boy."

Defendant moved to nonsuit plaintiff; motion sustained; plaintiff excepts, and appealed from the judgment.

H. L. Lyon and Irvin B. Tucker for plaintiff.
Rountree & Carr for defendant.

WALKER, J. We will assume in the discussion of this case, that D. S. Soles, the flagman, was guilty of contributory negligence in going to sleep upon the track, and thus exposing himself to grave peril, and which did result in his death. But this is not all of the case, as the question still remains to be decided, whether the engineer, *after he discovered the peril of the intestate,* had sufficient time, with the appliances at hand, by the exercise of due care, to prevent the injury. The rule of this Court is, in ordinary cases, that if by the exercise of due care he

could have discovered the peril of the intestate in time to have avoided the result, the defendant would be liable. But we are proceeding under the Federal statute, and must decide according to the Federal law, as expounded by its highest Court.

The rule, under the law as applied by the Federal courts in cases of negligence, is that the defendant is liable, if it could have avoided the injury which, in this case, caused the death of the intestate, by the exercise of ordinary care, only after discovering his perilous situation. *Judge Taft,* referring to this principle in *Newport News and M. W. Co. v. Howe,* 52 Fed. Rep., 362, used this pertinent language: "As applied to cases like the present, therefore, we believe the rule relied on by the counsel of plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense, if the defendant, *after he knew the peril of plaintiff,* did not use due care to avoid it." And adverting to certain expressions of the Court relating to the same question in *Inland & Seaboard Coasting Co. v. Tolson,* 139 U. S., 551, he said: "This would seem to show that, in the opinion of the Supreme Court of the United States, knowledge of plaintiff's peril was required to make the rule applicable." And in *Little Rock R. and E. Co. v. Billings,* 173 Fed. Rep., 903, *Justices Van Devanter, Sanborn,* and *Pollock* thus state the rule of the Federal Court, applying it to a state of facts very much like those we have here: "As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows: A., who by his own negligent act or conduct, has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself if conscious, may not be carelessly, recklessly, or wantonly injured by B., who, after he has discovered and knows the helpless and perilous condition of A., and has it within his power to avoid doing him an injury by the exercise of reasonable care and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B. under such circumstances will constitute actionable negligence, rendering him liable in damages to A., notwithstanding the prior negligent act of A. in placing himself in position to receive the injury." This rule was expressed substantially the same way in *Grand Trunk R. Co. v. Ives,* 144 U. S., 408 (36 L. Ed., 485), and in *Southern Railway Company v. Gray,* 241 U. S., 333 (60 L. Ed., 1030). See, also, *Buckworth v. Grand Trunk Western Railway Co.,* 127 Fed. Rep., 307; *N. Y., etc., R. Co. v. Kelley,* 93 Fed. Rep., 745; *Smith v. R. R. Co.,* 210 Fed Rep., 414. And so, when dealing with a Federal question, we must apply the common law as construed and administered in the United States courts. *Western Union Telegraph Co. v. Milling Co.,* 218 U. S.,

406; *S. C. R. R. Co. v. Finan,* 153 Ky., 340; *Sou. Ry. Co. v. Howerton,* 105 N. E. (Ind.), 1026, opinion by *Justice Myers.*

It seems to us, therefore, that, considering the special and peculiar facts of this case, the question is, as was said in *Newport News and M. W. Co. v. Howe, supra,* by *Justice Taft,* and in *Railway Co. v. Gray, supra,* by *Justice McReynolds,* whether the engineer had sufficient time after he actually discovered the dangerous situation of the intestate, by the exercise of due care, to have avoided the injury to the boy which resulted in his death. In the *Gray case, supra,* there was held to be no such evidence, but here we must hold, upon the testimony, that there was some under which the jury might reasonably have found, as a fact, that after the engineer first actually discovered the flagman's peril, he had sufficient time with the means and appliances at his command to have brought his engine and cars under such control, as eventually to have stopped them, if it became necessary to meet the emergency, in that way, and save the flagman's life. One of the witnesses, Mr. Norris, testified that he was on the top of the trestle at the time the intestate was killed, about four hundred yards north of him. He heard the train blow before it came around the curve, and, looking up, saw the boy, and he appeared to be sitting on the right-hand rail and on the southbound track, with his elbows on his knees and his head in his hands. He did not move although they sounded the whistle three or four times, which attracted Norris' attention at the distance he was from the place. The track was straight and up-grade for three or four hundred yards. The intestate had placed his torpedoes and they exploded with the usual noise when the train struck them. This and other evidence was sufficient for the jury to find that the intestate was sitting on one rail of the track with his elbows on his knees, his position indicating that he was asleep and unconscious of the approach of the train, and that this appeared to the engineer in time for him to take the proper measures to put his train under control and to stop it, if need be, to avoid killing the boy; and, again, the jury, when they have been apprised of all the facts—the defendant having introduced no testimony—may conclude that the engineer had not sufficient time to act and save the boy after he first discovered, if he did discover, the true situation. The jury might even find, upon the facts as now disclosed, that the engineer had no such time, as was required for the purpose, to act prudently and save the boy, after he first saw him. But that does not signify that there is no evidence to the contrary. As the case now stands, there is evidence tending to establish either of the two contentions, and as reasonable men might differ in regard to it, the jury must decide the question. The torpedoes exploded with the usual attendant and loud noise, and the engineer sounded the signals with the whistle which was calculated to warn one

not asleep or unconscious, but the continued silence and stillness of the boy, he not having moved or responded to them, was at least some notice to the engineer that he was unaware of his surroundings and the impending danger, as he still sat in deep, oblivious slumber.

It may be, too, that the engineer did not actually see him in time to have stopped his train, if he found it necessary, but this must be decided upon the testimony, there being sufficient circumstances at present to show that he probably did see the boy asleep on the track, and not conscious of the train's approach, at a time when he could have stopped his train by the exercise of ordinary care, if it was required to prevent injury to the boy. We repeat that the jury must find, in order to charge the defendant with liability for negligently killing the boy, that the engineer did see the danger to the boy in time, by the exercise of ordinary care, to have saved him. This is the rule which is upheld in the Federal courts.

Two reasonable men might come to different conclusions upon the testimony as now developed, which makes the case one for the jury, whereas, when it is fully heard, it may, perhaps, be easily seen that there was no culpable negligence. It is not clear now that there was none, and while the evidence is not of a definite or entirely satisfactory, and certainly not of a conclusive, character, it would be difficult to say that there was absolutely none, or less than a scintilla of proof.

In this view of the case it is not imperatively required that we should consider at this time the other question raised by the plaintiff, and we will therefore leave it for future decision, when we are confronted by such a necessity.

The nonsuit must be set aside and a new trial awarded.

New trial.

PEARSALL AND COMPANY v. L. C. EAKINS.

(Filed 1 November, 1922.)

1. Constitutional Law—Statutes—Police Powers—Fertilizers—Analysis—Agricultural Department—Evidence.

Statutes requiring evidence of the analysis of fertilizer, made by a State department, showing a deficiency in the ingredients used therein and different from those represented in the warranty of sale, in order to recover for damages to crops caused by their use, are constitutional and valid within the exercise of the police powers of the State. C. S., 4697, and recent amendments thereto.

2. Statutes—Fertilizer—Analysis—Agricultural Department—Evidence—Actions—Counterclaims.

In order to recover damages to the crops caused by the use of fertilizer containing a harmful deficiency of its ingredients, contrary to the seller's warranty, the statute, C. S., 4698, with its recent amendments, requires evidence of its analysis, showing the alleged deficiency, made by the State Agricultural Department, and whether sold upon a special contract, not waiving the benefit of the statute, or under the protection of the statute alone, such evidence is essential to defendant's recovery upon a counterclaim set up by him in plaintiff's action upon the note for the purchase price.

APPEAL by defendant from *Bond, J.*, at February Term, 1922, of NEW HANOVER.

This was an action brought by the plaintiff for the recovery of a certain sum of money due by contract, and secured by a crop lien, executed by the defendant to the plaintiff, for the purchase of certain fertilizers.

The defendant admitted the purchase of the fertilizers and the execution of the contract, and that same had not been satisfied, but defendant set up a counterclaim for damages to his crops, alleging that the fertilizer did not come up to the guaranteed analysis, and that it had borax in it, and that borax was deleterious to crops, and by the use of the fertilizer containing this borax his crops were damaged in a certain amount.

The plaintiffs replied, pleading noncompliance with C. S., 4697, as a necessary prerequisite to asserting the counterclaim against plaintiffs.

The plaintiffs offered in evidence the admissions of the defendant, as stated in the defendant's brief, and in addition to that, offered in evidence the fourth paragraph of the answer, which states "that no part of the indebtedness on the note had been paid." So there was no substantial dispute between the parties, as to the liability of the defendant to plaintiff, and the amount thereof, unless defendant was entitled to recover on his counterclaim.

In his effort to prove the counterclaim, defendant went on the stand and told about the crop that he contemplated planting, offering to testify as to some conversation he had with Mr. Pearsall, a member of the plaintiff's firm. This was objected to by plaintiff, and ruled out by the court on the ground that the defendant was not suing in his counterclaim upon a special contract, but only on the contract implied by law, which was based upon the analysis printed upon the bags, as required by the statute. Defendant thereupon admitted that he had no evidence to show that any samples had ever been drawn, in accordance with the statute (C. S., 4697), and that he had no evidence that the chemist of the Department of Agriculture had ever analyzed any samples drawn,

as required by law, which showed borax or other deleterious ingredients. In fact, he admitted that the requirements of C. S., 4697, had not been complied with at all, although "the action was a suit for damages from results of use of fertilizers." Thereupon, counsel for plaintiff moved to nonsuit defendant upon his counterclaim, which was granted, and moved for judgment on the note, or contract, which was not resisted, and was also granted. Defendant appealed.

Rountree & Carr for plaintiff.

Herbert McClammy, E. Croswell Robinson, and K. O. Burgwin for defendant.

WALKER, J. The only question, as it seems to us, except as stated, which is presented to the Court for decision in this case is whether the cross-action on the counterclaim can be brought when it is admitted that the provisions of C. S., 4697, were in no respect complied with. We understand the defendant to virtually admit that to be the only question, and he insists that under the case of *Tomlinson v. Morgan,* 166 N. C., 557, such an action is maintainable.

We deem it sufficient to say that since that case was decided, the Legislature has changed the statute, and for the express purpose of requiring the Department of Agriculture, its officers and agents, as directed thereby, to furnish the testimony, or at least an important and essential part of it, upon which actions for injuries to crops by the use of fertilizers can be brought and successfully maintained, and failing in this respect, that no such action can be sustained. This was for the purpose of placing the responsibility for ascertaining the truth as to the contents of the fertilizer in the hands of the highest authority in the State—the Agricultural Department, which acts under expert guidance.

This statute is the last declaration of the legislative body as to the requirements necessary before a suit may be maintained for damages due to defective or deficient fertilizers, and, for the purpose of showing this, it would be more accurate to quote from the statute as follows: "*Provided,* that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

We think no one will dispute the power of the Legislature to enact this statute, in the exercise of its police power, or to say under what conditions the courts of the State may be used for the purpose of litigation. The wording is plain and the requirements have not been complied with. No samples were taken of these fertilizers, as required by law, and no analysis by the chemist of the Department of Agriculture was ever made, and no attempt was made to prove, nor any offer to show that it was brought to the knowledge of the Department of Agriculture that the manufacturer of said fertilizer has offered, during the season, other outlawed or dishonest or fraudulent goods.

Plaintiffs rely upon the recent case of *Fertilizer Co. v. Thomas,* 181 N. C., 274, and defendant's counsel attempt to distinguish that case upon the grounds that there was a special contract, and that there was an analysis which showed that the fertilizer did not contain borax. As we read the *Thomas case, supra,* the decision is put squarely upon the terms of the statute, C. S., 4697, although the decision could also have been sustained upon the terms of the special contract, if that was not impliedly done. In fact, it has been held by this Court that, in the absence of a special contract, the parties must look for their rights in such cases to the terms of said statute. *Fertilizer Works v. Aiken,* 175 N. C., 398.

Defendant has directed our attention to the case of *Patterson v. Orangeburg Fertilizer Company,* 108 S. E. (S. C.), 401. It is sufficient to say that apparently there was no such statute in South Carolina as the one relied upon herein, and the decision of that case, as we understand it, was based upon principles of the common law, and really has no proper application to this one, which must necessarily be determined by a consideration and construction of our statute bearing upon the subject involved. That case, though, seems to accord generally with our former decisions upon the liability of the seller of fertilizers for deficiency therein which causes loss or injury to crops resulting from their use. *Carter v. McGill,* 168 N. C., 507 (*S. c.,* 171 N. C., 775). See, also, *Guano Co. v. Livestock Co.,* 168 N. C., 442.

The present case may well be decided upon the admissions of the defendant and the uncontested facts. Defendant has not complied with the provisions of the statute, which expressly forbids "any suit for damages resulting from the use of a fertilizer except after chemical analysis showing deficiency of ingredients, unless," etc., and defendant has not brought his case within the terms of this last or qualifying clause or proviso by proving, or offering to prove, the facts therein required to appear, in order to take his case out of the terms of the first clause or proviso. If there was a deficiency, in that borax was substituted for potash, the former being a deleterious substance and injurious to crops, the defendant should have proved first the analysis

showing the deficiency, under the clear terms of the statute, because it is provided thereby that no suit for damages resulting from the use of the fertilizer may be brought until the analysis is made, and shows the deficiency of ingredients.

The evidence sought to be introduced was properly rejected, and was so manifestly incompetent and irrelevant, under the pleadings and pertinent issues, as to require no discussion of it.

No error.

RALEIGH SAVINGS BANK AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF A. B. ANDREWS, DECEASED, v. W. W. VASS, INDIVIDUALLY AND AS TRUSTEE UNDER THE WILL OF W. W. VASS, DECEASED, AND J. S. KOONCE.

(Filed 8 November, 1922.)

1. **Adjoining Landowners—Light and Air—Boundaries—Party Walls.**

   The owner of lands in the business section of a city, unless otherwise restricted by his deed, may build upon his land to the line of a store building on the lands of an adjoining owner, though by so doing he will close the windows or openings of the owner on that side of his building, and to that extent deprive it of light and air.

2. **Same—Deeds and Conveyances.**

   The legal implication that when the owner of lands conveys a part thereof he grants all those apparent and visible easements on the part retained which were at the time used by the grantor for the benefit of the part conveyed, and were reasonably necessary for its use, cannot be made effective against the contrary intent of the grantor as gathered by a proper interpretation of the deed.

3. **Deeds and Conveyances—Interpretation.**

   A deed to lands will be so construed as to effectuate the intent of the parties as gathered from each and every related part.

4. **Same—Adjoining Landowners—Light and Air—Party Walls—Alleys—Easements.**

   A conveyance of a part of the owner's lands from a line running in the center of a dividing wall of his store building in the business section of a city, conveys to the grantee the right to build to that wall; and where the right to the permanent joint use of an alleyway running along this wall is also conveyed by or reserved in the deed, the conveyance or reservation of this right does not preclude the grantee from using the party wall by arching over the alleyway and preserving its proper use as such.

APPEAL by plaintiff from *Devin, J.*, at May Term, 1922, of WAKE.

The pertinent facts embodied in the case agreed and the judgment of the court thereon are as follows:

1. That on 15 April, 1907, by a deed duly recorded in the office of the register of deeds for Wake County, in Book 219, at page 359, the

defendant W. W. Vass, as trustee under the will of W. W. Vass, deceased, purchased from the Royall and Borden Furniture Company the property described in said deed, situate at the northeast corner of Wilmington and East Hargett streets, and running east along East Hargett Street for the distance mentioned in said deed and north along said Wilmington Street for the distance mentioned in said deed.

At the time of the purchase, there stood at the corner of Wilmington and East Hargett streets a building then occupied by the Royall and Borden Furniture Company, and which building had stood there for many years, having for a period of twenty-five or thirty years been used as the Central Hotel, and in the building fronting east there were windows on the first, second, and third floors, with a basement entrance to the cellar of said building, and through said windows light and air were furnished to the said building on the east.

That upon completion of said purchase, the premises were vacated by the Royall and Borden Furniture Company, and the corner building was leased as a grocery store to M. Rosenthal, who still occupies the same, and the defendant Vass, as trustee, built on the lot fronting on East Hargett Street in the rear of the above corner building, another brick building, and between the two buildings there was an alleyway or driveway 7 feet 10 inches wide at street entrance, 8 feet 1½ inches wide at the middle, and 8 feet 2 inches wide at north end of building, which afforded to both of said buildings light and air through their respective windows. That while the corner building had been built and used for many years as a hotel building, when it was acquired by the Royall and Borden Furniture Company, it remodeled the interior of said building, using the same for a store-room for mercantile purposes, and the rooms on the second and third floor for storage purposes, not altering substantially the partitions of said floors nor the openings outside; which said building is now occupied by M. Rosenthal as a grocery store, as aforesaid.

2. That on 10 October, 1913, W. W. Vass and W. W. Vass, trustee for Eleanor M. Vass and others, sold to A. B. Andrews, the testator of the plaintiff, and executed a deed on said date, which deed was duly recorded in the office of the register of deeds for Wake County on 11 October, 1913, in Book 276, page 649, by which deed the said parties, grantors therein, conveyed to the said A. B. Andrews and his heirs and assigns in fee simple the following described parcel of land:

By a line beginning at the intersection of the east side of Wilmington Street with the north side of Hargett Street, in the said city of Raleigh, N. C., running thence eastward along the north line of Hargett Street eighty-nine (89) feet to the center of the eastern wall of the building located thereon, now occupied by M. Rosenthal as a grocery store; thence

northward in a direction at right angles to said Hargett Street along the center line of the eastern wall of said present building one hundred and fifty-eight (158) feet to a point in the southern line of the Trade Building property; thence westward with the line of said Trade Building property in a direction parallel with said Hargett Street twenty (20) feet to a point in the eastern line of the lot of Mrs. Florence P. Tucker's estate; thence southward with said eastern line of Mrs. Florence P. Tucker's estate lot, in a direction at right angles to said Hargett Street one hundred and eleven feet and three inches (111′ 3″) to southeast corner of said Tucker lot; thence westward with the southern line of said Tucker lot in a direction parallel with said Hargett Street sixty-nine (69) feet to a point in the eastern line of Wilmington Street; thence southward along the eastern line of said Wilmington Street forty-six feet and nine inches (46′ 9″) to the beginning; being the western portion of the lot conveyed to the parties of the first part by the Royall and Borden Furniture Company by deed dated 15 April, 1907, and recorded in the office of the register of deeds for Wake County, in Book 219, at page 359, reference to which said deed is hereby expressly made for matters of description.

Also a right of way in and over an eight foot (8′) alleyway immediately east of the above described lot and premises, which is to be maintained permanently as an alley eight feet wide and extending northward as far as the south wall of the stable building now used by M. Rosenthal.

Also a right to maintain and use the said stable building which is located partly on the above described lot and partly on the property of the parties of the first part, in its present location, provided that when the same is removed or torn down by the party of the first part, it shall not thereafter be extended across the party line.

The said lot so conveyed being the corner of the old Central Hotel property, with a reservation, however, of one-half of the eastern wall of said property; and the said parties did in said deed grant unto the said A. B. Andrews and his heirs the aforesaid tract "to have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging, to said A. B. Andrews, party of the second part, his heirs and assigns, to their only use and behoof forever."

That at said date light and air were furnished to the said buildings situate on the lot conveyed to the said A. B. Andrews from the east side thereof, through the windows in said building, which said windows, as hereinbefore stated, had been maintained in the wall of said building for more than forty years, and they were in the same condition and in the same places in said wall when the said A. B. Andrews purchased said property; and that the elevator in use in said building has an opening from it into said alley.

That A. B. Andrews died 17 April, 1915, having published his last will and testament, which was duly admitted to probate and recorded in the office of the clerk of the Superior Court of Wake County, in Book of Wills ....., page ..... In paragraph two of said will, the said testator appointed the Raleigh Savings Bank and Trust Company trustee for certain specified trusts therein described, and devising certain property therein described or referred to as a trust estate, and one of the said buildings placed in the said trust estate in said will was the building described by him as the said Rosenthal building at the corner of Wilmington and Hargett streets in the city of Raleigh.

3. That the said W. W. Vass, trustee under the will of W. W. Vass, deceased, has contracted to sell, and has entered into a written obligation to sell to the said J. S. Koonce the remainder of said lot east of the center line of the eastern wall of said corner building, subject, however, to the alleyway rights described in the deed to the said A. B. Andrews, the said contract being dated 25 February, 1920, and recorded in Book 355 of the office of the register of deeds of Wake County, at page 142, in which contract the said Koonce has paid approximately one-half of the purchase price called for, the plaintiff contending that the said obligation and said contract of the said Koonce is made subject to all the rights, privileges, and appurtenances belonging to the lot of the said A. B. Andrews, conveyed by deed dated 10 October, 1913, hereinbefore referred to.

4. That the said Koonce, under his contract with the defendant Vass, trustee, contends that he has the right to bridge over or arch over the alleyway, beginning about eleven feet eleven inches above the ground at street entrance and ten feet eight and one-half inches above the ground at the north end, the said alleyway ascending gradually to the north, which said addition will close the second-floor windows, apertures, and openings in the building purchased by the said A. B. Andrews as aforesaid, and four feet eleven inches of a twelve foot doorway (five feet wide) opening from the alleyway into store and opposite elevator, the wooden door in opening being nine feet high with a three-foot transom above, said door opening inward, and will also close upper sash of ten-foot window, the sill of which is forty-two inches above surface of floor. The said Koonce offers to elevate the bottom sill of the sleepers six inches where they are opposite the doorway. The said Koonce has begun the said work, and where he has begun it, part of the windows on the first floor, and all of the windows on the second floor, and the door of said elevator opening into said alley on the east end of the building purchased by the said A. B. Andrews in the deed aforesaid will be closed and no light or air will be furnished to said building through said second-floor windows and apertures on the east side.

Upon the foregoing facts, the question submitted is whether the defendants have the right to arch over said alleyway and cut off light and air from certain of the windows as aforesaid of the building purchased by the said A. B. Andrews on 10 October, 1913, by arching or bridging across the said alleyway at the height of approximately twelve feet from the ground, or any other height, and it is agreed that if the court shall be of the opinion upon the foregoing question that the said defendants have not said right, then a perpetual injunction enjoining them shall be decreed in this case. But on the contrary, if the court shall be of opinion that the defendants have the right, as contended by them, then the action shall be dismissed at the cost of the plaintiff.

MANNING & MANNING,
Attorneys for plaintiff.
S. BROWN SHEPHERD,
Attorney for defendants.

(Verified.)

JUDGMENT.

Upon the agreed statement of facts in this action, the court is of the opinion, and so adjudges, that the defendants are entitled to construct their building over the alleyway in question, provided such structure does not interfere with the convenient use of said alleyway by the plaintiffs as a right of way.

This 29 May, 1922.

W. A. DEVIN,
Judge Superior Court.

Plaintiffs excepted, and appealed.

Manning & Manning and A. B. Andrews for plaintiff.
S. Brown Shepherd for defendants.

HOKE, J. From the facts presented in the case agreed, it appears that defendant W. W. Vass, as individual and trustee, owning a business lot abutting on Wilmington and Hargett streets, on 10 October, 1913, sold and conveyed to A. B. Andrews the lot and building situate thereon at the intersection of said streets, described as follows: "By a line beginning at the intersection of the east side of Wilmington Street with the north side of Hargett Street in said city, running eastward along the north line of Hargett Street 89 feet to the center of the eastern wall of the building now located thereon and occupied by M. Rosenthal as a grocery store; thence northward in the direction at right angles to said Hargett Street along the *center line* of the eastern wall of said present building," etc.

And in said deed is also conveyed a right of way back of said building in terms as follows: "Also a right of way in and over an 8-foot alley-

way, immediately east of the above described lot and premises, which is to be maintained permanently as an alleyway 8 feet wide," etc.

Subsequently, said W. W. Vass sold and conveyed to defendant Koonce "the remainder of said lot east of the center line of the eastern wall of the corner building, subject, however, to the alleyway rights described in the deed to A. B. Andrews, deceased," and the question is on the right of defendant Koonce to build over said alley and adjoining his building to said eastern wall, leaving room for the convenient use of the alley as an ordinary right of way, affording access to the buildings, etc.

On these the facts chiefly pertinent in so far as the deed to A. B. Andrews purports to convey a right of way affording access to the buildings, it is very generally held that the owner of the servient tenement may build over the same so as not to interfere with the reasonable and ordinary user of the easement as described and specified in the deed. *Duncan v. Goldthwart,* 216 Mass., 402; *Crocker v. Cothing et al.,* 181 Mass., 146; *Bitello v. Lipson,* 80 Conn., 497; *Grafton v. Moir,* 130 N. Y., p. 465; 19 Corpus Juris, p. 985; 9 R. C. L., p. 799.

In the digest of the *Connecticut case,* appearing in 16th L. R. A. (N. S.), at p. 1931, it is said: "A grant of an easement of a way with no mention of light and air does not prevent the owner of the fee from interfering with the light and air by placing structures over the way in such a manner as not to interfere with its reasonable and ordinary use."

And in the citation to Corpus Juris, the general position on the subject is very well stated as follows: "Unless it is clear from the language of the grant or the surrounding circumstances that the parties intended to have the passageway remain open to the sky, the owner of the servient estate may extend buildings or other structures over a way, provided in so doing he does not interfere with the free use of the way; and he will not be liable for damages, although the passageway, by reason of its being so covered, becomes to a greater extent the resort of strangers, to the annoyance of the grantee of the easement. The owner of a right of way has no claim to light by any passage other than that of the way itself, and he is not entitled to have light and air pass over the way to any greater extent than is necessary for the enjoyment of the right of passage."

We do not understand that appellant seeks to challenge the general position, as stated, but in his interesting and able argument, counsel contended that same should not prevail on the facts of this record by reason of another well established principle, stated in Jones on Easements as follows: "That where one conveys a part of his estate he impliedly grants all those apparent and visible easements on the part retained which were at the time used by the grantor for the benefit of the part conveyed, which are reasonably necessary for the use of that part."

This position, in proper instances, is well supported by authority, and has been fully recognized and upheld in recent decisions of this Court, where the apparent easement is continuous and permanent in its nature. *Meroney v. Cherokee Lodge,* 182 N. C., 739; *Lamb v. Lamb,* 177 N. C., 150; *Tiedike v. Lipman,* 76 Atl. (N. J.), 463; *Fowler v. Wick,* 74 N. J. Eq., 603; *Wilson v. Riggs,* 27 App. Cas., D. C. P., 550.

But in these and other authorities pertinent to the question it is always fully understood that such an implied grant is subject to be modified or controlled by the express terms of the deed and the facts and attendant circumstances relevant and permissible to its proper interpretation. In applying these principles to the case presented, it must be borne in mind that this is business property, where it is not customary to allow for light and air on the side of adjoining buildings. The rule is, unless otherwise specified, that you will build right up, one building against the other, and not only is this the custom in property along an active business street, but here the deed itself, under which plaintiffs claim, provides that their line shall not extend beyond the center of the eastern wall, thus expressing a clear purpose to restrict any implied grant of light and air by reason of the existence of the windows in said wall, and to reserve the right to build and use the remaining half when desired, subject only to the ordinary and reasonable use of the alley.

In construing deeds and instruments affecting property, it is the fully accepted rule "that the intent of the parties, as embodied in the entire instrument, shall prevail, and each and every part shall be given effect if it can be done by fair and reasonable intendment." *Bowden v. Lynch,* 173 N. C., 203; *Davis v. Frazier,* 150 N. C., 447.

Considering, then, the nature of this property and the facts and attendant circumstances, this description of the deed conveying to plaintiff's ancestor only to the center of the eastern wall of the building and reserving to Vass, the grantor, the other half of said wall, could only have meant that the parties contemplated joining to this wall when the exigencies of business should require it, subject to the rights of the alleyway specifically described in the deed. Any other interpretation would be to deprive this important and formal portion of the conveyance of any and all significance. Under the facts as they existed, and in reference to which the parties dealt, what possible good could the one-half of the wall ever do or be to the owner if the alley was to extend indefinitely upward, and thus shut off all user of the title and privilege reserved by the grantor.

On the record, we think his Honor has entered the proper judgment, and the same is

Affirmed.

L. W. STANLEY v. WHITEVILLE LUMBER COMPANY.

(Filed 8 November, 1922.)

1. Appeal and Error—Evidence—Remarks of Counsel—Prejudice—Res Inter Alios Acta—Trials.

In an action to recover damages for a personal injury alleged to have been negligently inflicted, involving the previous good health of the plaintiff before the injury, it is reversible error for the trial judge to admit as evidence plaintiff's certificate of discharge from the United States Army during the World War, containing recitals of honest and faithful services, etc., the same being *res inter alios acta*, the certificate but hearsay evidence, and prejudicial to the defendant, both in itself and the argument of the plaintiff's attorneys to the jury based thereon, and allowed by the court.

2. Jury—Evidence—Facts at Issue—Appeal and Error.

The plaintiff was injured while employed by the defendant to operate a power-driven wood lathe machine, by a splinter of wood flying off therefrom, and striking and putting out the sight of his eye. There was conflicting evidence on the trial as to whether the machine was properly constructed as to its safety in this respect, or whether it was one known, approved, and in general use, etc.: *Held*, it was reversible error for the trial judge to admit the testimony of a witness who had testified to his previous knowledge of such matters, to further say that if a certain protective hood had been used on the lathe, the injury would not have occurred, this being the opinion of the witness upon the facts in evidence, within the sole province of the jury to determine, and not coming within the exception allowing nonexpert opinion evidence in certain cases.

3. Appeal and Error—Improper Argument—Trials—Prejudice.

Improper remarks of plaintiff's counsel in addressing the jury in this case, as to defendant's indemnity from liability by a bonding company, were sufficient for the trial judge to withdraw a juror and order a mistrial, had motion therefor been made by defendant.

CLARK, C. J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at May Term, 1922, of COLUMBUS.

Civil action to recover damages for an alleged negligent personal injury.

Upon denial of liability and issues joined, there was a verdict and judgment in favor of the plaintiff. Defendant appealed.

Powell & Lewis and Tucker & Proctor for plaintiff.

Schulken, Grady & Toon, Brooks, Hines & Smith, and Rountree & Carr for defendant.

STACY, J. Plaintiff recovered a verdict of $10,000 as damages for the loss of an eye, and from the judgment rendered thereon, the defendant appealed, assigning errors.

It is alleged that the defendant's lathe machine, at which the plaintiff was injured on 9 June, 1921, was negligently and defectively equipped with insecure rollers and insufficient guard; and further, that it was in a generally unsafe and dangerous condition. Plaintiff was injured by a splinter being thrown from the machine and striking his eye, putting it out. There was evidence of splinters having been thrown out by said machine at other times prior thereto, and about which the plaintiff previously had made complaint.

Conversely, there was evidence on behalf of the defendant tending to show that the lathe machine was in good condition, equipped with proper guard, and of the kind and character in general use and of approved make. *Helms v. Waste Co.,* 151 N. C., 370; *Hicks v. Mfg. Co.,* 138 N. C., 319.

The errors assigned are largely addressed to the admission of incompetent and irrelevant testimony, and to the use made of same before the jury by plaintiff's counsel. The plaintiff, a witness in his own behalf, was allowed to testify as follows:

"Q. Were you honorably discharged (from the Army) in good physical condition? (Objection and exception.) A. Yes. (Objection and exception.)

"Admitted for the purpose of showing the plaintiff's physical condition prior to his injury.

"Q. Is that the discharge you received? (Objection and exception.) A. Yes, sir. (Objection and exception.)

"By the court: Q. Where were you discharged? Objection and exception.) A. Camp Lee, Virginia. (Objection and exception.)

"Q. And the officer who discharged you issued you this certificate? (Objection and exception.) A. Yes, sir. (Objection and exception.)"

The plaintiff was then permitted to offer in evidence, over objection, the following paper-writing, purporting to be the said certificate of discharge:

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY.

To all whom it may concern:

This is to certify that LaFayette W. Stanley, 1894876, Private 3d B. and S. Det. D. G., 221st M. P. Co., The United States Army, as a testimonial of honest and faithful service is hereby honorably discharged from the military service of the United States by reason Auth. Par. S. O. C. F. Q., Camp Lee, Va., 25 June, 1919.

Said LaFayette W. Stanley was born in Whiteville, in the State of North Carolina.

When enlisted he was 25 years of age, and by occupation a farmer.

He had brown eyes, dark hair, fair complexion, and was 5 feet 8 inches in height.

Given under my hand at Camp Lee, Virginia, this 26 June, 1919.

JOHN A. SHAW,
Major, U. S. A., Commanding.

ENLISTMENT RECORD.

Name: LaFayette W. Stanley. Grade: Private.
Enlisted or inducted: 27 May, 1918, at Whiteville, N. C.
Serving in first enlistment period at date of discharge.
Prior service: None.
Noncommissioned officer: No.
Marksmanship, gunner qualifications or rating: Not qualified.
Horsemanship: Not mounted.
Battles, engagements, skirmishes, expeditions: A. E. F. from 31 July, 1918. Meuse, Argonne, Verdun, St. Die.
Decorations, medals, badges, citations: None.
Knowledge of any vocation: Farmer.
Wounds received in service: None.
Physical condition when discharged: Good.
Typhoid prophylaxis completed: 13 June, 1918.
Paratyphoid prophylaxis completed: 13 June, 1918.
Married or single: Single.
Character: Excellent.
Remarks: No absence under A. W. 107.
Entitled to travel pay to Whiteville, N. C.
Signature of soldier: LaFayette Warrington Stanley.

A. A. HOFHAM, *Capt. Inf., U. S. A., Commanding 3d B. and S. Det. D. G.* CAMP LEE, VA.

Paid in full, including bonus, $103.25.

M. A. PITTMAN, *Captain Q. M. C.,*
By C. T. P., *Agent.*

Transportation issued to Florence, S. C., N. & W. R. R., 26 June, 1919, Camp Lee, Va.

The court, addressing the jury: "This document is offered as corroborative of the witness, L. W. Stanley, if you find that it does corroborate him, as to his discharge, and the fact of his physical condition."

The first question and answer, it will be noted, were admitted for the purpose of "showing the plaintiff's physical condition prior to his injury"; and then the latter evidence was admitted as corroborative of

his "discharge and the fact of his physical condition." It appears from the record, however, that it was not only used for these purposes, but also for quite a different purpose as well.

This evidence, we think, should have been excluded. It was not pertinent to the issues involved, and the certificate of discharge was incompetent as hearsay. It is clear that the major part of the certificate was used for the purpose of appealing to the sympathy of the jury. The physical condition of the plaintiff is referred to in one place only in the "enlistment record," not in the discharge proper, but counsel were permitted to argue the whole to the jury. When the defendant objected to the contents of the discharge being argued to the jury, his Honor ruled as follows: "The court suggests that there has been evidence tending to show that the plaintiff did serve in the great war, his discharge has been introduced in evidence, and further, the court stated to the counsel objecting that he would follow counsel Lewis in addressing the jury and could answer him." (Objection and exception.) Here, it will be observed, the court treated the certificate of discharge as having been admitted generally, and as substantive proof, and not merely as corroborative evidence.

Counsel then proceeded in his address to the jury: "He, plaintiff, L. W. Stanley, withstood the onslaughts of the enemy, the shrapnel, the machine gun bullets, the gas bombs that were thrown from the air, and every other form of attack that was possible for the Germans to put over. In his discharge he has been credited with several battles. He was at Argonne, Verdun, and St. Mihiel; he went through the war with his regiment at the front from 26 September, until the armistice was signed, in 1918. He remained in France nearly a year—from July to the following June. He was then sent home and was discharged from the Army. You will recall that in the early part of 1920 financial depression set in, and it was almost impossible for thousands of service men to get positions."

This was much more than "cross-firing with small shot." It was a dangerous use of "contraband of war."

Major John A. Shaw, who issued the discharge, was not sworn as a witness, and was not even present at the trial. His certificate was neither certified to as a public record, nor sworn to by him. Furthermore, it was *res inter alios acta.* A new trial was awarded in the case of *Bryant v. Bryant,* 178 N. C., 77, for a similar error in the admission of a letter which tended to corroborate one of the plaintiff's witnesses. The ruling in that case would seem to be directly in point here: "A letter from a third person, written to the son of the plaintiff, tending to corroborate his evidence on a material fact involved in the action, may not be introduced in evidence, and the facts therein stated must be

proved by the writer under oath as a witness, such being hearsay and *res inter alios acta.*"

It is manifest in the case at bar that the introduction of the above evidence was hurtful and prejudicial. We cannot safely say that it was harmless. "There is no telling how far the defendant's case was affected by this error. Where there is error, its *immateriality* must clearly appear on the face of the record in order to warrant this Court in treating it as surplusage." *Pearson, C. J.,* in *McLenan v. Chisholm,* 64 N. C., 324.

There was also error, as indicated in the defendant's fifth and sixth exceptions. J. P. Stanley, plaintiff's brother, was allowed to testify, over objection, as follows: "The piece that struck my brother in the eye could not have come from anywhere else except that tin. . . . I have worked in five or six different mills. I have seen lathe machines in other mills besides those I worked in. All the mills that I have worked in had a piece of iron over it about three-eighths of an inch thick and bent down over the roll to keep the stick back. If this machine had been so equipped this piece could not have struck the plaintiff in the eye as it did."

The admission of this evidence, in the manner and form in which it was offered, is in conflict with the decisions of *Marshall v. Tel. Co.,* 181 N. C., 292; *Kerner v. R. R.,* 170 N. C., 97, and *Marks v. Cotton Mills,* 135 N. C., 287. In the last case just cited, *Associate Justice Walker* states the rule with clearness, and fortifies the same with a full citation of authorities. As there held, in a matter of this kind, a witness should not be permitted to express an opinion on the very question which the jury is impaneled to decide. "The general rule undoubtedly is that witnesses are restricted to proof of facts, within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine." 1 Rice on Evidence, 325, quoted with approval in *Cogdell v. R. R.,* 130 N. C., 318.

It has been said in a number of cases that witnesses should describe the facts and circumstances to the jury, and leave them to draw their own conclusions, under proper instructions from the court. *Tillett v. R. R.,* 118 N. C., 1042; *Wolf v. Arthur,* 112 N. C., 691. There are, of course, exceptions to this rule of evidence, but the present case falls within none of them. *Barnes v. R. R.,* 178 N. C., 264, and *Britt v. R. R.,* 148 N. C., 41. In fact, the instant case furnishes a striking illustration of the wisdom of the rule. The witness was allowed to testify, in so many words, that the plaintiff would not have been injured if the machine had been covered with an iron hood. This was the full equivalent of saying that, in the opinion of the witness, the defendant had failed to discharge one of the primary duties which it owed to the

plaintiff; or, in other words, that the defendant was guilty of negligence. The jury alone was summoned and selected to pass upon this question, and the witness should not have been permitted to express an opinion upon the very matter at issue between the parties. *Lynch v. Mfg. Co.*, 167 N. C., 98; *Summerlin v. R. R.*, 133 N. C., 550.

Again, in addressing the jury, Mr. R. M. Lewis, one of plaintiff's counsel, made the following statement: "Gentlemen of the jury, you need not worry about the Whiteville Lumber Company having to pay this—you have heard about these insurance companies." Defendant objected, and counsel withdrew the remark.

By the court: "Gentlemen of the jury, you will not regard that remark of counsel."

Plaintiff concedes, and rightly so, that this remark, injected in the case during argument of counsel, was improper, and should not have been made. His Honor would have been justified in withdrawing a juror and ordering a mistrial, but he was not requested to do so. Hence, this exception, in its present form and standing alone, possibly should not be held for reversible error, but it gives pronounced color and tone to the other objections appearing on the record, which are valid. In *Lytton v. Mfg. Co.*, 157 N. C., 333, it was said: "Evidence that the defendant, in an action for damages arising from an injury, is insured in a casualty company is entirely foreign to the issue raised by the pleadings, and is incompetent. By some courts it is held to be so dangerous as to justify another trial, even when the trial judge strikes it from the record," citing a number of authorities. See, also, *Starr v. Oil Co.*, 165 N. C., 587, where the question is again treated in a full and well considered opinion by *Walker, J.*

For the errors, as indicated, the cause must be remanded for another trial.

New trial.

CLARK, C. J., dissenting: This was an action for damages sustained by plaintiff while working at the defendant's sawmill, and while operating a lathe machine, which was alleged to have been negligently and defectively equipped with insecure rollers, worn out and insufficiently guarded, and which was generally unsafe and dangerous. The jury rendered a verdict sustaining such allegations of negligence, causing loss of plaintiff's right eye, lacerating his face, and suffering on account of same.

The eye had to be removed and a glass eye substituted. The injury occurred on 9 June, 1921, and was caused by a splinter or stick which was thrown from the lathe machine and came through a hole worn in the tin guard used as a protection against such occurrence, striking the

plaintiff in the face and eye. There was evidence that prior to that time pieces of lath and splinters had been thrown out in that manner from said machine, and plaintiff had complained thereof to the foreman and superintendent of the mill. The testimony of the defendant tended to show that the machine was in good condition, of the most approved in use, and was equipped with the proper guard.

The defendant, in his argument and brief, seems practically to have abandoned exceptions as to proof of negligence and to rely upon prejudicial testimony and argument, which he claims prejudiced the jury and increased the damages. The defendant insists that the evidence of the plaintiff's discharge from the army was prejudicial, but the plaintiff contends that it was corroborative evidence as to his physical condition at the time of his discharge, he having testified that he was then in good physical condition, and that his present condition was due to the injuries he sustained on the occasion of this injury. The plaintiff insists, correctly, we think, that if the appellant desired fuller instructions in regard to that matter it should have asked, at the time of the admission of the testimony, that it be restricted. *S. v. McGlammery,* 173 N. C., 750, and cases there cited; *Nance v. Tel. Co.,* 177 N. C., 315. Rule 27 of this Court, 174 N. C., 835, cited in the above cases, provides: "It will not be ground for exception that evidence, competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

The official certificate of discharge was offered to corroborate the plaintiff's verbal testimony as to his physical condition at the time of his discharge and prior to his injury. This was competent in corroboration, being an official Government document certifying to the plaintiff's physical condition at that time. The statute of this State, Laws 1921, ch. 198, provides for the registration of official discharges from the military and naval forces of the United States in the office of the register of deeds of the several counties of the State, and requires that a special and permanent book shall be kept in the office of the register of deeds for that purpose. "The certificate of discharge issued to a soldier is legal evidence of his discharge, and his discharge, in the absence of contrary evidence, is held to be honorable." 3 Cyc., 342. The court stated to the jury that the document was offered as corroborative evidence of the witness as to his discharge, and the fact of his physical condition.

Nor was there any error in the admission of the testimony of plaintiff's brother that he had been a workman at this machine for some time; that he had worked in 5 or 6 different mills, and that the bearings on this machine were loose, and did not hold the material that went through the saws; that the machine was in very bad shape; that the tin used as a guard was worn and had holes in it, and that one piece of

stick came through the hole the evening before the injury and struck the witness in the face, and stuck two or three splinters in him.

In addressing the jury, one of the counsel for the plaintiff said to the jury that they "need not worry about the defendant company having to pay this. I have heard about these insurance companies—." The defendant objected, and counsel said that he would withdraw his remarks. The court thereupon told the jury: "You will not regard that remark of counsel." This, we think, was all that the court could have done, unless further caution had been asked as an instruction by the defendant.

Counsel for the plaintiff, in addressing the jury, picked up the discharge of the plaintiff and addressed the jury concerning the same. The defendant objected to the argument of the counsel and the reading of this discharge to the jury. The objection was overruled, and no exception was taken. We find no error prejudicial to the defendant in this particular.

Counsel for the plaintiff, further addressing the jury, said: "He (the plaintiff, L. W. Stanley) withstood the onslaughts of the enemy, the shrapnel, the machine gun bullets, the gas bombs that were thrown from the air, and every other form of attack that was possible for the Germans to put over. In his discharge he has been credited with several battles—he was at Argonne, Verdun, and St. Mihiel. He went through the war with his regiment at the front from 26 September until the armistice was signed in November, 1918. He remained in France very nearly a year, from July to the following June. He was then sent home and was discharged from the Army. You will recall that in the early part of 1920 financial depression set in and it was almost impossible for thousands of service men to get a job." To these remarks there does not appear in the record any exception, but the defendant excepted to the following remark of the court to the jury: "The court suggests that there has been evidence tending to show that the plaintiff did serve in the great war; his discharge has been introduced in evidence, and further stated to the counsel, who objected, that he would follow counsel Lewis (who has spoken for the plaintiff) in addressing the jury, and could answer him." We do not see that this statement was in any wise prejudicial to the defendant.

Mr. Tucker, also counsel for the plaintiff, addressing the jury, said: "This man I represent faced the greatest gas manufacturers of the world, on the greatest battlefields in the world, and came away ungassed, and this lumber company will not succeed in gassing him before this jury. He faced in the most terrible battle of the World War the enemy. He stood there and went through and came out and this paper shows he is an honorable man, and gives him an honorable discharge,

and that his physical condition was good. He was a better man physically when he came back than he was when the Government called him. They say he was drafted, that he would not have gone if he had not been yanked over there. Nobody has testified to that except Mr. Schulken. He went, as far as the record shows, as any man went from Columbus County, to face the enemy, and face the battles and came back without a scratch, although he stood in front of the most terrible military machine the world has ever seen for months and months, and yet he could not withstand the ingenuity of the Whiteville Lumber Company for 30 days, and after he had worked in there about 30 days they took one of the most precious organs of his body, etc. You, gentlemen of the jury, know that while this boy was off in the war fighting this company was here making money, and that they have got the money that they ought to have been spending equipping their machines and getting them so they would be safe." To this there is no exception or assignment of error in the record.

This Court has repeatedly held that exceptions to the language of counsel must be taken at the time, and if the court corrects it, it is not reviewable, nor even when it refuses to do so will it be held reversible error, unless there is clear and unmistakable abuse. As to the first language above quoted, the counsel promptly withdrew the remark. *S. v. Davenport,* 156 N. C., 597; *S. v. Tyson,* 133 N. C., 692.

In addition, the judge, in his charge to the jury, stated to them, as appears in the record: "The fact, gentlemen of the jury, that the plaintiff was a soldier in the great war must not influence your verdict, nor the fact that the defendant owns great tracts of timber and railroads have any effect upon your deliberations. Your duty is with the evidence, and the instructions I have given you as to the law. Counsel have made good speeches, and it is your duty to give their arguments consideration as long as they keep within the evidence within the case. But you will remember that lawyers are advocates, that it is their duty to make their side appear the best side. You will remember that you and I are to hold the scales in untrembling hands—I to instruct you in the law, and see that substantial justice is done, and you to judge the facts with cold impartiality. You take the law from the court, not from counsel. It is my duty to instruct you in the law, and it is your duty to take my instructions as to the law, and apply it to the evidence as you remember it. Counsel have the right to argue the law to you, and the facts, but it is your duty to remember the evidence and to take the law from the court, and apply it to the facts as you remember them. So, gentlemen of the jury, it is your duty to take the issues which are to be handed to you and faithfully and carefully consider them, and find your verdict and return it."

We do not see that more was required of the judge, or that, in the absence especially of a request from the defendant, he should have given fuller consideration to the remarks of the plaintiff's counsel, which were doubtless in reply to or were fully replied to by opposing counsel.

The testimony as to the good physical condition of the plaintiff at the time of his discharge was proper and competent, as it was incumbent upon the plaintiff to show his physical condition at the time he was injured by the defendant. If his eyes and physical condition had not been normal and good prior to the injury, he would not have been entitled to as much damages on account of the loss of one of his eyes. It is well known that soldiers were given a very rigid and searching physical examination immediately prior to their discharge, and to have this evidence was most pertinent on the issue of damages. If in any respect it could have been prejudicial to the defendant, it should have asked that it be restricted to that purpose.

The plaintiff's counsel contends that his remarks as to the large business done by the defendant were competent and relevant in reply to the remarks of the defendant's counsel that it was engaged in a valuable industry, building up and developing the county, and that it would be bankrupt, ruined, and cease to do business if the plaintiff recovered a large judgment against the defendant.

The plaintiff's counsel also contends that his remarks in regard to the plaintiff's war record and to the scarcity of employment soon after his discharge from the army were in reply to the remarks of the defendant's counsel that the plaintiff was not patriotic, but was drafted and forced to go to the war; that he had never accumulated anything, was worthless, and had brought this suit as a pauper, and the plaintiff contends that these remarks on the part of his counsel were prompted by the continual abuse of plaintiff by defendant's counsel, and reflections on his patriotism made by them. He contends that these remarks of defendant's counsel justified and required the replies that were made by the plaintiff's counsel, and the fact that these remarks of plaintiff's counsel were not excepted to, and the further fact that the plaintiff did not appeal prevented these and other injurious remarks of defendant's counsel being set out in the record.

It is to be presumed that the trial judge committed no error in these matters, as to which there was no exception, and that he held the scales of justice evenly between the parties. It was evidently the case of "cross-firing with small shot."

The defendant also excepted because the judge charged the jury, "The plaintiff is to have a reasonable satisfaction, if he be entitled to recover at all, for loss of both bodily and mental powers," but this charge must be taken in connection with the other part of the same paragraph, which

is not set out in the exception, but are fully stated in the record as follows: "And for actual suffering, both of body and mind, which was the immediate and necessary consequence of the injury, and it is for the jury to say, under all the circumstances, what is a fair and reasonable sum which the defendant should pay the plaintiff by way of compensation for the injury he has sustained. The age and occupation of the plaintiff, and the amount he was earning at the time of the injury, are matters properly to be considered by you."

The assignment of error of only a part of this sentence used by the court in its charge is fragmentary, and does not make complete sense. Taking the whole sentence and charge as given, it was correct, for there were allegations in the complaint, and evidence sustaining it, that the plaintiff had endured great pain, and still suffered great mental and physical pain.

GREENSBORO BANK AND TRUST COMPANY, GUARDIAN, v. G. M. SCOTT.

(Filed 8 November, 1922.)

1. Contracts—Promise—Consideration—Abstinence from Drink.

An offer from an uncle to his nephew that if the latter would abstain from drink for a period of five years, and devote his entire time and attention to the former's business, he would pay him $10,000, is for a sufficient consideration to support the promise upon the fulfillment of the obligation assumed by the nephew, and enforceable, it appearing that the parties were then living together in a relationship nearly approaching that of parent and child; and the nephew was an efficient manager of his uncle's mercantile business, and his sobriety, therefore, of monetary value to him.

2. Same—Trusts—Statute of Frauds.

Where the promisee has fulfilled his obligation, extending over a period of five years, made upon a valid and enforceable agreement of the promisor to pay him $10,000; and the promisor just before the expiration of the period has agreed by parol with the promisee that the consideration should be changed from the sum stated to his purchase for the promisee of a home of the latter's selection, which was accordingly done, but title was taken by the promisor in his own name under the parol trust in favor of the promisee, and the promisor continues to live there with the promisee and to pay the taxes on the house to the time of his death without making the deed as agreed upon, the promisee may in equity enforce the conveyance of the home against the heirs at law of the deceased promisor upon the principle of a parol trust, it being, in effect, the purchase of the home with the money belonging to the promisee, and which was due him upon the fulfillment of the original agreement; and the principle relating to the enforcement of a parol agreement affecting interests in land under the statute of frauds does not apply.

CLARK, C. J., dissenting.

BANK *v.* SCOTT.

APPEAL by plaintiff from *Connor, J.*, at the May Term, 1922, of CUMBERLAND.

This was a special proceeding, commenced before the clerk of the Superior Court of Cumberland County, in which the Greensboro Bank and Trust Company, as guardian for certain minor heirs of one C. L. Bevill, claimed an undivided one-sixth interest in a lot of land in the city of Fayetteville, the remaining five-sixth being owned by the defendant, and asked for a sale for partition. The defendant denied that the minor children had any interest in the lot, and claimed that he was the real and sole owner of the same, under parol trust with C. L. Bevill.

The testimony tended to show that C. L. Bevill died in October, 1920, intestate, and without lineal descendants. He left surviving him six brothers and sisters, or the children of such. The wards of the plaintiff are the minor children of one R. A. Bevill, a brother of the deceased, and the defendant is a son of a sister who is still living.

For many years C. L. Bevill lived in Fayetteville, and did a large wholesale and retail business in buying and selling horses and mules. His business was very successful, and he left a large estate. For many years the defendant handled the financial transactions of the business, as confidential clerk, bookkeeper, and general office man, at which he was very efficient, and his efforts materially aided in the building up of the business. The relationship between the defendant and his uncle was practically that of parent and child. Scott was married in July, 1910, and both before and after his marriage he had been drinking to excess. Influenced by his interest in the welfare of said Scott, and realizing his dependence upon him for the continued successful operation of his business, Bevill proposed to his nephew that if he would wholly abstain from the use of intoxicating liquors and devote his entire time and attention to his business for a period of five years, he would pay him the sum of $10,000. Scott accepted this proposition, and from the date of said contract and agreement until the expiration of said period of five years, wholly abstained from the use of intoxicating liquors and devoted his entire time and attention to the performance of his duties as an employee of the said C. L. Bevill, and in all respects fully complied with his part of the contract, which resulted in great benefit to his employer, financially and otherwise.

Some time during the year 1912, C. L. Bevill, having observed that the defendant was fully and faithfully complying with his agreement and contract, as aforesaid, proposed to the said Scott that instead of paying him the sum of $10,000 in cash at the expiration of the five-year period, he would immediately purchase for him the best home he could find in the city of Fayetteville, to be selected by himself and his wife. This offer was accepted by Scott, and soon thereafter he notified Bevill

that he and his wife had selected the home then owned by T. M. Green on Hay Street in said city. Bevill thereupon opened negotiations with Green for the purchase of said home, informing him that he desired to purchase same for G. M. Scott. Bevill paid Green $8,500 for the house and instructed Green to make the deed to him, declaring at the time that he would convey same to Scott after the expiration of the five-year period.

T. M. Green, pursuant to instructions from C. L. Bevill, delivered possession of the house and lot to the defendant G. M. Scott, and who has been in possession of same continuously since the execution of the deed on 4 December, 1912. The defendant continued in the employment of C. L. Bevill until his death, and the said Bevill often, in conversation with friends and associates, referred to the house and lot in question as the home of G. M. Scott. Bevill lived with Scott, occupying a room in the said house, and paying a stipulated sum per month to Mrs. Scott for the use of same and for his board.

Although G. M. Scott had fully performed his part of the contract and agreement, as aforesaid, C. L. Bevill did not convey said house and lot to the defendant at the expiration of the period of five years, nor did he convey the same thereafter, at any time prior to his death; he having died suddenly while on a purchasing trip at Saint Louis, Mo.

Since the death of C. L. Bevill, all of his heirs at law, who are above the age of twenty-one, in deference to the known wishes of the deceased, have executed a deed conveying to the defendant, without further consideration, all their right, title, and interest in and to said house and lot, the same being an undivided five-sixths interest.

By consent, the court heard the evidence and found the facts, as above stated, and held that C. L. Bevill took title to the property in trust for Scott, and that his heirs were charged with this trust, and ordered that the guardian of the minor children convey the remaining one-sixth interest to the defendant. Petitioner appealed.

Rose & Rose and R. D. Douglas for plaintiff.
Oates & Herring for defendant.

STACY, J., after stating the case: The promise and offer of C. L. Bevill, under the facts of the instant case, to pay his nephew the sum of $10,000, if he would wholly abstain from the use of intoxicating liquors and devote his entire time and attention to his business for a period of five years, accepted and carried out, as it was, by the defendant, constituted a valid and enforceable contract. *Homer v. Sidway,* 124 N. Y., 538; 12 L. R. A., 463; Clark on Contracts (2 ed.), 114. In *Talbott v. Stemmon's Executor,* 89 Ky., 222; 5 L. R. A., 856, it was held: "The

abandonment of the use of tobacco by one party during the life of another is a sufficient consideration for a promise by the latter to pay the former an agreed sum of money." See, also, Anson's Law of Contract, p. 100. Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes,* 60 Mo., 249. In the case at bar there was evidence to the effect that Scott's soberness and abstinence from the use of liquor in any form was worth to Bevill, in his business, the sum of $10,000 a year.

It will be observed that Bevill also profited to the extent of $1,500 and more by the change subsequently made in the contract. The single point presented for our consideration is whether a valid parol trust was created when Bevill, in lieu of paying the sum of $10,000 at the expiration of five years, agreed to purchase and to hold for Scott the best home in the city of Fayetteville, the same to be selected by the defendant and his wife. The facts are not in dispute. The change in the contract was agreed to by both parties. The plaintiff contends, however, that the contract, relating as it does to real estate, cannot be enforced, because, and only because, it is not in writing. Defendant counters by saying that his equity does not rest upon the idea of the specific performance of an oral agreement, but rather upon the idea of enforcing the execution of a trust; the relation of the parties being that of trustee and *cestui que trust. Cloninger v. Summit,* 55 N. C., 513. What actually took place was the full equivalent of, and really amounted to, a purchase of the property by Bevill with Scott's money, for Scott agreed to release Bevill from the payment of the sum of $10,000, and upon this promise, Bevill purchased the house and lot and took title in his own name. "It is not necessary that the consideration, which moves from the *cestui que trust,* should be *money;* it may consist of anything of value; and a trust will be decreed in favor of him who is the source of the consideration, whether it be lands, goods, money, securities, or credit." Bispham's Equity (9 ed.), p. 151; *Blodgett v. Hildreth,* 103 Mass., 484.

In application of this principle, the language of *Pearson, J.,* in *Hargrave v. King,* 40 N. C., 436, would seem to be quite pertinent and entirely appropriate here: "It is well settled that if one agrees, by parol, to buy land for another, and he does buy the land and pay for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, hold him to be a trustee, and compel him to make title to the principal; for the statute which requires all contracts 'to sell or convey land' to be in writing has no application."

We think the judgment in favor of the present defendant is fully supported by the decisions of this Court in *Lefkowitz v. Silver,* 182 N. C., 339; *Ballard v. Boyette,* 171 N. C., 24; *Lutz v. Hoyle,* 167 N. C., 632; *Brogden v. Gibson,* 165 N. C., 16; *Anderson v. Harrington,* 163

N. C., 140; *Avery v. Stewart,* 136 N. C., 426; *Sykes v. Boone,* 132 N. C., 199, and *Wood v. Cherry,* 73 N. C., 110.

It would seem to be unnecessary, and, indeed, a work of supererogation, to repeat here what has been said in these cases. There is no error appearing on the record, and this will be certified to the Superior Court.

Affirmed.

CLARK, C. J., dissenting: The cases where the abandonment of the use of tobacco or abstinence from intoxicating liquors was held to furnish a good consideration for a promissory note can have no application here, for this is an alleged oral promise to convey realty, which, under the statute of frauds, is void, and therefore unenforceable.

Nor is the principle stated by *Pearson, J.,* in *Hargrave v. King,* 40 N. C., 436, pertinent or appropriate, for there he said that "If one agrees, by parol, to buy land for another, and he does buy the land and pays for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, hold him to be a trustee, and compel him to make title to the principal; for the statute which requires all contracts 'to sell or convey land' to be in writing has no application." In this case nothing remotely resembling this took place. The deceased, C. L. Bevill, had no money whatever of D. M. Scott in his possession, and, of course, could not buy the land with Scott's money, and there could be no trust raised in this way, for if there was in fact any promise made to buy the house and convey the land, it was verbal and invalid under our statute, which the Legislature has not seen fit to revoke.

The land was bought by Bevill with his own money, and if he had made a verbal promise, as claimed, to buy the house with his own money and convey it to Scott, this was simply a parol contract to convey land. It is unnecessary to discuss whether such promise was upon a good consideration or not, for the purchase was not made with Scott's money, and any oral agreement to buy the house and convey it to Scott was simply invalid under the law of the land. None of the cases cited are authority which authorizes the courts to compel a conveyance of the property to Scott.

The fact that Scott lived in the house with Bevill after he bought it does not strengthen the contention that Bevill intended to give it to him. The point is that such intention was not evidenced by any writing, and cannot be enforced either in equity or at law.

Besides, when Bevill bought the land, which he did entirely with his own money, there is no evidence that Scott, then or at any other time, requested the deed to be made to him, and again, although Scott lived in the house with Bevill, the property was listed from the time of the

purchase in 1912 to Bevill's death in October, 1920, for taxes in the name of C. L. Bevill, and each year Scott paid those taxes by checks signed by Bevill. The five-year period of the required sobriety, alleged as the sole consideration, expired in 1916, four years before Bevill's death, and no demand was ever made by Scott for a conveyance. The fact that the other heirs of Bevill, who were of age, subsequently conveyed to Scott is not binding upon these infants who appeared by their guardian. They were not charged with any trust by the above transaction by virtue of which the court could decree that the guardian of the minor children should convey their undivided one-sixth interest to Scott.

There is no principle of law better settled than that parol evidence is inadmissible to prove the terms of a verbal agreement to convey land or any interest therein. There is nothing in the facts here to show any equity authorizing the court to decree that there was a trust in favor of Scott when there was no payment of any money of Scott by Bevill in the purchase of the land. Even if there was an oral agreement, under which, as Scott claims, Bevill became his debtor, that did not authorize the enforcement of a verbal contract to convey land.

The authorities are so uniform that it could be said with entire accuracy and confidence that there is no case in the books which authorized the enforcement of a decree compelling the minor heirs of Bevill to convey their interest to Scott. *No case anywhere heretofore has held that if one happens to be indebted to another he can contract to convey real estate to him verbally, without any writing.* Whether Bevill was or was not indebted to Scott by an oral agreement that he would give him a house if he remained sober, this was not a trust, but in any and every aspect was purely and simply "a verbal contract to convey."

The fact that Bevill lived in the house from his purchase in 1912 till his death in 1920; that the land was listed in his name for taxation, and that the taxes were paid through Scott by checks signed by Bevill; that the alleged five years sobriety which was the alleged consideration of the promise to convey to the defendant a house and lot expired in 1916; that Bevill survived the expiration of the five years for four years, and Scott made no demand for a conveyance of the house in all these 8 years time was evidence which should have been submitted to a jury, even if this had been an action at law upon an alleged valid agreement to convey, and even if it had been a valid and enforceable contract. The agreement being denied, only a jury, and not a judge, could pass on the fact.

The statute of 29 Charles II. provides: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the par-

ties to be charged therewith, or by some other person by him thereto lawfully authorized," is still in full force and effect in this State. C. S., 988. Our Legislature has retained it, thus approving the wisdom of this age-long rule, and as this Court has recently said, we cannot change the law.

W. H. MURRAY v. JOE B. BASS ET AL.

(Filed 8 November, 1922.)

1. Appeal and Error — Dismissal — Courts — Jurisdiction—Supersedeas Bond—Principal and Surety—Statutes.

Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of C. S., 650.

2. Principal and Surety—Supersedeas Bond—Execution—Bankruptcy—Discharge of Principal—Statutes.

Where an undertaking to stay execution on appeal to the Supreme Court has been given by the defendant against whom judgment has been rendered, C. S., 650, and pending appeal he has been adjudicated a bankrupt in the Federal Court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute, according to the terms of the undertaking, which the bankrupt's subsequent discharge does not affect. *Laffoon v. Kerner*, 138 N. C., 281, cited and distinguished.

3. Same—Federal Statutes.

Where defendant's appeal to the State Supreme Court has been properly dismissed with judgment against the surety on defendant's undertaking to stay execution, C. S., 650, before discharge in bankruptcy in proceedings then pending, the defendant and his surety on the undertaking are co-debtors within the meaning of the bankrupt act, and thereunder the surety is not discharged from his obligation on the bond.

4. Bankruptcy — Principal and Surety — Discharge—Defenses—Pleas—Puis Darreign Continuance.

In proper instances, the surety on the defendant's undertaking to stay execution on appeal may successfully plead in the State court the defendant's discharge in bankruptcy *puis darreign continuance*.

APPEAL by plaintiff from *Connor, J.*, at April Term, 1922, of ROBESON.

MURRAY *v.* BASS.

Civil action to restrain the collection of a judgment of the Superior Court of Robeson County, rendered in a case wherein Joe B. Bass was plaintiff and R. Pittman Barnes was defendant, and W. H. Murray surety on *supersedeas* bond.

From an order denying the relief sought, the plaintiff appealed.

Johnson & Johnson for plaintiff.

McLean, Varser, McLean & Stacy, S. Brown Shepherd, and Britt & Britt for defendants.

STACY, J. The essential facts, as found by his Honor and embodied in the judgment of the Superior Court, are as follows:

1. On 17 February, 1921, the present defendant, Joe B. Bass, instituted a civil action in the Superior Court of Robeson County against one R. Pittman Barnes. At the October Term, 1921, of Robeson Superior Court, judgment was rendered in said action in favor of the plaintiff Bass and against the defendant Barnes in the sum of $970, with interest from 14 February, 1921, and for costs. The defendant Barnes gave notice of appeal from said judgment to the Supreme Court of North Carolina, and was required, in order to stay execution on said money judgment, to execute his *supersedeas* bond in the sum of $1,200, which he did in the form prescribed by C. S., 650, with W. H. Murray, the plaintiff in the present action, as surety thereon; and the filing of the same did, pursuant to the statute and the order of the court, operate to stay any execution on the judgment rendered in said action pending the appeal.

2. Thereafter, at the second February civil term of Robeson Superior Court, 1922, in the said action wherein Joe B. Bass was plaintiff and R. Pittman Barnes was defendant, judgment was rendered by Hon. George W. Connor, judge presiding, finding that the appeal of the defendant from the judgment rendered at the October Term, 1921, had been abandoned and the liability of the surety on the *supersedeas* bond was thereupon adjudged to be absolute and subject to execution. There was no appeal from this judgment, and no objection or exception noted at the time of its rendition.

3. At this term of court no suggestion of pending bankruptcy of R. Pittman Barnes was made to the court when motion for judgment was made; but there were several cases on the calendar in which R. Pittman Barnes was being sued, and, during the call of the docket, counsel for Barnes announced that, as a petition in bankruptcy had been filed against the defendant, he would make no further contest in the cases pending against him.

4. It is agreed that the facts, with reference to the bankruptcy proceedings, are as follows: On 19 December, 1921, a petition in bankruptcy was filed against Richard Pittman Barnes in the United States District Court for the Eastern District of North Carolina, and on 7 January, 1922, he was duly adjudged a bankrupt by said Court. That at the time of the institution of the present suit, 1 April, 1922, no application for discharge had been made by the bankrupt, and said proceedings are now regularly pending in the United States District Court for the Eastern District of North Carolina.

5. Joe B. Bass, in his suit against R. Pittman Barnes, has issued execution on the judgment rendered in his favor, and the sheriff of Robeson County was proceeding to enforce same against the property of W. H. Murray when this action was instituted and application made for a restraining order.

6. There was no substitution of any other surety on the *supersedeas* bond, given in the case of *Joe B. Bass v. R. Pittman Barnes,* and the said W. H. Murray remained liable thereon, which said liability became fixed and absolute by the judgment rendered in said action at the second February civil term, 1922.

7. The question having been raised as to whether the plaintiff herein should have proceeded by motion in the original cause or by independent suit, in order that the case might be determined on its merits, it was agreed that this action might be treated as a motion in the original cause between Joe B. Bass and R. Pittman Barnes, and it was so regarded by the court below.

Upon the foregoing facts, his Honor declined to relieve W. H. Murray from his obligation on the *supersedeas* bond, and from the judgment rendered at the second February civil term, 1922; and to this ruling exception was duly noted, and plaintiff appealed.

The *supersedeas* bond is not set out in the record, but it is agreed that it conforms in all respects to the requirements of C. S., 650. This section provides: "If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment, unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal." Here, it will be observed, the affirmation of the judgment, or any part thereof, or the dismissal of the appeal, is the condition upon which the surety agrees to become bound, either in whole or in part, as the case may be.

It was suggested, though not urged, that as the appeal was never docketed in this Court, the judgment was not technically "affirmed" or "appeal dismissed," as contemplated by the statute, and, therefore, the event upon which the surety was to become bound has not yet occurred or happened. This position, of course, is untenable. A judgment of the Superior Court, upon proper finding that the appeal had been abandoned, would have the same effect, so far as the liability of the surety on the *supersedeas* bond is concerned, as an order of dismissal or judgment of affirmance here. *Dunn v. Marks,* 141 N. C., 233; *Blair v. Coakley,* 136 N. C., 409; *Causey v. Snow,* 116 N. C., 498; *Avery v. Pritchard,* 93 N. C., 266. Indeed, the statute does not require that such affirmance be made by the appellate court.

But appellant stakes his case upon the ground that the bankruptcy proceedings against the principal, R. Pittman Barnes, relieves him as surety on the *supersedeas* bond. For this position he relies upon the decision in *Laffoon v. Kerner,* 138 N. C., 281, where it was held that the sureties on a stay bond were not liable when, pending the appeal from a justice's judgment and before trial in the Superior Court, the defendant obtained a discharge in bankruptcy from all his debts, including the plaintiff's claim, and interposed same by way of plea in bar of plaintiff's suit. There is this distinction, however, between the facts of that case and the one at bar. In *Laffoon's case, supra,* the liability of the surety on the *supersedeas* bond had not become fixed and absolute when the principal named therein obtained his discharge in bankruptcy, and exhibited same to the court after plea setting up the fact; not so here. This, we apprehend, is a vital and important difference between the two cases. The contingency upon which the sureties in *Laffoon's case, supra,* agreed to pay the judgment never happened—the discharge in bankruptcy of the defendant having destroyed plaintiff's debt before the liability of the sureties thereon became fixed necessarily worked a dismissal of the action and a release of the sureties. *Payne v. Able,* 7 Bush. (Ky.), 344; 3 Am. Rep., 316. But here the contingency, upon which W. H. Murray agreed to pay Bass's judgment, has happened, and his liability therefor has become fixed and absolute; and this before any discharge in bankruptcy relieving R. Pittman Barnes from its payment. W. H. Murray, therefore, at the present time, stands in the position of a codebtor. Section 16 of the Bankrupt Act of 1 July, 1898 (U. S. Comp. St., sec. 9600), which does not seem to have been amended or changed by subsequent legislation, reads as follows: "The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." In order to have prevented this condition of affairs, the pending bankruptcy proceedings should have been called to the judge's

attention by proper plea prior to the rendition of the judgment at the second February civil term, 1922, of Robeson Superior Court. *Gay v. Brookshire,* 82 N. C., 409; *Ollis v. Proffitt,* 174 N. C., 675.

The identical question here presented was before the Court of Appeals of Kentucky, in the case of *Slusher v. Hopkins,* 97 S. W., 1128, where it was held that the sureties in an appeal bond, conditioned on the payment of the judgment appealed from, in the event of its affirmance, were not discharged from liability by appellant, pending the appeal, filing a petition in bankruptcy and obtaining his discharge subsequent to the affirmance of the judgment. To like effect is the decision of the Court of Appeals of New York in the case of *Knapp v. Anderson,* 71 N. Y., 466. And, in fact, as we understand it, *Laffoon v. Kerner, supra,* is in full support of, and in no way militates against, our present position.

It is undoubtedly the practice in this State that a defendant in an action brought to recover on a dischargeable debt may plead in the trial court his discharge in bankruptcy, secured *puis darrein continuance,* and, unless some valid cause is shown to the contrary, the action will be dismissed. *Laffoon v. Kerner, supra.* But where, in a case of this kind, a stay of execution or *supersedeas* bond has been given, pending appeal, and the condition or contingency upon which the liability of the surety was to become operative has happened, and this without any plea setting up the discharge, or even suggesting the bankruptcy proceedings, being interposed prior thereto, the surety will not be relieved of his obligation after judgment has been rendered against him. The bondsman having elected to deprive the judgment debtor of the opportunity of enforcing his claim, by voluntarily executing the *supersedeas* bond, cannot now with propriety complain if he is required to live up to the terms of his undertaking. In the present case he agreed to assume the risk, upon conditions stated, and those conditions have been met. His liability has now become fixed and absolute.

Affirmed.

J. MATT HAM v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 8 November, 1922.)

Instructions—Damages—Punitive Damages—Appeal and Error—Prejudice.

There was evidence on the trial tending to show, in plaintiff's behalf, that the defendant railroad company's agent at its station assaulted the plaintiff without provocation, while he was on the defendant's depot premises to purchase a ticket as a passenger on its train; and, in defendant's behalf, that the plaintiff was there as an idler and loafer, making

himself a general nuisance, and grossly insulted the defendant's agent, upon being ordered from the premises, in a manner well calculated to provoke the assault complained of: *Held*, a charge to the jury that they might award punitive damages in their discretion is reversible error, without the further instruction upon the conflicting evidence on the principle that such are allowable only in instances of malice, gross negligence, or other cause of aggravation in the act which caused the injury.

APPEAL by defendant from *Harding, J.*, at May Term, 1922, of FORSYTH.

Civil action to recover damages for an unlawful assault upon plaintiff by defendant's agents and employees in breach of the duty owed from defendant to plaintiff. There was evidence on part of plaintiff tending to show that in March, 1920, plaintiff was in and upon the premises of the railway station at Walkertown for the purpose of buying a ticket and taking the next train to Walnut Cove on defendant road, and while there for the purpose, the agent of defendant made an unlawful assault upon plaintiff with an insulator, an inkwell, and an iron poker, inflicting severe wounds and bruises, from which he still suffers.

There was evidence on part of defendant tending to show that plaintiff was not on defendant's premises for the purpose of becoming a passenger, but was there as an idler and a loafer, making himself a general nuisance. That he refused to leave when ordered off, and before going or attempting to leave, and before any assault made upon him, plaintiff grossly insulted defendant's agent, and in a manner well calculated to provoke the assault complained of.

On issues submitted, the jury rendered the following verdict:

"1. Did the defendant, the Norfolk and Western Railway Company, through its agent, unlawfully assault the plaintiff, as alleged? Answer: 'Yes.'

"2. What damages, if any, is the plaintiff entitled to recover therefor? Answer: '$2,000.' "

Judgment on verdict for plaintiff, and defendant appealed, assigning errors.

McMichael, Johnson & McMichael for plaintiff.

F. M. Rivinus, Murray Allen, Raymond G. Parker, and Craige & Vogler for defendant.

HOKE, J. As now advised, we discover no error in this case as to the rule by which the question of liability has been determined, nor as to the award of compensatory damages, *Harrison v. R. R., ante,* 86; *Clark v. Bland,* 181 N. C., 110, but we are of opinion that reversible error appears in the charge of the court on the question of punitive damages. Speaking to this question of punitive damages in the concurring opinion

of *Ammons v. R. R.*, 140 N. C., 200, it was said: "Exemplary or punitive damages are not given with a view to compensation, but are under some circumstances awarded in addition to compensation as a punishment to defendant, and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness and oppression, or in a manner that evinces a reckless and wanton disregard of plaintiff's rights." And in the prior case of *Holmes v. R. R.*, 94 N. C., 318, it was held that punitive damages are not to be allowed "unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury." Both of these statements were cited with approval in the recent case of *Cottle v. Johnson*, 179 N. C., 430, and in that case, among other things, it was directly held: "Where there is allegation and conflicting evidence that the defendant alienated the affections of the plaintiff's wife, and also had criminal conversation with her, it is error for the trial judge to charge the jury that they may award punitive damages in their discretion without instructing them upon the law relating to the principles upon which punitive damages may only be awarded."

The charge of his Honor in the principle case comes directly within the condemnation of this ruling. For he tells the jury that in addition to compensatory damages they may add "such an amount of punitive damages as would be a reasonable punishment to the defendant for its wrongful acts," without giving any further statement of the principles that should guide them to a correct and proper determination of such a question.

For this error we are of opinion that there must be a new trial of the cause, and it is so ordered.

New trial.

L. L. BLEVINS v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 8 November, 1922.)

Appeal and Error—Unanswered Questions—Presumptions—Evidence.

Upon the exception to the exclusion of an answer by the witness of a question, it must be made properly to appear what the expected answer would have been, to be considered on appeal, so that its materiality may appear of record, under the rule that prejudicial error will not be presumed, but must affirmatively be established by the appellant.

APPEAL by plaintiff from *Finley, J.*, at July Term, 1922, of ASHE.

Civil action to recover damages for the loss of plaintiff's cow, alleged to have been killed by the negligent operation of defendant's train.

From a judgment in favor of defendant, the plaintiff appealed.

Charles B. Spicer for plaintiff.
T. C. Bowie for defendant.

STACY, J. Plaintiff's cow was killed by defendant's train on 2 December, 1920. It was the contention of the defendant that the killing was accidental, and that the train could not have been stopped in time to have prevented the injury. In reply to this, the plaintiff, as a witness in his own behalf, offered to testify within what distance the train—admittedly running from ten to fifteen miles an hour—could have been stopped at that particular place. He stated that he was familiar with the track; that he had often observed trains passing up and down the line; that there was a cut and a curve at the place where the cow was killed; and that he had seen trains stop right near this particular point. There was also testimony to the effect that the engineer could have seen the cow for a distance of four hundred feet. Upon objection, the witness was not allowed to answer, or to give his proposed evidence. This ruling may have been erroneous (*Hanford v. R. R.*, 167 N. C., 277); but its materiality does not appear, as there is nothing on the record to show what the answer would have been. *Armfield v. R. R.*, 162 N. C., 24. Prejudicial error will not be presumed; it must be affirmatively established. *In re Ross*, 182 N. C., 478.

No error.

S. D. BARNES v. P. J. LEONARD ET AL., BOARD OF COMMISSIONERS OF DAVIDSON COUNTY.

(Filed 8 November, 1922.)

1. School Districts — Consolidation—Taxation—Nontax Territory—Elections—Approval of Voters.

Where special school tax districts have been consolidated with nonschool tax territory, it is, in effect, an enlargement of the special tax territory, and coming within the provisions of C. S., 5530, it is required for the validity of a special tax to be levied for school purposes in the enlarged territory that it be approved by the voters outside of the special tax district, or districts included in the consolidated territory, at an election to be held according to law.

2. School Districts — Consolidation — Taxation—Existing Districts—Collateral Attack—Actions—Injunction.

Where nonspecial school tax territory is included in a consolidated school tax district with a school tax district that has theretofore voted

and continued to levy a special tax, the question of the validity of the tax so levied by the existing district cannot be attacked collaterally in a suit to enjoin the levy of a special tax on the entire consolidated district, later attempted to be formed.

APPEAL by defendants from *Harding, J.*, at chambers, 30 September, 1922, from DAVIDSON.

Civil action, heard on return of preliminary restraining order.

From the affidavits and pleadings as presented, it appeared that in March, 1921, the board of education of said county made an order consolidating certain school districts in said county, and on 7 March an election was ordered on the question of a special tax to supplement the school funds of said consolidated district. The election was held, and the proposed tax measure approved by the voters on 8 April, 1921. That the districts composing the said consolidated school district were Churchland District, No. 3; Sapona District, No. 2; Sowers District, No. 4. And at the time of consolidation and the election, etc., the said Churchland District was a special school tax district, having voted same in July, 1911, and district organized and tax levied and collected for purpose since said date, and the two other districts were districts in which no special tax had ever been voted.

The action is to restrain the collection of the special tax in the consolidated district, and on the facts presented the court entered judgment continuing the restraining order to the final hearing, and defendants excepted and appealed.

Walser & Walser for plaintiff.
J. R. McCrary and Raper & Raper for defendant.

HOKE, J. It has been held in several of our recent decisions that under a proper construction of the legislation now prevailing on the subject, C. S., ch. 95, secs. 5469-5526, etc., also Laws 1921, ch. 179, that while county boards of education are given power to consolidate special tax districts, observing the provisions of the statutes in reference thereto, when they undertake to consolidate special tax districts with school districts in which no special tax has been voted, the case, in so far as levying the uniform tax is concerned, is one coming under the requirements of C. S., 5530, referring more especially to the enlargement of special tax districts, and in which it is provided that before any such consolidation or enlargement shall take place, it must have the approval of the voters outside of the special tax district or districts. *Hicks v. Comrs.*, 183 N. C., 394; *Perry v. Comrs.*, 183 N. C., 387; *Paschal v. Johnson*, 183 N. C., 129.

In further application of the principle approved in these decisions in *Burney v. Comrs., ante,* 274, decided intimation is given that a formal election on the question in the outlying or nontax territory would not always be regarded as essential, provided it affirmatively appeared that in an election on the question by the entire district a majority of the voters in the outlying territory had in fact approved the measure.

On the present record, however, there is no evidence tending to show, nor is it claimed or suggested that the voters of these two nontax districts have given their sanction to this proposed tax levy, and the case, therefore, as now presented, comes directly within the decisions of *Perry v. Comrs., supra,* and *Hicks v. Comrs., supra,* to the effect that the levy of the special tax for the consolidated district has not been properly approved.

It is urged for the appellant that decisions relied upon by appellee do not apply here by reason of an averment in the answer that Churchland District, No. 3, was never lawfully a special tax district, because the election under which it was organized and the special tax imposed was held in July, 1911, within three months of another election in May of the same year, citing for the position *Weesner v. Davidson,* 182 N. C., 604. Whatever may be the effect of this averment when properly presented and established, it appears that Churchland District, No. 3, was organized and has functioned as a special tax district since 1911, and the election in question has been recognized and acted on both by the municipal government and electors as valid since said date, and on authority its existence as a special tax district cannot be assailed collaterally in a proceeding of this character. *S. v. Cooper,* 101 N. C., 684; *Riggsbee v. Durham,* 98 N. C., 81; *School District v. School District,* 45 Kansas, 543; *Voss v. School District,* 18 Kansas, 467; *Keweenaw Asso. v. School District,* 98 Mich., 437; 35 Cyc., p. 846. It will be noted that in the *Weesner case, supra,* the action was one in which the validity of the election was directly assailed.

On the facts as they now appear, we are of opinion that his Honor correctly ruled that the restraining order be continued to the final hearing.

Affirmed.

C. T. EVANS v. COMMISSIONERS OF DAVIDSON COUNTY.

(Filed 8 November, 1922.)

(For digest, see *Barnes v. Leonard*, next preceding.)

CIVIL ACTION, heard on return to preliminary order against the levying a tax in a consolidated school district, heard before *Harding, J.*, holding the courts of the Twelfth District, on 30 September, 1922. There was judgment continuing the restraining order to the hearing, and the defendants excepted and appealed.

Walser & Walser for plaintiff.
J. R. McCrary and Raper & Raper for defendants.

HOKE, J. For the reasons stated in the preceding case of *Barnes v. Comrs.*, we approve of his Honor's ruling that the restraining order be continued to the hearing. And for the additional reasons: (1) that on the facts as here presented it affirmatively appears that the voters of the nontax territory disapproved of the measure; (2) that the objection raised to the validity of the special tax districts in *Barnes v. Comrs., ante,* 325, is apparently not presented in this record for the reason that the election establishing said district was held in 1910, one year before the enactment of the statute, Laws 1911, ch. 135, which prohibited elections on this subject oftener than once in two years. C. S., 5533.

The judgment continuing the restraining order to the hearing is Affirmed.

SOUTH GEORGIA MOTOR COMPANY v. GEORGE C. JACKSON, SHERIFF.

(Filed 8 November, 1922.)

Intoxicating Liquors—Spirituous Liquors—Transportation—Automobiles—Forfeitures—Mortgages—Registration of Instruments.

C. S., 3403, creating a forfeiture of an automobile used in the unlawful transportation of intoxicating liquors, and providing for its sale, etc., by its express terms relates only to the interest therein of the violator of the law upon his conviction, and cannot be extended by legal construction to include the interest of a mortgagee of the automobile who is entirely ignorant and innocent of the unlawful act of which the defendant has been convicted; nor will the failure of registration of the mortgage affect the matter under our registration laws enacted for the protection of creditors and purchasers for a valuable consideration, etc.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1922, of NEW HANOVER.

Civil action, tried upon an agreed statement of facts. Judgment was entered for the defendant, and the plaintiffs excepted and appealed.

The substance of the facts agreed is as follows:

1. The plaintiffs are residents of the city of Savannah, Ga., and copartners engaged in the business of selling automobiles under the general name of South Georgia Motor Company.

2. On 14 February, 1920, the plaintiffs sold to Christos N. Christakos and Chan Mavrikis a Cadillac touring car at the price of $2,000, the defendants paying $500 in cash and giving their joint promissory note for $1,500, payable thirty days after date. To secure the deferred payment, the purchasers gave the plaintiffs a mortgage on the car, which was registered on 25 September, 1920, in Chatham County, Georgia.

3. On 21 September, 1920, said Mavrikis was arrested and imprisoned in the city of Wilmington for the illegal transportation in said car of intoxicating liquor. He was operating the car at the time of his arrest contrary to the laws of the State and the United States. The defendant seized the automobile, and Mavrikis afterward gave a bond for his appearance on 28 September, but forfeited his bond, did not appear, and has never been tried on the offense charged. Judgment absolute was rendered on the appearance bond, and the automobile was condemned by the recorder's court, and afterward the sheriff, under the direction of the court, advertised it for sale in accordance with the statute.

4. Plaintiffs, who held the mortgage for $1,500, had no knowledge that Christakos or Mavrikis intended to use the car for the illegal transportation of liquor or other violation of the law, and had no knowledge of such violation until after Mavrikis was arrested.

5. No part of the mortgage for the $1,500 has been paid, and Mavrikis and Christakos are both insolvent.

6. The market value of the automobile at the time of the seizure was $1,250.

7. The mortgage was executed on 14 September, 1920, but was not recorded by the plaintiffs until a few days after the arrest of Mavrikis in the city of Wilmington.

K. O. Burgwyn for plaintiffs.
Rountree & Carr for defendant.

ADAMS, J. The plaintiffs admit that the statute providing for the confiscation or forfeiture of an automobile operated in the unlawful transportation of intoxicating liquor is a valid exercise of the police power (*Daniels v. Homer*, 139 N. C., 219), but they deny that the statute

is broad enough to include the interest which they claim in the condemned car by virtue of their mortgage. It will be noted that the mortgage was executed on 14 September, and registered on 25 September, four days after the arrest of Mavrikis.

"If any person . . . shall have in possession any spirituous . . . liquors in violation of law, the sheriff, . . . who shall seize such liquors by any authority provided by law, is authorized and required to seize and take into his custody any . . . automobile . . . used in conveying, concealing, or removing such spirituous liquors, and safely keep the same until the guilt or innocence of the defendant has been determined upon his trial, . . . and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title, and interest in and to the property so seized; and it shall be the duty of the sheriff having in possession the automobile so used . . . to advertise and sell the same under the laws governing the sale of personal property under execution." C. S., 3403. This statute was construed and the rights of a mortgagee were discussed in *Skinner v. Thomas,* 171 N. C., 103. In that case it was said: "The operative and material part of the statute is, 'and upon conviction of a violation of said law said defendant shall lose all right, title, and interest in and to the property so seized,' and as this confines the forfeiture to the right, title, and interest of the defendant, we are without power to extend its terms and embrace the right, title, and interest of the plaintiffs, mortgagees, who were not defendants, and who have had no connection with the illegal conduct of the defendant. The language of the second and third sections of the act is somewhat broader than that used in the first section, but as we have seen, the second section only deals with the sale of property when no person is arrested, and the third with the distribution of the proceeds of sale, and cannot be held to extend the forfeiture in the first section beyond its terms.

"The distinction between the case before us and the Federal cases cited by the defendant (*U. S. v. Two Bay Mules,* 36 Fed., 84; *Distillery v. U. S.,* 96 U. S., 395; *U. S. v. One Black Horse,* 129 Fed., 167; *U. S. v. Two Horses,* Fed. Cases, No. 16578; *U. S. v. Distillery,* Fed. Cases, No. 14963) is clear, as the Federal cases are based on statutes which declare the property forfeited, while our statute only confiscates the right, title, and interest of the defendant in the property.

"The decision in *Daniels v. Homer, supra,* is upon the same ground, the statute then before the Court declaring that the nets used illegally, and not the interest of the defendant in the nets, should be forfeited."

It is argued that in the case at bar the plaintiffs' mortgage was not registered. Nor does it appear that the mortgage referred to in *Skinner's case, supra,* was registered. There is nothing to indicate registra-

tion in the statement of the case, in the briefs of counsel, or in the opinion of the Court. Besides, the statutes providing for the registration of mortgages are intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. In *Williams v. Jones,* 95 N. C., 505, *Ashe, J.,* said: "By The Code, sec. 1254, it is declared that 'no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors and purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage,' etc.

"Prior to the passage of this act, a mortgage was valid even against creditors and purchasers, and it was required to be registered for their benefit. But as between the parties, their rights were undisturbed by the act, and they are left as they existed before its passage.

"There is no principle better settled than that, as between the parties, a mortgage is valid without registration. *Leggett v. Bullock,* 44 N. C., 283."

It is contended that the Court's construction of the statute in *Skinner v. Thomas, supra,* affords such opportunity for collusion as will destroy the purpose of the law in its practical operation. But we cannot accept such possibility as a ground for extending the terms of the statute to cases not within the contemplation of the Legislature; it is our duty to declare the law, not to make it. *S. v. Johnson,* 181 N. C., 640. In the instant case, however, the defendant admits that the plaintiffs were not in criminal collusion with the purchasers of the car.

Upon a review of the record, we think the judgment should be

Reversed.

CLARK, C. J., dissenting: This case comes up on an agreed state of facts. On 14 September, 1920, the plaintiff, in Chatham County, Georgia, sold to Christos N. Christakos and Chan Mavrikis a Cadillac automobile, which is duly described, for the sum of $2,000. The purchasers paid $500 in cash for the property and gave their joint promissory note for $1,500. This was a conditional sale, as to which the failure to register has the same effect as the failure to register a mortgage. C. S., 3312. The vendor did not record this instrument in Georgia until 25 September, after the purchasers had been arrested on 21 September for transporting intoxicating liquor in said automobile, and after the said automobile had been seized and held by the sheriff of New Hanover for their violation of the laws of this State.

The question presented is whether the action of the vendor in recording the conditional sale subsequent to the legal seizure here under due process of law, for violation of the law of this State can divest the lien which the State acquired by the seizure.

The statute, C. S., 3403, provides that when the law is violated which prohibits the keeping or having "in possession any spirituous, vinous, or malt liquors in violation of law, the sheriff or other officer of any county, city, or town who shall seize such liquors by any authority provided by law, is hereby authorized and *required* to seize and take into his custody any vessel, boat, cart, carriage, automobile, and all horses or other animals or things used in conveying, concealing, or removing such spirituous, vinous, or malt liquors, and safely keep the same until the guilt or innocence of the defendant has been determined upon a trial for the violation of any such law making it unlawful to so keep in possession any spirituous, vinous, or malt liquors, and upon conviction of a violation of the law, the defendant shall forfeit and lose all right, title, and interest in and to the property seized, and it shall be the duty of the sheriff having in possession the vessel, boat, cart, carriage, automobile, and all horses and other animals or things so used in conveying, concealing, or removing such spirituous, vinous, or malt liquors, to advertise and sell the same under the laws governing the sale of personal property under execution."

The validity of statutes forfeiting property used in violation of the statute has been often sustained. In this Court this was upheld in *Daniels v. Homer,* 139 N. C., 219, which has been since cited as authority in *Daniels v. Homer,* 146 N. C., 275; *S. v. Blake,* 157 N. C., 609, and *Skinner v. Thomas,* 171 N. C., 98. *Daniels v. Homer, supra,* was based upon *Lawton v. Steele,* 119 N. Y., 226, which on writ of error was affirmed, 152 U. S., 133, and has ever since been upheld as the unquestioned authority as to the validity of such statutes. Indeed, in numerous United States authorities it has been held that property so used is forfeited, even when it is not the property of the party having the property in possession, and the illegal use is without the knowledge of the true owners. This, of course, forfeits the property even when there is a registered mortgage thereon. Many of these cases are cited in *Skinner v. Thomas,* 171 N. C., at pp. 106-107. The principle laid down in these cases is thus stated: "Animals and conveyances used in removing spirituous liquors to evade payment of the tax are subject to be forfeited though used by a person who had hired them from the owner representing that they would be used for another purpose. . . . When property becomes liable to forfeiture under the positive provisions of a statute, owners who have in no way participated in the frauds which caused the forfeiture must seek redress from the wrongdoers who unlawfully used the property with which they were entrusted or they can apply to the officers of the Government invested with the authority to remit forfeitures. . . . This proceeding is *in rem;* the mules and wagons are considered the offenders, and are liable to forfeiture without

any regard whatsoever to the personal misconduct or responsibility of the owners." If this were not so, the forfeiture could be so easily evaded that the statute would become practically unenforceable.

Indeed, the law is thus summed up in 22 Cyc., 1643: "All personal property employed in the business of illicit distilling is subject to forfeiture, irrespective of ownership"; and in same volume, at p. 1681, it is said: "In addition to the penalties imposed upon persons who remove concealed goods upon which the tax has not been paid with intent to defraud, all conveyances and animals used in the accomplishment of this unlawful purpose are forfeitable. Knowledge or intent on the part of the owner of a conveyance to use it illegally is not required to be shown. The conveyance and animals are considered the offenders, and are liable without regard to the misconduct or responsibility of the owner. Innocent owners of property forfeited must obtain redress from those who were entrusted with the property and used it unlawfully or by application to the officers of the Government who have been invested with authority to remit forfeitures." The notes to that summary of the law show that the authorities are practically uniform that when property is used in violation of law it is subject to forfeiture, although the owner has no knowledge of the purpose. The proceeding is *in rem* against the property which has been devoted to an illegal purpose.

It is claimed in this case that under our statute above cited, which makes forfeitable all right, title, and interest in the property seized, the wrongdoer can protect himself by the device of hiring the property or placing a mortgage thereon. This would be practically a nullification of all means of enforcing the law in such cases, but the defendants rely upon the decision in *Skinner v. Thomas,* 171 N. C., 98. It is true that it does not appear in that case that the mortgage was recorded at the time of the "seizure" of the property under process of law, but it is admitted by the briefs on both sides in this case that in *Skinner v. Thomas, supra,* the mortgage was in fact recorded.

In this case it affirmatively appears that the mortgage was *not* registered at the time the property was "seized" for the penalty due the State, and the question now presented to us for the first time is whether when the mortgage is not registered, the mortgagee can exempt the property from liability denounced by the statute by subsequently recording the mortgage. The question has been clearly settled against the claims of the holder of the subsequently registered mortgage at this term in the case of *Hardware Co. v. Garage Co., ante,* 125, in which the opinion was filed on 27 September, 1922, and in which it was held: "A chattel mortgagee has no lien upon the automobiles and trucks unless registered at the time of the appointment of a receiver for the debtor in whose possession they were."

The right, title, and interest in the property under the unregistered mortgage passed as absolutely to the State upon the seizure of the automobile for violation of the law as it passed to the receiver under the appointment of the court under a direction to hold the same for the benefit of the general creditors. In that case the Court said: "The automobiles and trucks embraced in the order appointing the receiver passed the property to him for the benefit of the general creditors and the holder of the unregistered mortgage was held to have acquired no lien upon them nor upon the proceeds by the subsequent registration of the mortgage. *Starr v. Wharton,* 177 N. C., 324."

Both these cases quote *Observer Co. v. Little,* 175 N. C., 42, as decisive of this question, the Court there saying: "It is held further with us that after the proceeding is instituted and receiver appointed, no general creditor can on his own account take any separate or effective steps in furtherance of his claim," which in that case was attempted by the subsequent registration of a mortgage, and it was further said: "Under these conditions, it is in accord with right reason that a proceeding of this character and the appointment of a receiver thereunder shall be considered in the nature of judicial process by which the rights of general creditors are 'fastened upon the property' within the meaning of the principle and avoiding all claims for specific liens which have not obtained legal priority by having the same duly registered as provided and required by law; and well considered authority is in full support of the position," citing numerous authorities. Of course, there could pass to the receiver only the right, title, and interest of the debtor for whose property he was appointed receiver, but the Court explicitly held that by his appointment the lien for the benefit of creditors was fastened upon the property for the right, title, and interest as it then stood, and this could not be changed by the subsequent registration of any mortgage.

In the present case, by the highest authority, the statute itself, an authority certainly stronger than the decree of a court appointing a receiver, the lien of the law was "fastened upon this automobile," and it could not be divested by the subsequent registration of a mortgage or conditional sale. The State cannot be compelled to go into a controversy in all such cases over the question whether the mortgage subsequently registered was fraudulent and fictitious in order to divest the claim of the sovereign. It is very certain that men engaged in the business of violating the law should not be afforded opportunity to thus divest the lien acquired by a judicial seizure. If creditors cannot thus divest the lien acquired by the appointment of a receiver by the subsequent registration of a mortgage, those whose property has been seized by the Government for being used in violation of law cannot be afforded opportunity to defraud the Government, whose laws they are violating, by subsequently

registering mortgages and throwing upon the Government the almost impossible task of proving that such mortgages are not fraudulently executed, as well as recorded, subsequent to the seizure.

The proposition cannot be better stated than by *Hoke, J.*, in *Hardware Co. v. Holt,* 173 N. C., 310, where he thus says: "True, the receivers, unless otherwise provided in the order, did not properly assume control of the property until they had qualified. Certainly, they could make no authoritative disposition of it before that; but the language of the statute is that the property vests at the date of the appointment, and that the title of the corporation is divested at that date. The statute was evidently expressed in these explicit and peremptory terms with a view of insuring a distribution of the property under the conditions existent at the time of the appointment and to prevent a creditor from obtaining any advantage over another from and after that time, and it is therefore explicitly provided that from such date the corporation shall have no interest in the property on which a lien can be acquired."

In this case, the purchasers of the automobile, as against the world, had the full right, title, and interest to this property when it was seized by the State as forfeited under the statute. The fact that the seller of the machine still had a right in equity to acquire a lien as against the purchasers by recording his mortgage, in no wise affected the absolute right, title, and interest of the purchasers in the property until such mortgage was recorded. Until such registration, the property could have been sold by the purchasers, and an absolute title conveyed. Until such registration, the property could have been sold under an execution for debt against the purchasers, and the sheriff would have conveyed an absolute title. Until such registration, upon the appointment of a receiver, absolute title would have passed to him to hold the absolute title to the property, and this could not have been affected in any of these cases by any subsequent registration of a mortgage or conditional sale.

For further and stronger reasons, when the Government, to enforce the majesty of its violated laws, seizes property on which there has been no mortgage recorded, the absolute title, by virtue of that judicial proceeding, is vested in the State, to be held subject to the verdict of the jury as to the guilt of the defendant, and if found guilty, under the terms of the statute, the property should be sold and the proceeds turned into the school fund, as C. S., 3405, provides, and no subsequent registration of a mortgage can detract from the absolute title which passed to the Government by virtue of its seizure any more than a subsequent registration could affect the title acquired by sale of the property to an individual, or under execution, or its assignment by the appointment of a receiver, or in any other instance.

The seizure of the property for forfeiture, under C. S., 3403, is a judicial procedure, which made the State a "purchaser" under the terms of the registration act, C. S., 3311, and its title can be divested only by a verdict of acquittal and order of the court, C. S., 3403. The violation of the law subjecting the offender to a penalty, which is a debt, the State became a creditor when the violation occurred, and this debt has priority over any mortgage registered subsequent to such violation and by virtue of the seizure the State also became a purchaser of the title, subject to be divested only by acquittal or order of the court. Both as purchaser and creditor the State has priority over subsequently recorded liens.

Upon what reasoning can it be held that the title acquired by the Government in the exercise of the highest power, to enforce a penalty, or in seizing property under judicial proceedings, is less efficacious than the sale to another individual, or under execution, or by the appointment of a receiver?

A penalty for violation of law being a debt to the State, a seizure to enforce this collection takes precedence over a claimant under an unregistered mortgage as fully as under an attachment by any other creditor.

Not only is a fine, or a penalty due the State, a "debt," but it is a debt that has preference over judgments and other debts C. S., 93 (4), and even the homestead does not avail against it. *S. v. Davis,* 82 N. C., 610, and citations thereto in Anno. Ed. And as to forfeitures, a repeal of the statute conferring it will not affect any forfeiture, or rights accruing, prior to the repeal of the statute creating the forfeiture. C. S., 3948.

W. E. STORY v. BOARD OF COMMISSIONERS OF ALAMANCE COUNTY.

(Filed 8 November, 1922.)

1. Constitutional Law—Races—Negro—Schools—School Districts—Taxation.

A school district, made under the provisions of a private statute coterminous with the limits of a city, vesting in a school committee appointed under Public Laws of 1899, ch. 732, sec. 76, the sole control of the public schools of the city, by reference to a school district for each race is not a violation of our State Constitution, Art. IX, sec. 2, as a discrimination between the races, when by proper interpretation it appears that the intent of the statute was to define the boundaries of a district where the

races were to attend separate schools, without discrimination in the apportionment of the proceeds of the bonds, or school facilities; and the sale of the bonds may not be enjoined on that account.

2. Statutes — Taxation — Schools — School Districts — Supplementary Powers.

Public Laws, Extra Session of 1920, ch. 87, applying to all school districts within the State, including incorporated cities and towns, requiring an election to be called upon the proposition of levying an additional special annual tax, etc., in the manner therein specified, is not in substitution of the existing powers of school districts, etc., and may be exercised independently of the provisions of C. S., 5523; nor is the statute of 1920, in its application to the town of Burlington, repealed by Public Laws of 1921, ch. 81, allowing that town from time to time to raise and appropriate money for erecting, enlarging, repairing, and equipping school buildings, and acquiring land for school purposes.

3. Statutes—Interpretation.

The repealing of a statute by implication is not favored by the courts, and they will not do so if by any reasonable construction the statutes may be reconciled and repugnancy avoided.

4. Same—Schools—School Districts—Bonds.

The general statutory inhibition against an election in a school district upon the issuance of bonds within two years after an election in which the question had been disapproved, C. S., 5533, does not apply to an election held under a public-local law applicable only to a certain city or district.

APPEAL by plaintiff from *Connor, J.*, at chambers, 4 October, 1922, from ALAMANCE.

Controversy without action to enjoin the defendant from holding a special election within the corporate limits of the city of Burlington on the question of issuing bonds on behalf of a school district. The following is a summary of the material "facts agreed."

1. The members of the board of education were elected by the aldermen of the city pursuant to the provisions of Private Laws of 1907, ch. 341.

2. On 22 September, 1922, the board of education presented to the defendant a petition for an election to be held in the graded school district, which is coterminous with the city, on 9 January, 1923, pursuant to Public Laws, Extra Session, 1920, ch. 87, and the amendments thereto, on the question of issuing bonds of said district for a maximum principal amount of $150,000 to be used for the purpose of erecting, enlarging, altering, and equipping school buildings and acquiring sites, or for any one or more of these purposes.

3. The defendant heard the petition and ordered that an election be held on the question of issuing bonds in an amount not exceeding $150,000, and of levying a sufficient annual tax to pay the principal and

interest on said bonds, and ordered a new registration of the voters in said district.

4. Pursuant to Private Laws of 1913, ch. 268, and the vote of a majority of the qualified voters, the city of Burlington has issued $40,000 of bonds for school purposes, which are now an outstanding obligation of the city.

5. Pursuant to sec. 76, ch. 732, Public Laws of North Carolina, 1899, at an election duly called and held by the board of aldermen of the city of Burlington a special tax for schools of 30 cents on the $100 valuation of property was voted by a majority of the qualified voters, and said tax has been annually levied by the board of aldermen of the city of Burlington, and collected by the tax collector of the city of Burlington; in the year 1917, under and pursuant to the provisions of Public Laws 1917, ch. 102, a majority of the qualified voters of the city of Burlington, at an election called and held by the board of aldermen of the city, voted in favor of an additional tax for schools of 20 cents on the $100 valuation of property, the same to be in addition to the 30 cents theretofore voted, and such additional tax, or so much thereof as the board of aldermen has deemed necessary, has since said date been annually levied by the board of aldermen, and collected by the tax collector of said city.

6. On 4 April, 1922, the city of Burlington held an election under the Municipal Finance Act, 1921, upon the question of the approval of a bond ordinance passed 14 February, 1922, and authorizing bonds in a maximum principal amount of $100,000 for the purpose of enlarging, altering, repairing, and equipping school buildings and acquiring land, or land and buildings, for school purposes, or for any one or more of said purposes, and at said election the said bond ordinance was not approved.

7. The assessed valuation of property for taxation in the territory embraced within the boundaries of the alleged Burlington City Graded School District, as fixed for the year 1922, is in excess of $9,500,000, and that the only bonds which have been issued for schools within said territory are the $40,000 bonds issued pursuant to ch. 268, Private Laws of North Carolina, Session 1913, as hereinbefore set out.

It is the declared intention and purpose of the board of commissioners of Alamance County to hold said election as ordered, and, if a majority of the qualified voters at said election vote in favor of issuing said bonds, to levy annually a special tax *ad valorem* on all taxable property within said alleged Burlington City Graded School District for the purpose of paying the principal and interest of the bonds.

9. The plaintiff contends that upon the foregoing agreed facts the territory embraced within the corporate limits of the city of Burlington and its inhabitants do not constitute a school district and that ch. 87, Public Laws of North Carolina, Extra Session of 1920, has no applica-

tion to the schools within said territory; and that, therefore, the defendants should be perpetually enjoined and restrained from holding said election under said chapter 87, and from taking any further steps in the premises. And that in any event an election upon the question of issuing bonds for schools within the city of Burlington cannot be held within two years from 4 April, 1922, the date of the last election upon that question.

10. The defendants contend that upon the foregoing agreed facts the territory embraced within the corporate limits of the city of Burlington, and the inhabitants thereof, constitute a school district, and that under ch. 87, Public Laws of North Carolina, Extra Session, 1920, they have full right and power to order and hold said election, and in the event that the same results favorably, and the said bonds are sold, to levy a tax upon all the taxable property within said school district for the purpose of paying and sufficient to pay the principal and interest of such bonds, and that no injunction should be granted; and that there is no law preventing the holding of said election within two years after the election held 4 April, 1922.

Upon the hearing, his Honor adjudged that the petitioner is not entitled to have the holding of said election enjoined, and denied the plaintiff's application for an injunction. The plaintiff excepted, and appealed.

Carroll & Carroll for plaintiff.
Parker & Long and Coulter & Cooper for defendant.

ADAMS, J. The purpose of the action is to enjoin the defendant from holding a special election in the city of Burlington on the question of issuing bonds for the benefit of the schools conducted in a school district which is coterminous with the corporate boundaries of the city. The order of the defendant authorizing the election was made pursuant to the provisions of an act passed by the Legislature at the Extra Session of 1920. Public Laws, Extra Session, 1920, ch. 87. The plaintiff contends that the order was *ultra vires,* and that any bonds issued as the result of the election would be invalid. His contention involves three propositions:

1. The city of Burlington is not a school district.

2. The election can be ordered only in pursuance of C. S., 5523, or in any event not by virtue of Public Laws, Extra Session, 1920, ch. 87.

3. That on 4 April, 1922, the municipal authorities of the city of Burlington held an election on the question of issuing school bonds, and another election cannot be held in the district for the same purpose within two years from that date. C. S., 5533.

In support of the first proposition it is said that by virtue of a statute enacted in 1901 (Private Laws 1901, ch. 187), the city constitutes two school districts—one for the white race and another for the colored race—and that the existence of these two districts implies that each race shall be taxed in breach of the Constitution for the maintenance of the separate schools; and, moreover, that the order for the election does not specify whether the bonds are to be voted upon by the one district or the other, or how the proceeds from the sale shall be applied as between the two races. We do not concur in this construction of the act. We think the reference to a school district for each race was intended to define the boundaries of the district in which there are schools for both races, and to make the boundaries of the district coterminous with those in the municipality. In fact, the plaintiff admits that the boundaries of the school district are the same as those of the city. Section 3 of the act of 1901 vests in the school committee appointed under the act of 1899 sole control of the public schools of the city, and it was no doubt the primary intention of the Legislature merely to provide that the two races should be taught in separate schools. The order for the election expresses the purpose for which the bonds are to be issued and it contains no suggestion of discrimination between the white and colored races. Const. N. C., Art. IX, sec. 2; *Riggsbee v. Durham,* 94 N. C., 800; *Puitt v. Comrs., ibid.,* 709; *Markham v. Manning,* 96 N. C., 132.

The plaintiff next contends that the election can be ordered, if at all, only under the provisions of C. S., 5523, and that the act of 1920 has no application. Public Laws, Extra Session, 1920, ch. 87. This section provides that in any school district which includes an incorporated city or town, upon the written petition of one-third of the qualified voters of the district for an election to be held upon the question of levying an additional special annual tax to an amount specified in the petition, with the approval of the school trustees of the district, such election shall be ordered by the governing body of such city or town in case the district is confined exclusively to such city or town, or by the board of county commissioners if the district includes a part of the county not embraced within the city or town. The act of 1920, *supra,* applies to all school districts in the State, and confers powers in addition to and not in substitution of the existing powers of the school districts. It provides that under it, or under any other act, any school district may issue bonds (section 8), that the term 'school district' shall include the principal administrative or governing body of a school district, by whatever name it may be called (section 9). Section 6 provides that whenever the board of trustees of any school district shall so request, the board of county commissioners . . . shall order a special election to be held in the school district at such time as the board of trustees may

designate for the purpose of voting upon the question of issuing bonds and levying a tax; and section 1 provides that upon approval of the bond issue at the election by a majority of the qualified voters, the board of trustees of the school district shall be authorized to issue the bonds of such district for the purpose of erecting, enlarging, altering, and equipping school buildings, and acquiring land for such buildings, or for any one or more of these purposes, and that the county commissioners may levy an *ad valorem* tax for the purpose of paying the principal and interest of the bonds.

In our opinion this act and section 5523 are not in conflict as to the question here presented. The powers conferred by the later statute are in addition to and not in substitution of the provisions of the older statute. One provides for levying a tax, the other provides for issuing bonds. But the plaintiff insists that the act of 1920 has been repealed by a private law enacted by the Legislature at the Extra Session of 1921, which is as follows: "That in the manner and subject to the limitations now or hereafter provided by the Constitution and laws of the State, the city of Burlington may, from time to time, raise and appropriate money for erecting, enlarging, altering, repairing, and equipping school buildings, and acquiring land, or land and buildings, for school purposes." Public Laws, Extra Session, 1921, ch. 81.

It will be noted that the object of this statute is to grant to the city authority to raise and appropriate money for the same purpose for which the school trustees are authorized to issue bonds under the act of 1920. Extra Session, ch. 87. It does not profess in express terms to withdraw the powers conferred upon the trustees of the school district. Does it withdraw such powers by implication? The repeal of statutes by implication is not favored. The presumption is against the intention to repeal where express terms are not used, and it will not be indulged if by any reasonable construction the statutes may be reconciled and declared to be operative without repugnance. "To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed." 36 Cyc., 1072; *College v. Lacy,* 130 N. C., 364; *S. v. Davis,* 129 N. C., 570; *S. v. Perkins,* 141 N. C., 797; Sutherland on St. Con., sec. 138; Black on Int. of Laws, 112. We are unable to discover such repugnancy between the two acts as will necessarily work a repeal of the powers conferred upon the trustees of the school by the act of 1920.

The plaintiff further contends that the order for the election is invalid because it provides for a second election within two years after a prior election in the same district on the same question. C. S., 5533. On 14 February, 1922, the city submitted to the voters of the district an

ordinance approving the issuance of bonds in the maximum principal amount of $100,000 for the purpose of enlarging, altering, repairing, and equipping school buildings and acquiring land and buildings for school purposes, and at an election held 4 April the ordinance was not approved. In *Weesner v. Davidson,* 182 N. C., 605, it is decided that where an election is held on the question of levying a special tax for a school district and defeated a second election cannot be ordered by the same authority on the same question in the same district within two years after the former unsuccessful election. The facts presented in the instant case differ from the facts in *Weesner's case, supra,* in a most important particular. The General Assembly has conferred upon the school trustees the power to issue bonds for the purpose of erecting, enlarging, altering, and equipping school buildings and acquiring sites, and to levy an *ad valorem* tax to pay the principal and interest, and upon the city the power, subject to the laws of the State, to raise and appropriate money for the same purpose. If it be admitted that the authority of the city is the more limited, the powers to an extent are concurrent. To such a case section 5533 does not apply, for the exercise of the power by the city cannot deprive the trustees of the authority with which they are vested by the act of 1920. Upon an examination of the record, we think the judgment of his Honor should be

Affirmed.

D. GRANT COBLE ET AL. V. THE COMMISSIONERS OF GUILFORD COUNTY.

(Filed 8 November, 1922.)

1. Constitutional Law—Statutes—Interpretation.

The rules for the interpretation of statutes also apply to constitutional provisions, and therein the intent and purposes should be considered with regard to the object to be accomplished and the wrong to be prohibited or redressed; and to determine whether the terms of a statute are unconstitutional, every presumption is in favor of the validity of the statute, and of the honesty of purpose of the Legislature to conform to the organic law with its restrictions and limitations; and the courts will sustain the constitutionality of the statute unless its invalidity, thus ascertained, is "clear, complete, and unmistakable," or the nullity of the act is beyond question.

2. Same—State Agencies.

The purpose of the Constitution, as applied to the subordinate divisions of the State Government, is not to weaken or destroy the power of the Legislature in its necessary control over them, but to preserve their cohesion and prevent their dismemberment.

8. Same—Schools—School Districts—Consolidation—Taxation—Statutes—Local or Special Laws.

Where special school tax districts have been combined with nontax territory, a public-local act to provide an additional tax to that of the special tax districts, and to equalize the benefits among them all for the better equipment of the schools, better pay for the teachers, the transportation of the scholars, expressly leaving intact the boundary lines and management of the schools of each of the districts so consolidated, the question of this supplementary taxation to be submitted to the voters of the enlarged or consolidated district made for the purpose, is not in contravention of Art. II, sec. 29, of the State Constitution, prohibiting the Legislature from enacting local, private, or special acts establishing or changing the lines of school districts.

4. Same—Elections—Approval of Electors.

Special school tax districts may be consolidated and their lines established within a county, where no special tax has been imposed, without the approval of the voters thereof; and where special tax and nonspecial tax territory have been consolidated, a statute which authorizes an additional tax for school purposes upon the approval of a majority of the qualified voters of the district so formed, the proceeds to be equalized among the special tax and nonspecial tax territory, without impairing the existing obligations of the former, does not come within the inhibition of our State Constitution, Art. VII, sec. 7, as to agencies of the State Government pledging their faith, loaning their credit, or levying a tax, unless approved by a majority of the qualified voters, etc.

5. Same—Contracts—Federal Constitution.

The question as to whether a statute authorizing an additional tax for a consolidated school district, composed of special tax and nonspecial tax territory, impairs the obligation of the contract of the tax territory in issuing bonds, U. S. Const., Art. I, sec. 10, cannot be raised in a suit by the taxpayers in the district, but only by the bondholders, or those who have a legal or equitable right arising under the contract; and *semble*, under the facts of this case, the bondholders' rights were preserved by the requirement of the statute that the new district assume and pay the obligation of the old district.

STACY, J., concurring in result.

APPEAL by defendant from *Harding, J.*, at August Term, 1922, of GUILFORD.

By virtue of Public-Local Laws of 1921, ch. 131, and the amendments thereto, the defendant ordered an election, in which was submitted to the qualified voters of Guilford County (excepting the city of Greensboro and the township of High Point) the question of levying and collecting an annual special tax for the purpose of maintaining the schools and erecting school buildings in the prescribed territory. A majority of the qualified voters voted in favor of the tax. Thereupon the defendant made known its purpose to levy the tax so authorized, and the plaintiff, on behalf of himself and other taxpayers, instituted this action for the

purpose of enjoining the levy of the tax, and of having the election declared void.

The statement of facts is as follows:

1. That the plaintiff, D. Grant Coble, is a resident of Coble District, in Clay Township of Guilford County, maintaining his residence therein and owning property in said district of said county.

2. That the defendants are the duly elected and qualified commissioners of Guilford County, charged under the law with the duty of levying and collecting taxes.

3. That prior to 25 April, 1922, there were one hundred and thirteen rural school districts in said county, exclusive of High Point Township and the territory within the city of Greensboro; that of this number 79 were white districts and 34 colored districts.

4. That of the total number of said district on said date there were 35 white local tax districts and 18 colored local tax districts in said territory; and there were 60 nonlocal tax districts which had never voted any special tax for school purposes.

5. That prior to said date one of said local tax districts, known as Jamestown Township, had voted and issued bonds to the amount of $22,500, and that said bonds are still outstanding and unpaid. That the valuation of school property in said Jamestown District on said date mentioned above was more than $50,000; and the valuation of property for taxation within said district for the year 1921 was $1,591,979.

6. That prior to said date ten other local tax districts, constituting Morehead Township, in addition to special taxes, already had voted and issued bonds to the amount of $10,000, which bonds are still outstanding and unpaid. That the valuation of school property in said Morehead District at said time was more than $100,000; and that the valuation in property for taxation within said district for the year 1921 was $15,331,917.

7. That prior to said date three white and one colored local tax districts, in Fentress Township in said county, had also voted taxes and bonds, and had issued bonds to the amount of $8,000, and that said bonds are still outstanding and unpaid. That the valuation of school property within said Fentress District at said time was more than $20,000; and that the valuation of property for taxation for the year 1921 was $1,810,738.

8. That prior to said date three other local tax districts of said county, namely, Bessemer, South Buffalo, and Whitsett, in addition to a local tax already voted and levied, had each voted and issued bonds to the amount of $10,000; and that said bonds are still outstanding and unpaid. That the valuation of school property in Bessemer District is more than

$35,000; and that the valuation of property for taxation within said district for the year 1921 was $1,843,077. That the valuation of school property in South Buffalo District is more than $30,000; and that the valuation of property for taxation in said district for the year 1921 was $2,404,979. That the valuation of school property in Whitsett District was more than $25,000; and that the valuation of property for taxation within said district for the year 1921 was $572,272.

9. That prior to said date 27 of said districts had voted and authorized a levy of a special tax of 30 cents on each $100 worth of property; and that a part of said authorized levy and tax had been levied and collected up to and including the year 1921.

10. That prior to said date 8 of said districts had voted a special tax of 20 cents on the $100 worth of property; and that a part of said tax had been levied and collected up to and including the year 1921.

11. That prior to said date 10 of said districts had voted a special tax of 50 cents on the $100 worth of property, and that a part of said tax had been levied and collected up to and including the year 1921.

12. That prior to said date one of said districts, known as Guilford College District, had voted a tax of 33⅓ cents on the $100 worth of property; and that a part of said tax had been levied and collected up to and including the year 1920.

13. That prior to said date one of said districts had voted a tax of 15 cents, and 3 of said local tax districts had voted a tax of 12 cents on the $100 worth of property; and that a part of the same had been levied and collected up to and including the year 1921.

14. That under Public-Local and Private Laws, Session 1921, ch. 131, as amended by ch. 38, Special Session of 1921, upon written request of county board of education of Guilford County, the board of county commissioners of said county, on 6 March, ordered an election upon the new registration, and after 30 days notice, submitted to the qualified voters of said county, except the city of Greensboro and the township of High Point, embracing all the territory of said local tax district and the non-local tax districts, the question of whether there should be levied and collected annually a special tax not exceeding 10 cents on the $100 worth of property, for building purposes, and not exceeding 15 cents on the $100 valuation of property for school maintenance, in addition to the taxes now authorized, except as provided in said act; and that said election was duly held on 25 April, 1922.

15. That there were registered under the new registration for said election, in all of said territory, 5,093 voters, and of this number 2,988 votes, reading as follows: "For Abolishing All Local School Taxes and Adopting a County-wide Equalizing Tax," were cast in favor of the proposition to abolish all school taxes, as set forth in said act.

16. That a majority of the voters of said territory resided in the local tax districts, and that a majority of the votes cast at the said election were cast by the voters residing in said local tax districts; and that the question submitted as aforesaid was determined by the votes cast in the said local tax district, including said bonding districts.

17. That in the township in which the plaintiff D. Grant Coble resides there were 251 qualified voters, and of this number only 68 votes were cast in favor of the proposition, showing a majority of about 183 against it. That in Greene Township there were 252 qualified voters, and only 61 votes were cast for it, showing a majority of 191 against it; and that in S. Madison Township there were 77 qualified voters, and only one vote was cast for it, showing a majority of 76 against it. That in Morehead, Jamestown, and Fentress, local tax and bonding districts, with 1,050 qualified voters, there were 876 in favor of the proposition.

18. That the tax valuation of property in the territory approving the levy of the tax is $49,465,606, and the valuation of property in the territory not approving the levy of the tax is $10,748,113. That these valuations do not include the property of the railroads and public-service corporations, the total value of which, for taxation, is $5,809,757, and a very large proportion of which is within the townships voting for the levying of said tax, there being considerably less than $1,000,000 of this amount assessed against the railroad and public-service corporations in the townships which voted against said tax.

19. That the value of school property in Clay Township is $7,500; and in Greene Township, $8,500; and in South Madison Township, $2,500.

20. That the board of education of Guilford County has recommended to the board of county commissioners of Guilford County to levy and collect the tax mentioned in said act; and the said board of commissioners have levied said tax for the year 1922, and seek to collect the same.

Judgment was rendered in favor of the defendant, and the plaintiff excepted and appealed.

Bradshaw & Koontz for plaintiff.
John N. Wilson and James S. Manning for defendant.

ADAMS, J. The object of the action is to test the validity of a public-local law, entitled "An act to equalize school advantages in Guilford County." Public-Local Laws 1921, ch. 131. A summary of the pertinent and material provisions of the act is deemed necessary to an understanding of the nature and scope of the controversy presented in the appeal. Section 1 requires the board of commissioners for the county, upon a written request of the county board of education, to call an

election and, after due notice, to submit to the qualified voters of the county, with the exception of the city of Greensboro and the township of High Point, the question of levying and collecting an annual special tax for building purposes and school maintenance, in addition to the school taxes regularly authorized by the General Assembly. Section 2 provides that if a majority of the qualified voters shall favor the additional school tax, the board of county commissioners shall annually thereafter levy this tax at such rate, not exceeding the fixed maximum, as the county board of education may request; section 3, that the additional tax shall be collected uniformly throughout the designated territory in like manner with other taxes, and, when collected, shall be used by the county board of education for the benefit of the schools in the county, not including those in the excepted city and township; and section 10, that the act shall not in any way interfere with the organization of schools as provided in the general law. Other sections will hereafter be considered in connection with questions to which they are immediately related.

This act, ratified 21 February, 1921, was supplemented by another, authorizing the appointment of two additional members of the county board of education (Public-Local Laws 1921, ch. 375), and was subsequently amended by changing the form of the ballot and increasing the maximum amount of the indebtedness for which provision is made under section 7. Public-Local Laws 1921, Extra Session, ch. 38.

The plaintiff's counsel have earnestly insisted that the act of the General Assembly under which the election was held was enacted in breach of the organic law, and that the defendant was without power to levy the proposed tax. All the questions involved in the appellant's argument may be grouped and considered in connection with the three questions, (1) whether the act referred to is inhibited by Art. II, sec. 29, of the Constitution; (2) whether it conflicts with Art. VII, sec. 7, and (3) whether it violates the provisions of Art. I, sec. 10, of the Constitution of the United States.

1. The first question, then, is this: Does Article II, section 29, inhibit the legislation embraced in chapter 131 of the Public-Local Laws of 1921, and the amendments thereto? The material part of the section is in these words: "The General Assembly shall not pass any local, private, or special act . . . establishing or changing the lines of school districts." It is contended by the plaintiff, as we understand, not that the act of 1921 in express terms purports to change the lines of any of the school districts, but that its necessary effect is to incorporate into one school district the entire county, save the city of Greensboro and the township of High Point. On the other hand, it is contended by the defendant that the act, instead of abolishing the districts either in

terms or by implication, leaves them intact, and merely creates a taxing district for the benefit of the schools in the several districts. In our examination of these contentions we should bear in mind certain principles of statutory construction which, accepted, approved, and reiterated, may be regarded as fixed and fundamental. While it is the function of a Constitution to establish the framework or general principles of government, which are not to be defeated by the application of rules that are purely technical, it is likewise true that the canons ordinarily governing the construction of statutes apply also to the construction of constitutions. We may consider the intent and purpose both of the statute and of the Constitution—the object to be accomplished and the wrong to be prevented or redressed. We should apply the principle that every presumption is to be indulged in favor of the validity of the statute, that the General Assembly is presumed to have acted with an honest purpose to observe the restrictions and limitations imposed by law, and that legislation will be sustained unless its invalidity is "clear, complete, and unmistakable," or unless the nullity of the act is beyond a reasonable doubt. *King v. R. R.*, 66 N. C., 283; *Holton v. Comrs.*, 93 N. C., 435; *Lowery v. School Trustees*, 140 N. C., 40; *Bonitz v. School Trustees*, 154 N. C., 379; *Williams v. Bradford*, 158 N. C., 38; *Whitford v. Comrs.*, 159 N. C., 162. "Every act of the Legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution, and avoid the consequence of unconstitutionality. Hence, it follows that the courts will not so construe the law as to make it conflict with the Constitution, but will rather put such interpretation upon it as will avoid conflict in the Constitution, and give it full force and effect, if this can be done without extravagance. If there is doubt or uncertainty as to the meaning of the Legislature, if the words or provisions of the statute are obscure, or if the enactment is fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed." Black on Interpretation of Law, pp. 93, 94.

Keeping in mind the purpose of the Constitution not to weaken or destroy the power of the Legislature in its necessary control over the subordinate divisions of the State Government (*Mills v. Comrs.*, 175 N. C., 217), but to preserve the cohesion and to prevent the dismemberment of the school system by local legislation, let us ascertain the purpose of the statutes in question and, by applying the accepted rules of construction, determine whether the nullity of the act is "clear, com-

plete, and unmistakable," or shown "beyond a reasonable doubt." In plain language it is provided that the act shall not interfere in any way with the organization of the schools, as provided in the general law (section 10); that the school committee of each district shall meet annually at least a month before the time for the preparation of the annual budget and report their recommendations to the county board of education (section 9); that the act shall not operate to reduce the funds which are now provided, or may hereafter be provided by the Legislature for operating the schools for a period of six months, and that the funds raised under the act shall be an additional amount to be used for the purpose of securing better buildings and equipment, of lengthening the term beyond six months, and of providing for an increase in the salaries of teachers (section 6).

Section 5 is as follows: "That if this act is approved by a majority of the qualified voters, then it shall become the duty of the county board of education to, as rapidly as possible, equalize school advantages in every section of the said county, and to this end the county board of education is authorized to provide, at public expense, as a charge against the fund derived from the provisions of this act, to transport those children who live beyond a reasonable walking distance of a public school. It shall also be the duty of the county board of education, as early as possible, to provide all those who have completed the grammar school with good high school facilities either by having a high school in walking distance or by transporting the pupils to a high school."

The various provisions of the statutes, coördinated and combined, seem to indicate as the primary purpose the creation of a single tax district. It will be conceded, we presume, that there is no express provision for establishing one school district or for changing the lines of any district. Nor do we think that such provision can be implied; but if it can, such implication, under the usual rules of construction, while it might be resorted to to sustain the statutes, cannot be invoked to destroy them. *Lowery v. School Trustees, supra.* As we understand the act, it leaves intact the boundary lines of the district and the management of the schools as provided in the general law, subject only to such modification as is reasonably necessary to effect the application of a supplementary tax for the designated purposes. Equalizing the school advantages signifies a just and equitable apportionment of the funds derived from the entire taxing district among the various school districts in order to remove such inequality as under the existing plan works to the benefit of one district to the detriment of another. We are not at liberty to assume, as a cause for destroying the act, that the provision for transporting children who live beyond a reasonable walking distance from a public school necessarily implies that the lines of the various

districts shall in effect be obliterated or ignored. We do not think the language used indicates such intention.

The proposition that the provision for a special taxing district and the application of the funds is a legislative act which is not inhibited by the organic law appears to rest on established principles. In Desty on Taxation, vol. 1, p. 276, it is said: "The Legislature, in the exercise of its general powers of taxation as distinct from its power of local assessment, may create a special taxing district, without regard to the municipal or political subdivisions of the State; and it is not essential that such districts should correspond with the political divisions. . . . It may create taxing districts without regard to any territorial division of the State, and confine the taxation to the district benefited. It may constitutionally establish new civil divisions of the State, embracing the whole or parts of different counties, cities, villages, or towns, for general purposes, provided the divisions recognized by the Constitution are not abolished, and their capacity to subserve the purposes of their organization is not impaired."

In Cooley on Taxation, vol. 1, p. 234, it is said: "When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions. Reference to the cases cited in the margin will show that this is a principle which the courts assert with great unanimity and clearness. 'The judicial tribunals,' it has justly been said, 'cannot interfere with the legislative discretion, however onerous it may be.' And when it was objected that a certain construction of a statute would throw upon one locality the expense of constructing a road for State purposes, 'the conclusive answer' was declared to be 'that the State may impose such a burden where, in the wisdom of the Legislature, it is considered that it ought to rest.' The right to do this, where the Constitution has interposed no obstacles, is declared to be not now open to controversy, if indeed it ever was. The Legislature judges finally and conclusively upon all questions of policy, as it may, also, upon all questions of fact which are involved in the determination of a taxing district."

These principles have been approved by this Court in cases involving the construction of the section of the Constitution now under consideration. This section inhibits the enactment by the Legislature of any local, private, or special act authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys. After the constitutional amendment went into effect the General Assembly passed an act authorizing the board of commissioners of McDowell County to issue bonds for road purposes in North Cove Township, and

requiring the levy of a tax for paying the principal and interest. In sustaining the act, *Brown, J.*, said: "An analysis of the act shows that its primary purpose is to authorize the sale of bonds for road purposes in North Cove Township, and to require the levying of a tax to pay the interest and principal of the bonds. It appoints road commissioners to control the expenditure of the money and to supervise the work, the present laws of the township remaining in force except where modified by the act. The question presented is of necessity one of novel impression in this State, but we must conclude that the act is not of a character which the General Assembly is prohibited from enacting. It contains no provision for laying out, opening, altering, maintaining, or discontinuing highways. It only provides the means for constructing and repairing them. . . . It is impossible to conceive that the purpose of the recent amendment was to deprive the General Assembly of the power absolutely necessary to aid counties and townships in the construction and repair of their public roads. The framers of the amendment no doubt intended to leave intact a long recognized and salutary power of the Legislature to supervise and control the financial affairs of the municipalities of the State. Similar prohibitions as the one under consideration are to be found in other states, and they have not been construed so as to deprive the General Assembly of said powers. Such provisions are construed not to destroy or weaken the power of the General Assembly in its necessary control over the subordinate divisions of the State Government, but to prevent cumbering the statute books with a mass of purely private and local legislation."

The act construed in *Brown v. Comrs.*, 173 N. C., 600, was obviously intended to create a taxing district for road purposes, and the power of the Legislature to enact it was upheld. This case was affirmed in *Mills v. Comrs.*, 175 N. C., 215; *Parvin v. Comrs.*, 177 N. C., 508; *Comrs. v. Pruden*, 178 N. C., 394; *Martin County v. Bank*, 178 N. C., 26; *Comrs. v. Bank*, 178 N. C., 170. See, also, *Board of Trustees v. Webb*, 155 N. C., 379. In the Guilford act the manifest purpose is to create a taxing district for school purposes. In such case the constitutional prohibition does not apply, but it has been applied when the Legislature undertook by special act to establish school districts and to prescribe their boundaries. *Trustees v. Trust Co.*, 181 N. C., 306; *Sechrist v. Comrs., ibid.*, 511; *Robinson v. Comrs.*, 182 N. C., 590.

Since the general power of the Legislature to create a taxing district and to fix its boundaries is neither denied nor impaired by the constitutional amendment, Art. II, sec. 29; since the school districts are retained with their former boundaries, and since the powers of the school committee in each district are unchanged, and the organization of the schools

is not affected, we conclude that the act under which the election was held is not in conflict with Art. II, sec. 29, of the Constitution.

2. Is the act under which the election was held in conflict with Art. VII, sec. 7, of the Constitution? The plaintiff contends that the voters of the districts in which no tax has been levied are taxed without their consent and required to bear a portion of the burden imposed upon the common fund for the payment of obligations outstanding against the districts in which bonds have been issued, while the defendant contends that the creation of the tax district was a matter within the power of the Legislature, and that the validity of the act creating such district is not impaired by the failure to extend to all the voters within the territory an opportunity to approve or disapprove the tax. For the sake of clearness, it may be well, in the first place, to refer to former decisions of the Court with respect to the consolidation of school districts. C. S., 5530, provides that upon a written request of the committee or trustees of any special tax district, the county board of education may enlarge the boundaries of any tax district . . . so as to include any contiguous territory, and in case a majority of the qualified voters of such new territory shall vote in favor of a special tax of the same rate as that levied in the special tax district, the new territory shall be added to and become a part of the special tax district. In *Paschal v. Johnson,* 183 N. C., 132, it was suggested that the question of combining a special taxing district with nonspecial taxing territory should be considered and dealt with as an enlargement of districts under this section; and in *Perry v. Comrs.,* 183 N. C., 387, and in *Hicks v. Comrs.,* 183 N. C., 394, it has been held that the consolidation of a taxing district and a nontaxing district could not legally be effected without the approval of the qualified voters in the proposed new territory. As we have attempted to show these decisions do not determine the question presented in the instant case, because there is no attempted consolidation of the various school districts within the territory embraced in the Guilford act. In *Riddle v. Cumberland,* 180 N. C., 321, it appears that an election was held for the purpose of consolidating all the school districts in Gray's Creek Township, in which there were two special taxing and three nonspecial taxing districts. It was understood at the election that if a majority of the qualified voters favored the consolidation, the tax, and the sale of bonds, the existing tax in the two special taxing districts should automatically cease. In affirming a judgment declaring the election valid, *Walker, J.,* discussing the question, said: "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. . . . 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." This decision is in accord with the recognized authorities.

Section 4 of the Guilford act is as follows: "That if a majority of the qualified electors favor the additional school tax, then it shall operate to repeal all local school taxes heretofore voted by local tax districts and special charter districts: *Provided,* that all indebtedness, bonded and otherwise, of the special tax districts and special charter districts in said territory shall be assumed by the county board of education and the indebtedness and the interest and sinking fund on bonds shall be paid out of the revenue derived from the additional school tax levied under this act." The clause preceding the proviso is substantially identical with the stipulation which had a material bearing in the *Riddle case*—that if the proposed tax should be voted the existing tax should automatically cease. The instant question, therefore, is this, What is the effect of the proviso in section 4?

Art. VII, sec. 7, of the Constitution is as follows: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

In view of this constitutional provision, can the creation of the taxing district be sustained without affording the voters of the nontaxing districts an opportunity to vote on the question? If the Guilford act had provided for the consolidation of all the school districts, the decision in the *Perry* and *Hicks cases, supra,* would have been controlling; but in the creation of a taxing district the Legislature has plenary power to fix the boundaries without regard to the question of approval or disapproval by the qualified voters. When the boundaries are thus prescribed, a majority of the qualified voters residing in the taxing territory may determine the question of levying a tax and issuing bonds, even when the tax, as in this case, is not, in the constitutional sense, a necessary expense. The principle is analogous to that of an extension of the boundaries of a municipal corporation in which the annexed territory must share the burdens of the entire municipality (Dillon on Municipal Corporations, vol. 1, sec. 106), or to the extension of the boundaries of a county, by

means of which the inhabitants of the new territory may be taxed, not only to pay their proportionate part of the existing indebtedness of the county from which the new territory is taken, when such liability is retained by legislative action, but the indebtedness likewise of the county to which it is annexed, unless otherwise provided, whether then existing or thereafter contracted. That is, tax districts may be created without special regard to the will, wish, or convenience of the people who inhabit them. *Dare v. Currituck,* 95 N. C., 190; *S. c.* (*Currituck v. Dare*), 79 N. C., 566; *Comrs. v. Bullard,* 69 N. C., 18; 28 Cyc., 185-220 *et seq.*

The authorities in this jurisdiction support the defendants' contention that the nontaxing school districts cannot enjoin the levy of the proposed tax on the ground that the act under which the election was held is in conflict with Art. VII, sec. 7, of the Constitution.

3. The plaintiff's final contention is that the act under discussion was enacted in violation of Art. I, sec. 10, of the Constitution of the United States; or, specifically, that the legal effect of section 4 is to impair the obligation of contracts entered into by the governing bodies of the bonded districts and the holders of the unpaid bonds. "No state shall . . . pass any law impairing the obligation of contracts." But the question whether this provision has been infringed is not open to the plaintiff. He is not a creditor of either of the school districts; he holds none of the bonds. When the legal or equitable rights of a party are not involved, he cannot be heard to complain as an abstract proposition that the obligation of a contract between others is impaired. In *Williams v. Eggleston,* 170 U. S., 309, *Mr. Justice Brewer* said: "The parties to a contract are the ones to complain of its breach, and if they are satisfied with the disposition which has been made of it, and of all claims under it, a third party has no right to insist that it has been broken." And in *Hooker v. Burr,* 194 U. S., 422, *Mr. Justice Peckham* observed: "We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint." Furthermore, provision is made for payment of the indebtedness, bonded and otherwise, of the taxing districts by the new taxing district (section 4), and it has been held that a statute which authorizes or requires a new taxing district to assume and pay the debts and obligations of the old district does not thereby impair the obligation of the existing contracts. 10 Fed. Sts., Anno., 2d Ed., 993, 994, and cases cited. The debts contracted are not extinguished, and the rights of the creditors are amply protected. *Broadfoot v. Fayetteville,* 124 N. C., 478.

After a careful and deliberate consideration of the record and the argument of counsel, we hold that the judgment of the Superior Court should be

Affirmed.

STACY, J., concurring in result: If all the school districts of Guilford County (exclusive of those in High Point Township and the city of Greensboro) wish to pool their resources by levying a uniform tax, throughout the entire territory, for the support and maintenance of all the schools in the respective districts, and thus equalize the educational advantages and opportunities in the different sections of the county, there would seem to be no constitutional barrier to such a course, where, as in the present case, it has been sanctioned and approved, under legislative authority, by a favorable vote of all the people affected. In principle, this is not unlike the levy of a State tax for the purpose of creating a "State Public School Fund," and a "Special Building Fund," to be used, in each instance, as an equalizing fund, and to be apportioned among the different counties of the State, as provided by Public Laws 1921, chs. 146 and 147, respectively. *Lacy v. Bank,* 183 N. C., 373; *Board of Education v. Comrs.,* 182 N. C., 571.

It will be observed that the act of the Legislature in question is not in conflict with Art. II, sec. 29, of the Constitution, for it nowhere undertakes to establish a new school district or to change the lines of any of the old districts already existing. *Burney v. Comrs., ante,* 274. *In re Harris,* 183 N. C., 633. Further, it will be noted that the districts to be benefited, taken in their entirety, are coterminous with the territory to be taxed. *Hill v. Lenoir County,* 176 N. C., 572; *Hood v. Sutton,* 175 N. C., 100; *Faison v. Comrs.,* 171 N. C., 415; *Keith v. Lockhart,* 171 N. C., 459.

The question as to whether the creditors of the respective school districts could insist upon the original tax levies in said districts is not before us for decision. *Smith v. Comrs.,* 182 N. C., 149, and cases there cited. But, from what is now apparent, it would seem that the full equivalent of said original tax levies, if not more, has been provided by the one uniform levy throughout the enlarged taxing territory. *Port of Mobile v. Watson,* 116 U. S., 289 (29 L. Ed., 620).

For these reasons, I concur in the result.

EFLAND HOSIERY MILLS v. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.

(Filed 8 November, 1922.)

Refusal of Shipment—Carriers of Goods—Railroads—Commerce—Bills of Lading—Order, Notify—Interstate Commerce—Storage—Options—Negligence—Public Warehouses.

By accepting a bill of lading from the initial carrier of an interstate shipment of goods, approved by the Interstate Commerce Commission under the authority of Congress, the consignor becomes bound by its terms; and where, upon an interstate shipment "to order notify," the person to be notified has refused it, and the consignor has been duly notified, the exercise of the option given in the bill of lading to store the goods in a public warehouse without liability, releases the railroad from all liability, either as a common carrier or warehouseman, and the destruction by fire of the goods while thus stored cannot be considered as its negligence, or permit recovery against the initial carrier, in the line of transportation, under the Carmack (now Cummins) Amendment.

APPEAL by defendant from *Kerr, J.*, at May Term, 1922, of ORANGE.

The plaintiff alleges that it delivered to the defendant, at Efland, N. C., in October and November, 1918, five consignments of hosiery for transportation to Lykens, Pa. That the shipments were consigned to plaintiff, "order notify Enterprise Hosiery Mills, Lykens, Pa.," which is on the Pennsylvania Railroad, and that uniform "order notify" through bills of lading were issued covering said shipments. The goods arrived at their destination, and the Enterprise Hosiery Mills was notified and refused to accept the same; the goods were thereafter placed in storage with Leeds Storage Warehouse, at Williamsport, Pennsylvania, and plaintiff notified that the goods were placed in storage.

The plaintiff, on or about 1 March, 1919, sent to the agent of Pennsylvania Railroad Company, at Williamsport, Pa., the original "order notify" bills of lading, with instructions to reship said goods to Elizabethville, Pa. That the goods were not reshipped in accordance with these instructions until 10 March, 1919, and that in the meantime, and on 6 March, they were damaged by fire which occurred at the warehouse.

The defendant answered and admitted the shipment of the goods, the refusal of the Enterprise Hosiery Mills to receive the same, the giving of notice of nondelivery to plaintiff, the placing of the goods in a public storage warehouse, and notice to plaintiff of the same.

The defendant pleaded the contracts of shipment as evidenced by the bills of lading, and alleged that he had completed his contracts of shipment by transporting the goods to the point of destination, delivering the same there, notifying Enterprise Hosiery Mills, and also notifying

plaintiff, and thereafter placing said goods in a public storage warehouse, in accordance with said contracts, and denied any liability on account of the alleged damage by fire at the warehouse, or alleged negligence on account of any alleged delay in reshipping said goods after surrender of the bills of lading by plaintiff to the terminal carrier and giving reshipping instructions to said terminal carrier and said warehouse company.

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

Gattis & Gattis for plaintiff.
Parker & Long for defendant.

WALKER, J. The alleged cause of action arose during the period in which the railroads were operated by the United States Government, under the Director General, and this action is brought against the Director General of Railroads, operating Southern Railroad lines as the initial carrier. The plaintiff is seeking to hold the initial carrier liable for its alleged damages under the provisions of the Federal law known as the Carmack (now Cummins) Amendment.

The defendant's second exception is to the refusal of the trial judge to dismiss this action as of nonsuit at the conclusion of the plaintiff's evidence. His third exception is to the refusal of the trial judge to dismiss this action as of nonsuit at the conclusion of all the evidence.

Considering first these two exceptions, the facts in this case, as to the real question involved, are practically undisputed. The pleadings and all of the evidence show that the several shipments of goods were made by the plaintiff at Efland, N. C., consigned to itself at Lykens, Pa., "order notify Enterprise Hosiery Mills, Lykens, Pa." That said shipments were interstate, and that "order notify bills of lading" were issued covering each of the shipments, and that all the goods were delivered at Lykens, Pa., and the Enterprise Hosiery Mills promptly notified of the arrival, and that it refused to receive or accept the goods, and it was further notified that unless the goods were removed within thirty days same would be placed in public storage. That thereupon the plaintiff was notified that the Enterprise Hosiery Mills had refused to accept the goods, and that the same were being placed in public storage as refused goods. That after the goods were held at Lykens, Pa., for thirty days, they were forwarded to Williamsport, Pa., and placed in a public storage warehouse, and plaintiff was notified that the goods were in storage and that he would have to pay freight and storage charges and surrender the original "order notify bills of lading" before the goods would be released. That plaintiff first placed the bills of lading with the agent of defendant

at Efland, N. C., and was later requested by the agent of the Pennsylvania Railroad at Williamsport to forward bills of lading to that office, which was done, the said bills being received by the agent at Williamsport on 1 March, 1919.

It appears that the contracts entered into by the defendant, operating the Southern Railway lines, as the initial carrier, and the plaintiff, as evidenced by the five bills of lading, were fully complied with by the defendant and his connecting carriers, in that all of the goods were delivered at Lykens, Pa., notice duly given of their arrival, and that they were refused by the plaintiff, and thereafter placed in public storage in full conformity with the said contracts of carriage or bills of lading.

Section 5 of the several bills of lading was specifically pleaded, and the bills of lading introduced in evidence, section 5 being as follows: "Sec. 5. Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier or warehouse, subject to reasonable charge for storage and to carrier's responsibility *as warehouseman only,* or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse, at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

In the case of *Booth v. N. Y. Central Railway Co.,* where an interstate shipment of box shooks were placed in a public storage warehouse, the Supreme Court of Vermont, in construing that part of the bill of lading quoted above, says: "By the terms of the contract, if the shooks were not removed by the party entitled to receive them within the time specified, two courses were open to the defendant; the shooks could be kept in the place named in the bill of lading, subject to responsibility as warehouseman only; or they could be removed to and stored in a public or licensed warehouse, in which case they would be held without liability on the part of the defendant." *Booth v. N. Y. C. R. Co.,* Atlantic Reporter, vol. 112, pp. 894-896.

There can be no reasonable contention, upon the material facts of this case, that the duty of the defendant as carrier and warehouseman had not terminated. The duty as carrier ended certainly at the expiration of 48 hours after the arrival of the goods at their destination and notice was given of their arrival. If the terminal carrier had retained the goods in its possession, then, according to the earlier authorities, it would have been liable as warehouseman only, but the defendant, as the initial carrier, would not be liable as warehouseman, for it was said in

those cases: "Where the liability of a connecting carrier as such has ceased, and it has assumed the status of a warehouseman, the amendment (the Carmack Amendment) does not make the initial carrier liable for any subsequent loss or damage to goods so held." Note: Ann. Cas. 1915 B, p. 85, citing *Milling Co. v. R. R.*, 91 Kansas, 783; *R. R. Co. v. Milling Co.*, 63 S. E., 415.

The terminal carrier, in accordance with the contracts of carriage, after the goods were refused, and after they were held for a period of 30 days, removed the same to and stored them in a public warehouse, where, under the bills of lading constituting the contracts of carriage, they were held at the owner's risk and without liability on the part of the carrier. It is said in R. C. L., p. 763, sec. 229: "So long as a carrier has the custody of the goods, although there has been a constructive delivery which exempts him from liability as a carrier, there supervenes upon the original carriage contract, by implication of law, a duty, as bailee or warehouseman, to take ordinary care of the property. But while in no case is the carrier justified in abandoning the goods, or in negligently exposing them to injury, it seems generally to be recognized by the authorities that the law enables him to terminate the relation and so exempt himself from responsibility, by giving him the right to warehouse the goods" (as stipulated in the contracts, that is, to place them in a public warehouse, when he is released from further liability for the same). This is a most just and reasonable provision, because the consignee has refused to take the goods, and they are, therefore, left in the possession of defendant by no fault of his. The plaintiff, or consignor, knew what the consequences would be, as he accepted the bills of lading, and thereby assented to the contracts of carriage expressed therein, and must be held as bound by their terms. One of the terms is what we have quoted above as to the right of the carrier to store the goods in his own car, warehouse, or place of delivery, subject to his responsibility *as warehouseman*, "or (they) may be, at the option of the carrier, removed to and stored in a public or licensed warehouse, at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage." "When that is done," it is further said in 4 R. C. L., *supra*, "he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman the carrier is not liable."

We may as well pause here to state, in its proper connection, that the "uniform order bills of lading," under which the goods were shipped by the plaintiff over the line of the Southern Railway Company, then in charge of the Director General, was that which was prescribed by the Interstate Commerce Commission, and the conditions and terms under

which the shipments were made, as written therein or thereon, are those accepted, approved, and adopted by said commission, under its power to do so, derived from the acts of Congress, and they are therefore the lawful contracts and valid bills of lading under which the carriage was undertaken by the defendant.

Resuming the discussion of the case where we left off to explain the bills of lading, we may now say that there was some delay on the part of the plaintiff as to the surrender of its bills of lading, as the evidence indicates, but it finally surrendered these bills of lading to the agent of the first carrier in the connecting line, as plaintiff required to be done by its letter of 27 February, 1919. On 1 March, 1919, giving instructions at the same time to the warehouse and to the agent of the Pennsylvania Railroad to ship all of these goods to the Enterprise Hosiery Mills, Elizabethville, Pa.

The plaintiff alleges that the delay of the agent of the Pennsylvania Railroad, or the warehouse, or both, to reship these goods before the fire occurred at the warehouse on 6 March, constitutes actionable negligence of the defendant, as the initial carrier, under the original bills of lading. The defendant says that this is not true, as the obligation of the initial carrier had long since been discharged, and the original shipment of the goods, and the delivery thereof, had been fully completed when the same were placed in public storage, and plaintiff had fully ratified and affirmed said acts, and on his own responsibility had assumed control of the said goods, and had surrendered the original bills of lading, and had instructed the reshipment of said goods from Williamsport, Pa., to Elizabethville, Pa., and if the delay of six days, as alleged, should be actionable negligence which would entitle plaintiff to recover, it was not the actionable negligence of the defendant, or the Southern Railway Company, but that of the Pennsylvania Railroad, or the public warehouse, or both, and plaintiff, for any such default as alleged by him, could have no right of action or cause of action against the defendant or the Southern Railway Company, and this, according to the undisputed facts, is the correct position and must control in this case, as there was no culpable or actionable wrong done by the defendant, or the said railway company, they having been discharged by the very terms of the bills of lading of all liability after compliance with the directions given therein, namely, the carrier, could deliver the goods, at his option, to the public warehouse for the purpose of being stored therein at the owner's risk and cost, and without any further liability of the carrier, subject, however, to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The court misconstrued the terms of the contracts, as stated in the several bills of lading, and consequently misapplied the law to the

material questions involved in the case. It follows, without making more particular reference to them, that the court erred in not applying the law to the facts, as we have already stated it, and as requested by the defendant to do. It was not negligence on the part of the defendant to store the goods in the public warehouse, for this was expressly allowed by the contracts of carriage, and when they were stored the defendant's liability for them was terminated.

The plaintiff contends that the carrier's liability, as such, did not cease when the goods had arrived at their destination, and the consignee duly notified of their arrival and given the full time allowed for the removal of them, but we think this is a clear misapprehension of the authorities upon which it relies in support of the contention. The court merely held that the storage of the goods after they had reached their destination was a part of their transportation, and not that the company's liability after the goods had been stored by it, at the end of the journey, should change the liability of the company from that of warehouseman to that of carrier under the act of Congress, but simply that "transportation" should include storage as warehouseman, with the ordinary liability incident to it, and the cases cited by the plaintiff establish this to be the manifest purpose and intent of the statute, as a careful reading of them will show. 34 St. at Large, 584, ch. 3591; Comp. St., 1913, par. 8563; *Cleveland C. C. & St. Louis R. R. Co. v. Dettleback,* 239 U. S., 588, and *Southern Rwy. Co. v. Prescott,* 240 U. S., 632. It is the duty of the carrier to store the goods, as a part of the "transportation," but his liability is that of warehouseman and not of carrier, as will clearly appear from the construction of the act by the Court in the cases cited.

But the defendant did not store the goods in the public warehouse as a part of the transportation, but under and by virtue of the express stipulation of the bills of lading, authorizing the carrier to do so, not in his own warehouse, as ordinarily done, but in a public warehouse, and this stipulation, which was approved by the Interstate Commerce Commission, providing for immunity from further liability in any respect when the goods are so stored, the courts have held to be valid and binding on the shipper, as we have seen.

There are other serious questions raised by the defendant, but we do not deem it essential to discuss them, as those discussed are quite sufficient to dispose of the appeal.

The court should have granted the defendant's motion to dismiss as of nonsuit, and in failing to do so, as the material facts, which go directly and conclusively to the defendant's liability, clearly negative the same, there was error.

Reversed.

WILLIAM J. WAGONER v. B. B. SAINTSING.

(Filed 8 November, 1922.)

Appeal and Error—Case Agreed—Parties—Consent—Procedure.

Where all of the proper or necessary parties having an interest in the lands sought to be conveyed by a deed, the sufficiency of which is attacked in a case agreed, are not parties to the action or the agreement, but the Superior Court judge has rendered judgment, from which an appeal has been taken, the case on appeal may be retained in the Supreme Court for a reasonable time, or remanded, as the parties may elect, to afford those who have not consented an opportunity to consent to the facts as at present presented, or to change or modify them as they may all agree, or take such steps for the complete determination of the case as may be in accordance with the law and the course and practice of the court.

APPEAL by defendant from *Harding, J.*, at July Term, 1922, of DAVIDSON.

Raper & Raper for plaintiff.
J. R. McCrary for defendant.

WALKER, J. This is a controversy without action, submitted to the Superior Court upon facts to which the parties have agreed. It comes here for the purpose of determining whether the plaintiff can make a good and indefeasible title to the defendant for the land described in the submission, and this involves a construction of the will of Jacob Wagoner, deceased. But the living daughters of Jacob Wagoner, and the heirs of such as have died, are necessary, or, at least, proper parties to the controversy in order to a complete determination of the question raised.

The matter as now presented is not substantially unlike that upon which the case of *Brinson v. McCotter,* 181 N. C., 482, was decided, and in which this Court ordered certain parties to be brought in. That was a case stated on agreed facts, and the order of this Court was as follows: "This is an action to settle the title to a tract of land, submitted upon an agreed statement of facts, and it appearing that there cannot be a complete determination of the rights of the parties in the absence of the heirs of Ellis H. Pickles, it is ordered that the cause be remanded to the Superior Court in order that the said heirs be made parties to this action with the right to plead."

We do not pursue that course entirely nor do we compel the persons we have designated as proper or necessary parties to be brought in against their will (*in invitum*), but merely afford them the opportunity of coming in by consent and joining in the submission of the controversy upon the facts as they are now stated, or if the parties and inter-

ested persons are so advised and agree, upon a new state of facts, or such facts additional to those already agreed upon, as may meet with the consent of the parties, the case may be submitted to the judge again, if found to be necessary, and the parties so agree, for his decision, or such other and further proceedings may be had as may be in accordance with the law and the course and practice of the court.

Upon a somewhat similar question, the Court said, in *Waters v. Boyd,* 179 N. C., 180-181: "Whether the fee passed out of the grantor to Nancy E. Waters at all depends upon the exact wording of the deed, and whether, if she took only a life estate (which is nowhere alleged), the language in the warranty can be construed as a conveyance of the remainder to the two children are matters which cannot be adjudicated unless the deed was before the court nor, *in the absence, as parties to this action,* of the heirs of the grantor in the deed to her. There is such a defect of parties and of allegations, and in the affidavit of submission, that the judgment in any aspect is erroneous, and must be set aside. Being a consent proceedings, the court could not have directed additional parties or statement of facts to be made *in invitum* to cure the defect. On the record, this is simply a moot question on which the opinion of the Court is asked, but on such it will not render its decision," citing *Bates v. Lilly,* 65 N. C., 232; *Millikan v. Fox,* 84 N. C., 107.

The case will be remanded, but if it is so agreed, and is found to be feasible, the new parties may be added and the necessary amendments to the case may be made in this Court, and for this purpose the case may be retained here for a reasonable time, or remanded, as the parties may elect.

Remanded.

R. L. RIERSON v. CAROLINA STEEL AND IRON COMPANY.

(Filed 8 November, 1922.)

1. Appeal and Error—Evidence—Trials—Prejudice.

The admission of evidence upon the trial, if erroneous, must be of such character, in relation to the subject-matter of the action, as to work prejudice in the consideration of the jury to the appellant's rights, and not so unimportant, in connection with the other pertinent evidence on the subject, that the jury could not have reasonably been misled into rendering a verdict that they would not otherwise have given.

2. Same—Employer and Employee—Master and Servant—Safe Place to Work—Safe Appliances—Custom.

In an action by an employee of a steel and iron works company to recover damages for a personal injury alleged to have been negligently

inflicted by the failure of the defendant to furnish a reasonably safe place to work, and reasonably safe appliances therefor, there was evidence that the plaintiff, while engaged in his duty, was cutting iron by the use of an acetylene torch, in front of an opening in the factory building through which other employees were conveying, by means of an overhead trolley, beams or pieces of iron with only one chain encircling them, when more chains should have been used for safety, and further, by using a hook for the purpose of fastening the loop together that was improper and unsafe, etc. The injury was caused by the slipping of the iron within the encircling chain, which fell upon the plaintiff at work below: *Held*, the testimony of a witness that the defendant was using only one chain, "only custom I know," while insufficient to show a general custom, was not reversible error to the defendant's prejudice, the obvious meaning being, in its relation with the other evidence, that the defendant had used only one chain in moving the trolley from place to place when carrying the beams or pieces of iron, at the times he had observed it.

3. Appeal and Error—Instructions—Employer and Employee—Master and Servant—Negligence.

Where the principle of a primary or nondelegable duty of an employer to furnish his employees a reasonably safe place to work, and reasonably safe appliances therefor, is involved in an action, wherein the plaintiff has been injured by the alleged negligent acts of his fellow-servants, the instructions of the judge substantially stating the correct principle to the jury, when given a fair and reasonable interpretation as a whole, as they should be, are sufficient, and so considered, no reversible error is therein found on the appeal in this case.

APPEAL by defendant from *Long, J.*, at March Term, 1922, of GUILFORD.

This was a civil action, brought by the plaintiff to recover damages for personal injuries alleged to have been caused by the negligence of defendant, or its agents, while the plaintiff was in the employ of the defendant.

There was evidence on the part of the plaintiff tending to show that he was employed by the defendant, the Carolina Steel and Iron Company, on 24 June, 1920, and was at the time engaged in the performance of his work—that of an acetylene torch operator, welding and cutting iron of various kinds used in construction work; that he was engaged at the time of his injury in the building or factory of the defendant; that this factory was a large building; that he was cutting pieces of iron into various lengths with his torch, performing his work in front of a large door or entrance to said building. That in said building there was an overhead trolley-way, used for carrying iron of various kinds from the building out through the door, in front of which he was engaged at the time of his injury. That other employees of the company, wishing to remove a number of beams, or pieces of iron, from the building, had wrapped around them a chain, or chains, fastened to

said trolley, or run-way, and had hoisted them for the purpose of carrying them out through said door into the yard beyond. That as they were carrying said pieces of iron along by the overhead trolley, and as the same passed over the plaintiff, the chain or chains slipped and slackened, causing the ends of the long pieces of iron to fall or slip down upon the plaintiff's back, he being at work upon the ground and immediately underneath the overhead trolley, in front of the door. That he was knocked down, his back and spine hurt, and he suffered permanent injury.

There was evidence tending to show that there was no negligence on the part of the defendant or its agents; that the method for moving the iron approved and in general use was the one adopted by the defendant, and that if there was negligence on the part of defendant, the plaintiff was guilty of contributory negligence in placing himself in a dangerous position, under the trolley line, and in front of the door that was being constantly used. The defendant further set up the defense that the negligence, if any, was that of a fellow-servant.

There was evidence of the plaintiff, by the witness C. A. Walters, as follows: "I was in the shop on the morning Mr. Rierson was injured. I didn't see the angle irons when they fell. I saw them when he pulled them up, and saw them take Mr. Rierson from under them, and saw them immediately after they fell. I noticed the chain which was around them. It was a chain the hook of which was square, and was too large to go through the link and they hooked it around the link. They had been using that chain to my knowledge ever since I had been there at work for them, and had been using it for that purpose. I knew it had been slipping before and spilling loads. The method that is approved and in general use in plants like that of defendant for moving loads like the one that fell is to use two chains. They always used two chains where I worked. They have a large ring, and they have two chains fastened in that ring with a hook at the end of each chain. They take it out and put it around a load some six or eight feet apart, far enough apart to give the load a balance and keep it from slumping. I know what kind of chains are approved and in general use in factories like this for the purpose of lifting loads like this was on the trolley system. They use a large chain with a hook on it that will fit down tight around the load, with a hook on it large enough to go around the whole chain, and the chains that are approved and in general use have rings in them so that the hook can be put in the rings. The Carolina Steel and Iron Company, the defendant in this case, had two or three other chains. They had two or three there with rings in them. I had been there nearly three months before Mr. Rierson was hurt, and

to my knowledge they had been using this chain since then. I don't know how many times I have seen this chain slip, but I saw it slip several times."

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

King, Sapp & King for plaintiff.
Wilson & Frazier for defendant.

WALKER, J. The defendant objected to testimony that there was a custom to use only one chain instead of two in moving material along the trolley, but when we examine the evidence relating to this question, we find that really what was meant by the "custom," and what counsel denominated such in his questions to the witnesses was evidently considered by the witness as equivalent to what was actually done on these several or numerous occasions, when he witnessed the operations of the trolley in carrying material from one place to another. If the plaintiff was seeking to prove a general custom, and exception was properly taken to his effort in doing so, plaintiff's counsel were not even moderately successful in showing such a custom, and the witness, who seemed to be very intelligent, and to understand the scope of the inquiry, when confined within its proper limits, gave an unobjectionable answer. For example, in answering the first question on this subject, he said: "Well, they were using only one chain; only custom I know." This can mean but one thing, and that is that defendant was using only one chain in moving the trolley from place to place when loaded with beams or pieces of iron. If evidence of the custom in operating the trolley was incompetent, and there was any substantial evidence of it, we would not reverse upon such a slight, or rather attenuated departure from the true line of inquiry, when we can well see, from the answers of the witness, that it could not have worked injury to the defendant. We repeat what was said in *Brewer v. Ring,* 177 N. C., 484: "Courts do not lightly grant reversals, or set aside verdicts upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be at least 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. Hilliard on New Trials (2 ed.), secs. 1 to 7. The motion should be meritorious and not based upon merely trivial errors committed manifestly without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have long ceased to have that effect, and have become obsolete. The law will not now do a vain and useless thing."

S. v. Smith, 164 N. C., 476. The sum and substance of what the plaintiff, as his own witness said, and intended to say, was that defendant always used only one chain, when two chains were necessary to balance the trolley and prevent it from capsizing, as it did, and this assertion becomes more reasonable if not shown conclusively to be a correct one, when there is evidence to show that such trolleys are approved and in general use in other similar factories, and the only safe kind. But it would seem from the peculiar construction of the trolley and the uses to which it was applied that there should have been some contrivance to keep it on a balance, or in an upright position, so that it would not careen, or incline to one side, or lie over, and precipitate its load to the ground. If there was nothing to hold it straight, or on a level, just such a result as follows in this instance was the one most likely to ensue, just as a ship sailing on the wind is apt to get off its keel if there is no counteracting force applied to it. It was apparently a dangerous method of doing the kind of work the defendant was engaged in at the time.

Defendant complains that the judge did not follow the rule laid down in our cases as to the duty of the employee to his employer, and especially as it relates to his primary obligation to use ordinary care in providing a reasonably safe place to do his work, and reasonably safe and proper tools with which to do it. *Smith v. R. R.,* 182 N. C., 296. But we think otherwise. It is an almost universal rule of the law that the charge of the judge must be taken as a connected whole; that is, it must be considered and construed in its entirety, and not by the process of selecting one portion as the object of attack when, if it is viewed in the light of its relation to all that was said by the judge, a very different meaning would clearly be revealed.

Applying this rule to the charge in question, his Honor gave the following instruction as embodying a principle applicable throughout the case, as it relates to the master's duty to exercise ordinary care, or not to be negligent, which itself means the absence of proper and commensurate care. He said: "The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are common servants, and *prima facie* the common master is not liable for the negligence of one of his servants, which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the

work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employee, and if the employee suffers damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engaged another to do them for him, he is liable for the neglect of that other, which, in such cases, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform, as such." It will also be seen by a careful and intelligent consideration of the charge, such as the jury are supposed to have given it, that his Honor, in other parts of the charge, clearly and explicitly stated that the obligation was one of ordinary care in performing his duty to his servant, and not altogether an absolute duty, or one which may be performed regardless of the element of care. *Marks v. Cotton Mills,* 135 N. C., 287, approved in *S. c.,* 138 N. C., 401. Having laid down this as the all-pervading rule, instead of the one imposing an absolute duty in this respect, as supposed by the defendant, he proceeded then to charge more particularly concerning the master's duty, as follows: "While the master is not held to the requirement of guaranteeing the safety of his workmen, or those engaged to work for him, in a factory of this kind, it is, nevertheless, his duty to provide for them reasonably safe tools and machinery, and a reasonably safe place to work, and to keep them in such condition as to afford reasonable protection, and this duty being one personally required of him, he may not delegate it to another and escape liability for damages, if neglect of duty by the latter proximately causes injury to the servant while in the performance of his duties." And, again, instructing the jury respecting the master's primary duties owing to his servant, he said: "There are, however, some duties which a master owes as such to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties. If the master be neglectful in any of these matters it is the neglect of a duty which he personally owes to his employee, and if the employee suffers damage on account thereof, the master is liable. If instead of personally performing these obligations the master engaged another to do them for him, he is liable for the

neglect of that other, which, in such cases, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform, as such."

It will be noted that his Honor uses a broad and sweeping expression (intended to cover and include every duty he had enumerated in the earlier portion of his charge) by the use of these terms: "If the master be neglectful *in any of these matters,* it is the neglect of a duty owing to his servant"; and, moreover, "the neglect is one he personally owes to him." It will be observed here that he repeated what he had formerly said in opening his charge, that the standard and measure of the master's liability is his neglect (or a failure to use ordinary care) as to any of those duties which he had recited, and he added that it would be such neglect as would impose liability upon him for any damage proximately caused by it.

We must say, in justice to the court, that the charge was carefully prepared and delivered, and should receive from us not a too liberal nor yet a too restricted construction, but a fair and sensible one, or such a one as we must infer from the clearness of its language an intelligent jury fully understood. If we acted upon any other principle, we would violate one of the cardinal and most practical rules in the law governing the granting of new trials, which is, in fact, but a corrolary from what we have already said of them, and which we may well repeat in substance.

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 no sense injurious, for it simply wounds the feelings or disappoints expectations. But this alone is not 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 a court would be 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 wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, when there is a prospect of ultimate benefit, and in a practical

sense, some wrong has been done which calls for redress. 3 Graham and Waterman on New Trials, 1235; *Hulse v. Brantley*, 110 N. C., 134; *Alexander v. Savings Bank*, 155 N. C., 124; *McKeel v. Holloman*, 163 N. C., 132. See, also, *Grice v. Ricks*, 14 N. C., 62; *Gray v. R. R.*, 167 N. C., 433; *Brewer v. Ring, supra; S. v. Smith, supra.*

Having fully and carefully considered the defendant's exceptions, we find that no error appears in the case.

No error.

THE McINTOSH GROCERY COMPANY v. L. C. NEWMAN.

(Filed 15 November, 1922.)

1. Execution—Choses in Action—Common Law—Statutes.

At common law, choses in action were not subject to seizure and sale under final process of execution, and except and to the extent the same have been modified or changed by statute, this rule still prevails.

2. Same—Equity—Fi. Fa.—Supplemental Proceedings.

Except in case of attachment proceedings, wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.*, or by the statutory method of supplemental proceedings, both of which methods, in this jurisdiction and in proper instances, are still open to claimants.

3. Same—Negotiable Instruments—Notes—Banks and Banking—Collaterals—Set-off.

In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured, and it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold which specifically affects the property.

4. Same—Notice.

A judgment creditor, in pursuing the remedy allowed by our statutes in supplemental proceedings, C. S., 711 *et seq.*, acquires no lien upon the choses in action of the judgment debtor held by a bank as collateral by the issuance of notice, this being shown by perusal of section 714, providing for arrest and bond, on proper affidavit, etc.; section 717, for an order of the judge, without arrest, for bidding the transfer of the judgment debtor's property, etc.; section 723, for the appointment of a receiver, etc.

5. Same—Deposits.

A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right.

6. Same—Levy.

Where it has been determined in proceedings supplemental to execution that there are certain notes made payable to the judgment debtor, some of which he has hypothecated with a bank as collateral to his own notes given thereto, a levy of the sheriff, by virtue of the writ therein, requiring that the bank turn over and deliver to him all such of the collaterals as may be sufficient to satisfy the judgment in a certain amount, is inoperative and ineffectual.

7. Appeal and Error—Judgment—Fragmentary Appeal—Cost.

Where the clerk of the Superior Court, in supplemental proceedings, has erroneously entered an order that a bank holding certain collateral of the judgment debtor turn the same over to the sheriff to satisfy the execution issued under the judgment, the finding of the Superior Court judge that the facts were insufficient, and his setting aside the clerk's order and remanding the cause for further hearing and findings in the proceedings, without prejudice to either party, is not such final judgment, or one in its nature final, as will admit of instant appeal to the Supreme Court, and the appeal therein will be dismissed, at appellant's cost.

8. Same—Dismissal—Court's Discretion—Objection and Exception.

While it is held in this case that the appeal was premature and improvidently taken, the Supreme Court expresses its opinion on the exceptions presented in the record, the nature of the case rendering it desirable, under the authority of *S. v. Yates*, 183 N. C., 753, and other cases cited.

APPEAL by plaintiff from *Calvert, J.*, at September Term, 1922, of CRAVEN.

This is a proceeding supplemental to execution. From the facts embodied in the judgment of the clerk, it appears that plaintiff had recovered judgment against defendant in Superior Court of said county for $427.80 and costs, and caused same to be docketed in said county on 20 December, 1921. That under execution issued upon said judgment the sheriff of the county attempted to levy and collect same on defendant's bank deposit in the National Bank of New Bern, and holding said execution on Monday, 17 July, 1922, issued and served on the bank a notice in terms as follows:

"That under and by virtue of the writ of execution issued from the Superior Court of Craven County in the above entitled action, and to me issued, I have and do hereby levy upon the funds of L. C. Newman, on deposit in the said bank, and any and all debts or indebtedness due by said bank to the said L. C. Newman.

"You will further take notice that you are required hereby to furnish to me, the undersigned sheriff of Craven County, statement under oath of all such sums on deposit or due by you as said bank to the said L. C. Newman, or to appear before the clerk of the Superior Court within ten days from the date and answer under oath touching and concerning such matters and things.

"You are further notified and directed, under and by virtue of said writ, to forthwith turn over and deliver to me, the undersigned sheriff, all such sums as may be sufficient to satisfy said judgment in execution, in amount of $468.08."

That at time of notice served defendant had a general bank deposit of $877.97; to closing hours of 17 July, there were checks drawn and paid on said deposit of $33.88. That at said time the bank, among others, held the promissory note of defendant for $475, due and payable 18 July, 1922, and at said time held other notes of said defendant amounting from $2,000 to $3,000, and had collateral to secure such indebtedness as it matured to the nominal amount of $2,855, as to which the actual value or solvency of the parties has not been determined. That on 19 July, on affidavit properly made, the clerk of the court entered an order requiring that the bookkeeper, an official of the bank, and defendant appear before said clerk for examination on 28 July, 1922, touching the property of said Newman then held by the bank.

Upon such examination it appeared that the judgment debtor had no visible or tangible property subject to execution. That, in addition to the $475 due 18 July, he owed the bank from $2,000 to $3,000, not yet matured, and secured by collateral in the nominal sum of $2,855. That defendant also produced a list of notes and open accounts held by him other than those deposited with the bank as collateral, aggregating the nominal sum of $6,471.56. That it was not disclosed or made to appear on said examination what was the real value of the notes and accounts of judgment debtor, either those held by the bank or otherwise.

Upon the facts as then presented of record, the clerk entered judgment as follows: "It is now ordered that the National Bank of New Bern turn over to the sheriff of Craven County the sum of $877.97, less the amount of checks that had been drawn and presented against the said amount in the aggregate sum of $33.88.

"That the defendant Newman turn over to the sheriff of Craven County the notes enumerated in the schedule of effects, to wit: the note of John Saunders for $900, secured by deed of trust; note of Roscoe Jones, $100, secured by deed of trust; note of Alec Henderson, $600, secured by deed of trust, and note of James Williams, $500, secured by deed of trust; note of Luke Brown, $500, and the book of account as follows, to wit: Schedule A. (These being among the notes held by the bank as collateral.)

"And that the sheriff proceed to collect the execution in his hands in this action by application of the sum from the National Bank, and by sale of the property above enumerated, or so much thereof as may be necessary as provided by law."

To this order the National Bank excepted, and in so far as the same affects its rights and interests, and appeals to the judge of the Superior Court. On consideration of the appeal, the court heard, in addition, the testimony of the cashier as to the value of the collateral deposited with the bank, and entered judgment as follows:

"This matter coming on to be heard before his Honor, T. H. Calvert, judge, W. W. Griffin, cashier of the National Bank of New Bern, was called and testified as follows: 'That it was impossible to say at this time that the notes, etc., deposited with said bank by defendant Newman as collateral security for said Newman's indebtedness to said bank was sufficient to secure and pay said indebtedness; that some of the notes were collectible and others incollectible; that said Newman's note for $475, and which was payable 18 July, 1922, was also signed by C. J. Bedell, and the same was charged by said bank to said Newman's account on 18 July, 1922.'

"The court finds the facts appearing are insufficient, the order of the clerk is set aside, and this cause remanded for further hearing and findings in the supplemental proceedings, without prejudice to either party.

"This 7 September, 1922. THOMAS H. CALVERT,
"Judge Presiding."

Plaintiff thereupon excepted and appealed.

Guion & Guion for plaintiff.
R. A. Nunn for National Bank of New Bern.

HOKE, J. At common law choses in action were not subject to seizure and sale under final process of execution, and the principle still prevails except and to the extent that the same has been modified or changed by statute.

In this jurisdiction, and except in case of attachment proceedings wherein provision is made for exceptional and urgent cases, this kind of property can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.* or by the statutory method of supplemental proceedings, both of which remedies in proper instances are here still open to claimants. *Boseman v. McGill, ante,* 215; *Bank v. Burns,* 109 N. C., 105; *Hancock v. Wooten,* 107 N. C., 9; *Monroe v. Lewald,* 107 N. C., 655; 6 Pomeroy Equity, secs. 871-877.

On the facts presented, the property of the judgment debtor involved in this controversy are but choses in action as to which the bank has

the general right of appropriation to claims held by it against said defendant, where such claims have matured and a right of set-off under recognized equitable principles when its debtor is insolvent, and to the extent required to protect its own interests, and with the additional right of application according to any contract it may hold which specifically affects the property. *Moore v. Trust Co.,* 178 N. C., 118; *S. c.* (*Moore v. Bank*), 173 N. C., 180; *Hodgin v. Bank,* 124 N. C., 540; *Hawes v. Blackwell,* 107 N. C., 196; 5 Cyc., 553; 3 A. & E., 827.

In the instant case the judgment creditor is pursuing the statutory remedy of supplemental proceedings, C. S., ch. 12, art. 30, sec. 711 *et seq.,* and a perusal of this legislation and the authorities apposite will disclose that no lien arises to the creditor by the mere issuance of the notice. This will appear from the various provisions of the statute by which a lien may be secured and the remedy made effective for the application of this kind of property.

Thus, in section 714, on proper affidavit the judgment debtor may be arrested and a bond required providing for his continued attendance and against any disposition of his property meantime in fraud or hindrance of the proceedings. In section 717 it is provided that the court or judge may, by order and without arrest being had, forbid any transfer or other disposition or interference with the property of the judgment debtor not exempt from execution. And section 723 authorizes the appointment of a receiver in whom the title of the property shall vest from the date of the service of the restraining orders, if any have been made, and otherwise from the filing and recording of appointment of the receiver.

A proper application of the rules and principles stated is in full support of his Honor's judgment setting aside the order of the clerk and directing that further evidence be had affecting the rights of these parties. It clearly appearing that no intelligent or satisfactory disposition of the cause can be made in the present condition of the record.

As to the collateral held by the bank under a specific contract, it has the undoubted right to hold and apply the proceeds to its debts whenever realized on and required for their payment. As to the deposit of $877.97, less $33.88 checked out on 17 July, leaving a balance on that date of $844.09, no lien having been acquired by the notice, the bank had the lawful right to apply the deposit, or so much as required, to the payment of its debt of $475 maturing on 18 July, and this much of said fund is in no event available to the creditor. In reference to the remainder of the deposit, $844.09 minus $475, leaving a balance of $369.09, the creditor having procured a restraining order of date, 19 July, served same day, and the bank having no specific lien on said deposit and, so far as now appears, there being no further debt presently due the bank,

the rights of the parties would seem to depend on the principles of equitable set-off, referred to and approved more especially in case of *Moore v. Bank,* 173 N. C., 180; *Hodgin v. Bank,* 124 N. C., 540. But further expression on this matter is reserved until a fuller disclosure of the pertinent facts is had pursuant to his Honor's order.

While we have thus expressed our opinion on the exceptions presented in the record, a course sometimes pursued by the Court when the nature of the case renders it desirable, *S. v. Yates,* 183 N. C., 753-755; *Gilbert v. Shingle Co.,* 167 N. C., 290; *In re Sermons,* 182 N. C., 122-129, we must not be understood as approving the plaintiff's right of appeal from the order entered by his Honor. It has been repeatedly held with us that except where otherwise expressly provided by statute, an appeal may be taken to this Court only in case of a final judgment, or one in its nature final, and under the principle upheld in these decisions, the judgment of his Honor directing the taking of further testimony is clearly neither the one nor the other, and on authority, therefore, the appeal must be dismissed at the cost of appellant. *Corporation Com. v. Trust Co.,* 183 N. C., 179; *Cement Co. v. Phillips,* 182 N. C., 437.

Appeal dismissed.

C. M. WITTY ET AL. V. ED. WITTY ET AL.

(Filed 15 November, 1922.)

1. Wills—Interpretation—Intent—Estates—Remainders—Heirs—Descent and Distribution—Vested Interests—Title.

Under a devise of lands to the testator's wife for life in lieu of dower, and at her death, the lands to be sold at public sale, and the proceeds equally divided "among his lawful heirs," the title will immediately vest in the testator's children at the time of his death, and will not be postponed to the death of his widow, when the distribution of the proceeds of the sale is directed to be made; and where at the time of the vesting of the estate there were several children of the testator living, but all of them died during the continuance of the life estate of the widow, the title to the whole of the lands having vested in the last surviving child under the canons of descent will pass to the devisee under the will of such child. *Grantham v. Jinnette,* 177 N. C., 229, cited and distinguished.

2. Same—Canons of Descent.

The law favors the early vesting of estates; and upon a devise of lands to the testator's wife for life, and at her death to be sold and the proceeds divided among "his lawful heirs," without qualifying words, the word "heirs" is to be taken in its natural and primary meaning as designating the ones on whom the law casts the estate immediately on the death of the ancestor, and the direction that the lands be sold and the proceeds divided does not affect this interpretation.

3. Wills—Interpretation—"Heirs"—"Next of Kin"—Synonymous Terms —Words and Phrases.

In construing a will the courts will ordinarily consider the words "heirs at law" as having the same meaning as the words "next of kin," in dealing with real property.

4. Wills — Interpretation — Intent—Estates—Remainders—Inferences— Presumptions.

A devise of lands to the testator's wife, in lieu of dower, and at her death to be sold "and the amount it brings equally divided among my heirs at law," cannot affect the interpretation that the title vested in his children upon his death, the enjoyment to commence after the falling in of the life estate, because of the fact that no gift in remainder by specific words had been used, the inference thereof being from the direction to sell the lands and divide the proceeds among his heirs.

APPEAL by plaintiffs and defendant, Elizabeth Terry, from *Harding, J.*, at September Term, 1922, of GUILFORD.

Civil action in ejectment and for a sale for division of certain lands, situate in Guilford County, North Carolina.

The evidence offered by plaintiffs tended to show the following facts: That Levi R. Witty died in January, 1872, seized and possessed in fee of the lands described in the complaint, and which are in controversy here; that he disposed of said lands by his last will and testament—the effect of the terms of which are in dispute; that his wife, Louisa Witty, who was given a life estate in the lands in controversy, survived her husband, and died on 16 December, 1920; that said Levi R. Witty was survived by five children, all of whom died before the death of his said wife and life tenant; that only one of these five children ever married, and the defendant, Mrs. E. M. Witty, is the wife of that one child, to wit, E. M. Witty; that no issue was ever born to any of said children, but that the defendant Mark Witty, Jr., is an adopted child of the testator's married child, E. M. Witty; that the defendant Elizabeth Terry is the only surviving brother or sister of the said testator, while the other parties to this action, except Mrs. E. M. Witty and Mark Witty, Jr., are all the nephews and nieces of said Levi R. Witty.

At the close of plaintiffs' evidence, and on motion of the defendants, there was a judgment as of nonsuit, from which the plaintiffs and the defendant Elizabeth Terry appealed.

Brooks, Hines & Smith for plaintiffs.

Thomas C. Hoyle for defendant Elizabeth Terry.

William P. Bynum, King, Sapp & King, and Sidney S. Alderman for appellees, Mrs. E. M. Witty and Mark Witty, Jr.

STACY, J. On the hearing, the title offered was properly made to depend upon the construction of the following clause in the will of Levi R. Witty:

"I give and devise to my beloved wife, Louisa, the plat or parcel of land (description not in dispute), to have and to hold her natural life or widowhood in satisfaction for and in lieu of her dower and thirds in all my real estate; at the death of my wife, or if she marries again, my will is that the aforesaid lands be sold at public sale (after due notice has been given) to the highest bidder, and the amount it brings equally divided among my lawful heirs. . . . My will is that the remaining portion of my lands be sold according to law to the highest bidder, and the amount equally divided among all my children, excepting my daughter Emma. She is to have $100 more than any of the other children."

The plaintiffs and the defendant Elizabeth Terry contend that under a proper construction of the foregoing clause in the will of Levi R. Witty, the property described in the complaint is to be sold after the death of his widow, Louisa Witty, and the proceeds divided among them and the other nephews and nieces of said testator living at the death of said Louisa Witty, and that the class to take is to be determined as of the date of her death.

The defendants, Mrs. E. M. Witty and Mark Witty, Jr., contend, as held by the court below, that by the will of said Levi R. Witty a vested remainder in fee was given to the children surviving at the testator's death, and that the remainder to the five children so surviving accumulated in the respective survivors as each of them died without issue, until the entire estate vested in E. M. Witty, the last one to die, and was devised by him to his widow, the defendant, Mrs. E. M. Witty, for life, and the remainder to his adopted son, Mark Witty, Jr.; and that these defendants are the owners and entitled to the possession of the lands in controversy.

The case turns upon the single question as to whether the interests in remainder are vested or contingent; and as to whether the testator's "lawful heirs" are to be determined as of the date of his death or at the death of his widow, the life tenant.

It is admitted that if vested remainders are created, the interests in remainder vested, upon the death of the testator, in the five children of his then living; that the vested interest of each of these five, as he or she died before the life tenant, accumulated in the survivors until finally testator's son, E. M. Witty, was the only living child and heir, holding all the remainder as a vested interest, and that when he died before the death of the life tenant, his vested right in the entire remainder passed by his will to the appellees, Mrs. E. M. Witty, his widow, as life tenant, and Mark Witty, Jr., as remainderman in fee.

In other words, if the remainders created are vested, the class of remaindermen is to be ascertained according to the general rule, *i. e.*, as of the date of the death of the testator, and such being the case, the appellees, Mrs. E. M. Witty and Mark Witty, Jr., are the devisees or legatees of all of the fee in remainder. This was the holding of the trial judge.

It is admitted, on the other hand, that if contingent remainders are created, the contingency being that the class of remaindermen is not to be ascertained until the death of the life tenant, then the appellants are entitled, for themselves and other collaterals who did not appear, to an order for the sale of the land in question, now in the possession of the appellees, and for distribution of the proceeds.

It is undoubtedly the general rule of testamentary construction that, in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, an estate limited by way of remainder to a class described as the testator's "heirs," "lawful heirs," or by similar words descriptive of those persons who would take his estate under the canons of descent, had he died intestate, vests immediately upon the death of the testator, and at which time the members of said class are to be ascertained and determined. *Jenkins v. Lambeth,* 172 N. C., 468, and cases there cited. 23 R. C. L., 549; note, Ann. Cas. 1917 A, 859; *Welch v. Blanchard,* 33 L. R. A. (N. S.), 1, and note. This is not only the general rule of construction, but it is in keeping with the natural and primary meaning of the words themselves. *Wall v. Converse,* 146 Mass., 345; *Tuttle v. Woolworth,* 62 N. J. Eq., 532. "An heir," says Blackstone, "is he upon whom the law casts the estate immediately on the death of the ancestor." II Blackstone, ch. 14.

In *Bullock v. Downes,* 9 H. L. Cas., 1, *Lord Campbell* stated the rule as follows: "Generally speaking, where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class, following a bequest of the same property for life, vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death."

Of course, in dealing with real property, "heirs at law" takes the place of "next of kin" in any statement of the rule.

This general rule has been recognized and approved by us in a number of cases, notably *Jones v. Oliver,* 38 N. C., 369; *Brinson v. Wharton,* 43 N. C., 80; *Rives v. Frizzle,* 43 N. C., 237; *DeVane v. Larkins,* 56 N. C., 377; *Newkirk v. Hawes,* 58 N. C., 268; *Pollard v. Pollard,* 83

N. C., 97; *Harris v. Russell,* 124 N. C., 554; *Wool v. Fleetwood,* 136 N. C., 471, and *Baugham v. Trust Co.,* 181 N. C., 406.

In the last cited case, *Allen, J.,* speaking for the Court, quoted with approval the following from 40 Cyc., 1481: "As a general rule, the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives, unless the context of the will indicates a clear intention that the property shall go to the heirs, next of kin, or other relatives at a different time, such as at the time of distribution, or at the death of the first taker, or at the date of the execution of the will. . . . Where the gift is to the heirs or next of kin of another than the testator, it ordinarily refers to the death of such other, unless the context of the will manifests that the class shall be determined at a different time, such as at the time of distribution."

In *Jenkins v. Lambeth,* 172 N. C., 468, the same rule is stated by *Hoke, J.,* as follows: "It is undoubtedly the general rule that when a testator, after a prior limitation of his property by will, makes, in present terms, a disposition of the same in remainder to his own heirs or right heirs, these heirs, nothing else appearing, are to be ascertained and determined as of the time of his death. This is not only the primary meaning of the word heirs, but the position is said to be favored by the courts because in its tendency it hastens the time when the ulterior limitation takes on a transmissible quality," citing a number of authorities.

It will be noted in the case at bar, as in those cited above, that no qualifying words are used before or after the phrase "my lawful heirs." These words have a well defined meaning. Their significance is fixed by law, and when they are used in a deed or will without any superadded words or phrases, indicating a different meaning, they are to be understood as having been used in their ordinary sense, and according to their legal acceptation. *Rives v. Frizzle, supra; Harris v. McLaren,* 30 Miss., 533.

Again, the fact that the direction is to sell the realty at the expiration of the preceding particular estate and to divide the proceeds derived therefrom ordinarily will not affect the general rule as to when the remainder is to vest. *Vanhook v. Vanhook,* 21 N. C., 589; *Cropley v. Cooper,* 19 Wall., 167; *Bates v. Spooner,* 75 Conn., 501; *Atchison v. Francis,* 165 N. W. (Iowa), 587.

In the last case just cited, which contains an exhaustive review of a number of cases on the subject, it is said: "Of the multitude of precedents bearing upon the construction of wills in which the testator first provides a life estate for his widow or other person and follows this by a direction that upon the expiration of such life estate, the property

shall be divided or shall be sold and the proceeds divided between certain named persons, or members of a designated class of persons, and holding such remainder to be vested, we will cite a few illustrative cases. If we first look to jurisdictions other than our own we find, with very few exceptions, a unanimous holding that in such cases the beneficiaries named acquire a vested right therein immediately upon the death of the testator" (citing authorities from a number of jurisdictions).

And after a minute examination of some of the cited cases, the Court continues: "These quotations fairly reflect the holdings in all of the cases to which we have called attention on this branch of the cases under consideration. Indeed, after a somewhat extended research, we have found no case whatever in which the soundness of that rule is questioned or denied. It is true that here and there a precedent may be found in which the distinction we have pointed out has not been noticed, but in such cases the omission would seem to have occurred simply because counsel failed to raise or to argue the question."

And further it is said: "In principle there is no difference, so far as the vesting of the right is concerned, between a direction to divide the property and a direction to sell the property and divide the proceeds. A direction to sell and divide does no more than to work an equitable conversion of the real property as of the time of the death of the testator, and the gift, technically speaking, becomes a bequest instead of a devise, but the right of the beneficiary therein vests alike in either case."

In *Hoover v. Smith,* 96 Md., 393, the provisions of the will under consideration were as follows: "I devise and bequeath to my beloved wife, Elizabeth, all my property, real, personal and mixed, to have and to hold the same during her natural life, or as long as she shall continue to be my widow. After either of the above events the property to be sold and divided equally among my lawful heirs."

In construing this clause, which is strikingly similar to the one in the instant case, the Court said: "The law favors the early vesting of estates, and 'courts will, in the absence of plain expressions, or an intent plainly inferable from the terms of the will, adopt the earliest time for the vesting where there is more than one period mentioned.' *Straus v. Rost,* 67 Md., 476. It is a well recognized rule of construction that in doubtful cases the interest shall be deemed to be vested in the first instance, rather than contingent, unless the instrument under consideration does not admit of such construction. When a testator has employed terms in his will which in their ordinary signification are in accord with such familiar and fixed rules of law, it should require very clear expressions elsewhere in the will to justify the court in giving such terms some other and unusual meaning. When, therefore, a testator directs that after his wife's death or marriage his property is to

be sold and divided equally among his 'lawful heirs,' and makes no other disposition of the remainder after his wife's death or marriage, when and in whom does such remainder vest? At common law an heir is 'he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor.' In 15 Ency. of Law (2 ed.), 322, it is said: 'A devise to heirs, whether to one's own heirs or to the heirs of a third person, designates not only the persons who are to take, but the manner and proportion in which they are to take. Where there are no words to control the presumption, the law presumes the intention to be that they take as heirs would take by the rules of descent'; and again it is there said: 'It is well settled that a gift to the heirs of one will be construed as referring to those who are such at the time of the ancestor's death.' If, then, we adopt the ordinary meaning of the term used by the testator (lawful heirs), we find that he presumably intended that those who would be entitled to his real estate at the time of his death should get the benefit of the proceeds of the sale. It cannot be successfully contended that merely because he gave his wife an estate for life, or as long as she continued to be his widow, the vesting of the estate given the heirs should be postponed until the widow's interest ceased."

While the general rule of construction is stated to be that a bequest or devise by way of remainder to the "heirs" of a testator will be construed as referring to those who are such at the time of his death, yet the authorities all agree that this rule must give way to the controlling rule of interpretation, that the intent of the testator is to govern, provided it does not conflict with the settled rules of law. In fact, this is the cardinal principle in the interpretation of wills to which all other rules must bend. *Sears v. Russell,* 8 Gray (Mass.), 86. Thus it has been held that contingent and not vested remainders were created where the testator, in making an ulterior disposition of property after a particular life estate, uses such expressions as "to such of my sons as may be living at their mother's death," or "surviving at her death," or "to the representatives of such as may have died before her death," showing clearly that not only the enjoyment of the remainder, but also the right to take it was intended to be postponed until after the expiration of the preceding life estate. *Whitesides v. Cooper,* 115 N. C., 570; *Bowen v. Hackney,* 136 N. C., 187; *Freeman v. Freeman,* 141 N. C., 97; *James v. Hooker,* 172 N. C., 780; *Jenkins v. Lambeth,* 172 N. C., 466; *Thompson v. Humphrey,* 179 N. C., 44; *In re Kenyan,* 17 R. I., 149.

But in the case at bar we have no such expression as any of those just mentioned. It is provided that the remainder after the life estate is to be divided equally among "my lawful heirs," *simpliciter,* and this imports a division among those who were the heirs of the testator at

his death, and who took in right at that time, though they were not to come into actual possession and enjoyment until the previous benefit, intended for their mother, should terminate by her death. *Wright v. Gooden,* 11 Del., 414.

Appellants contend, however, for a contrary construction under authority of *Grantham v. Jinnette,* 177 N. C., 229. In that case the Court was construing the will of a *nullius filius,* one of those melancholy characters, in law as in life, who had no heirs, either at his death or at the death of his widow, the first taker under his will. Those claiming the lands at the death of the life tenant were claiming only through those connected to the testator by illegitimacy. The main question was between the widow's descendants and the escheat right of the University. The widow's descendants claimed that she was both life tenant and remainderman; that she not only took the life estate, but was the testator's lawful "heir"; and that the whole fee merged in her. The University contended that the widow could not be life tenant and heir; that the statute makes a widow heir only when the property is not disposed of by will; that this testator did dispose of his property by will, and the widow was not therefore his heir; and that therefore the testator, as to the remainder in fee, was without heirs. The Court held this to be correct, and that the fee escheated to the University. There was no question before the Court as to whether the remainders were vested or contingent.

The argument there advanced that a direction to convert the land into personalty and to divide it after the death of the life tenant indicated an intention to ascertain the testator's heirs as of the time of the falling in of the life estate, rather than as of testator's death, was used in connection with the significant fact that at the time of the making of the will there was only one person to whom the testator could have considered as coming within the class of his "heirs," and at the death of the testator, there was still only one, and that, therefore, his direction to divide the remainder among a plurality of takers showed an intention of the testator that the one person who at his death would presumably constitute the class should not take the remainder (as well as the life estate), but that he presumed that at the end of the life estate he might have a plurality of heirs.

We have no such case here.

Another significant fact in the *Grantham v. Jinnette case, supra,* and a fact upon which the Court laid emphasis in its opinion, was that the property directed to be sold and divided was not simply all of the property which had been left to the wife for life, but was "all property, real and personal, *left by her* under item 3 of the will."

This decision cannot be held to sustain the contention of the appellants in the case at bar.

Nor do we think the fact that the will contains no specific words of gift in remainder, other than the inference from the direction to sell and to divide the proceeds, can be held to delay the vesting of said estates, since the enjoyment of the remainders is postponed only in the interest of the life tenant, and not in view of the character or quality of the remaindermen. *Fairly v. Kline,* 2 Pennington (N. J.), 754; 4 Am. Dec., 414; *In re Thomman's Estate,* 161 Pa., 444; 29 Atl., 84. It is clear from the face of the will that the distribution among the testator's children was postponed in order to make a comfortable provision for the widow, and that, too, "in lieu of her dower and thirds," and not on account of anything affecting the children (their arriving at a certain age, marrying, etc.) so as to cause him to attach any condition to the legacies.

In Underhill on Wills, sec. 866, this position is treated as follows: "A legacy will the more readily be construed as vested in every case where there is no other gift than a direction to pay or to distribute money, if it is apparent that the payment or the distribution was postponed, not in order that the legatee should personally perform some act or acquire some personal qualification as a condition precedent to payment, but where the postponement is clearly intended for the benefit of some one who takes a prior interest, or, in the language of the cases, where the postponement is 'for the convenience of the estate.'"

After a careful investigation of the record and the authorities on the subject, we are of the opinion that his Honor's judgment was correct, and that it must be upheld.

We deem it proper to say that, in considering this appeal, we have found the excellent briefs filed by counsel on both sides of material aid and assistance.

Affirmed.

H. G. NASH ET AL. v. J. T. SHUTE.

(Filed 15 November, 1922.)

1. Adverse Possession—Limitation of Actions—Title.

In order to ripen title to lands by possession, without color, it is not only required that the claimant should have had possession for twenty years, but that the possession should have been adverse under claim of right, and not by permissive user.

2. Same—Trespasser—Estates—Remainderman—Permanent Damages.

The remainderman is put to his action only for permanent injury caused by the continued trespass of an adjoining owner on his land during the continuance of the outstanding life estate.

3. Same—Adjoining Owners of Land.

Negligible and nonapparent damages during the continuance of a life estate caused by the trespass of an adjoining landowner are not permanent damages that will put the remaindermen, or those claiming under them, to their action during the preceding life estate; and where, after the falling in of the life estate, the one who has acquired title from the remainderman commences to erect a building on his lands, and permanent and serious damages to his walls are caused by dripping of water from the overhanging eaves of a building on the lands of an adjoining owner, first becomes apparent, the trespasser will not ripen title to an easement so to do until the lapse of twenty years, without color, from the time the damages became apparent and serious.

4. Same—Continuing Trespass.

In this case, damages for a continuing trespass of an adjoining owner of lands were recoverable for a period of three years next before the commencement of the action.

APPEAL by defendant from *Webb, J.*, at February Term, 1922, of UNION.

The plaintiffs own a lot on Hayne Street, Monroe, lying just north of the defendant's opera house lot. In partition proceedings in 1864, between those under whom both parties claim, the division line was settled at the location claimed by the plaintiffs in this action. In a special proceeding in 1919 between these parties to establish the boundary line, the defendant filed an answer admitting the dividing line claimed by the plaintiffs to be the correct one, and admitting plaintiffs' ownership of their lot, and judgment was rendered accordingly. In 1898 the defendant erected an opera house on his lot, the eaves of which project a few inches beyond his line and over the plaintiffs' lot.

The plaintiffs began the erection of a brick building on their lot in 1920, and in their excavations for a basement and brick walls they found that the water from the eaves on the defendant's building was thrown into the excavation, causing the dirt to cave in and causing considerable expense to pump out the water, and damaging the new walls to the extent that they had to be torn down and rebuilt at great delay and expense.

The defendant refused the plaintiffs' request to remove his eaves so far as they overhang the plaintiffs' lot, and to stop the flow of water on the plaintiffs' land caused thereby. This he refused to do, and this action was brought to compel him to remove his eaves to the extent that they hang over the plaintiffs' land and for recovery of all damages sustained therefrom. The defendant, in his answer, claims that he had acquired an easement to project his eaves over the plaintiffs' property. The plaintiffs denied the existence of the alleged easement, and contend that if the projection of the eaves over their property could be considered possession, still the defendant had not had 20 years possession against these plaintiffs and under those whom they claim.

Upon the issues submitted the jury found that the defendant had constructed the eaves of his opera house building projecting over the property of the plaintiffs, thereby throwing water thereon, as alleged in the complaint; that the defendant had not acquired an easement so to do; that the plaintiffs' property has been damaged by the water illegally thrown from defendant's building, and assessed the damages at $500. Appeal by defendant.

Stack, Parker & Craig for plaintiffs.
Vann & Milliken for defendant.

CLARK, C. J. It appears in the evidence, without contradiction, that the division line between the plaintiffs' lot and the defendant's lot was as the defendants claim, having been settled in a proceeding for the division between the then owners in a decree of court, duly recorded in April, 1864; that the defendant had erected the opera house in 1898; that the eaves projected a few inches beyond his line, and thereby water from his roof was thrown upon the plaintiff's land; that from 1872 to 1911 the plaintiffs' lot was owned and in the possession of a life tenant, T. J. Ezzell, from whom, by *mesne* conveyances, the title and possession of the lot has passed to these plaintiffs. There was no evidence of any damage to lot of plaintiffs prior to 1920 when they began to build on it, and the water from the defendant's eaves began to injure the construction of the building the plaintiffs then began to erect.

The plaintiffs do not claim through or under T. J. Ezzell, the life tenant, who was the owner and in possession of the property from 1872 to 1911. The remaindermen, S. J. and R. F. Ezzell, under whom, by *mesne* conveyances, the plaintiffs claim, could not have maintained an action of ejectment or for damages to the possession against the defendant so long as the life tenant was in possession of the lot. An easement by presumption, which the defendant claims, can arise only upon an adverse possession for 20 years. Even if the defendant's possession of a few inches of space in the air over the lot now owned by the plaintiffs was adverse, it was adverse only to T. J. Ezzell, who was from 1872 to 1911 in actual possession of the lot, and under whom the plaintiffs do not claim.

Where there has been a trespass causing *permanent* damages to the realty, the owner of the remainder may sue for damages to his estate and interest. *Cherry v. Canal Co.*, 140 N. C., 422; *Balcum v. Johnson*, 177 N. C., 213; but the mere occupation of a few inches up in the air was not such a permanent injury to the lot as would warrant an action for trespass by them against the defendant. The remaindermen, S. H. and R. F. Ezzell, who came into possession on the death of the life tenant in 1911, could have maintained an action against the defendant

if he had entered upon the lot, injured, or removed the house, or otherwise damaged their interest in the lot, but the defendant's occupation of the air for a few inches above their lot did not permanently injure the lot in any way. At least, in this action no injury was shown to have occurred prior to 1920.

The present action is for possession, and the defendant having no deed or color of title, must show 20 years adverse possession against these plaintiffs and those under whom they claim. He cannot tack on the time during which T. J. Ezzell was in possession.

The defendant also pleaded the three years statute of limitations. That would be good as to all damages to the property accrued more than three years before bringing this action, but the plaintiffs neither alleged nor recovered damages, if any, accruing before three years prior to the beginning of this statute.

It has long been settled that the mere lapse of time is not sufficient to create an easement. *Boyden v. Achenbach,* 86 N. C., 399, in which *Smith, C. J.,* held, for a unanimous Court, that it is not only necessary to show that the claimant has used the alleged easement continuously for the 20 years, but that the user was adverse and as of right. See authorities there cited, and the citations thereto in the Anno. Ed.

In that case it was held: "There must be some evidence accompanying the user, giving it a hostile character, and repelling the inference that it is permissive and with the owner's consent, in order to create the easement by prescription and impose the burden upon the land." In this case there was no evidence whatever of any hostile character in the possession of the air by the defendant prior to 1920. On the contrary, when sued to establish the dividing line in a former proceeding in 1919, he frankly admitted that the plaintiffs are the owners of their lot, and set up no claim to any easement.

The remaindermen could not sue, as already stated, except for permanent injury to their estate or interest, and the technical trespass of the defendant in a space of a few inches up in the air of itself was not such permanent injury to the lot as would warrant the remaindermen in recovering damages therefor.

To sum up, the defendant has shown no hostile possession that any length of time would ripen into an easement. *Boyden v. Achenbach, supra.* If there had been hostile possession, the statute would not have run against the remaindermen, or those under whom they claim, until after the death of the life tenant, except as to permanent damages to the freehold, which was neither alleged nor shown.

The other exceptions do not require discussion. The damages claimed accrued in less than 3 years before this action was brought, and the evidence in regard thereto was properly admitted.

No error.

HARRY GEIGER v. E. F. CALDWELL ET AL.

(Filed 15 November, 1922.)

1. **Arbitration and Award—Contracts—Intent—Scope—Conclusiveness.**

An agreement to submit a controverted matter to arbitration is, in its interpretation, to be regarded as a contract between the parties and construed to arrive at their intent, and the scope of their award will be confined to such matters only as are submitted to them.

2. **Same—Extraneous Matters.**

Where the arbitrators have included in their award matters relating to the subject that are not properly within its scope, the award as to the matters that are properly therein passed upon will be held to conclude the parties when capable of being separated without prejudice to the rights of any of them.

3. **Same.**

Where the vendor of land has agreed with the purchaser under a writing that the latter was to repair the dwelling upon the land, not to exceed a certain sum, as a part of the purchase price, and he claims that he has exceeded the sum limited in making the repairs; a written submission to arbitration of the value of the repairs made by the purchaser within the limitation imposed by the agreement to arbitrate, is conclusive only within the amount so limited, and to that amount only are the parties bound by the award.

4. **Arbitration and Award—Award if Two Arbitrators.**

Where the parties have each selected an arbitrator under an agreement that three were to determine the controverted matter, and have conducted the proceeding upon the idea that the third should be called in only in case of disagreement of the arbitrators so selected, it becomes unnecessary for those selected to call in the third when they both have agreed and rendered their award accordingly.

5. **Appeal and Error—Objections and Exceptions—Sufficiency of Exception—Arbitration and Award.**

The form of an exception to the judgment of the Superior Court that presents on appeal the question as to whether the arbitrators had exceeded the authority conferred upon them by the agreement to arbitrate, will not be held insufficient when it substantially presents the real point intended to be raised.

APPEAL by defendant from *Long, J.*, at September Term, 1922, of RICHMOND.

Civil action, heard on the report of a referee. The case is this: On 27 September, 1918, defendant sold to plaintiff a certain lot in Hamlet, N. C., known as No. 81, for a stipulated price, on which plaintiff made payments and then gave his note for the balance, which was $4,750, due 27 December, 1918, with interest, and to secure the same he executed a deed to E. A. Harrill, as trustee, for said lot, with power of sale, which was duly registered. At the time of said purchase there was on the

lot a dwelling-house, which had never been completed, and which had been damaged by fire, and as a part of the contract of purchase, it was agreed between the parties that the defendant should, at his own expense, repair the house, complete it, and put it in good condition, as will fully appear from a contract between the parties, dated 27 September, 1918. That if the defendant had proceeded with due diligence with the work performed by him in accordance with the contract of 27 September, 1918, it should have been completed by 1 January, 1919, but on account of sickness and lack of money the defendant did not complete the work, and on 27 June, 1919, although defendant had done certain work on the house, it had not been completed in the way and manner specified by the contract.

On 27 June, 1919, the contract of 27 September, 1918, was abandoned by mutual consent, and a new contract was entered into between the parties, under the terms of which the plaintiff was to pay the defendant the sum of $4,000 in cash as a credit upon the indebtedness secured by the deed of trust to E. A. Harrill, trustee, and was himself to finish the house in the manner specified in the contract of 27 September, 1918, the reasonable cost thereof to be credited on the indebtedness secured by the deed of trust to E. A. Harrill, the estimated cost of finishing the house, to wit, the sum of $750, to be retained by the plaintiff pending the completion of said house. It was further agreed that if, upon the completion of the house, the parties could not agree upon the amount expended by plaintiff for work done by him on the same, the matter should be referred to three disinterested persons as arbitrators, and the plaintiff and defendant, on 27 June, 1919, executed a written agreement which, as far as it relates to this matter, is as follows: "Whereas, Harry Geiger is indebted to E. F. Caldwell in the sum of $750, and E. F. Caldwell is indebted to the said Harry Geiger, in the manner hereinafter stated, both parties mutually agree to the following: The parties agree that for the purpose of paying whatever amounts are due for completing this house, which the said Geiger agreed to do, but failed to do, and which Geiger now agrees to do, the said Geiger shall complete the house and receive payment for the same (omitting immaterial matters), and the parties agree that Geiger may deduct the cost and expense of completing the house from the balance due by him to Caldwell for the land to the amount of $750 of said purchase money, and the balance thereof he shall pay to Caldwell, with a lien on the house and lot for the same. The parties further agree to refer any dispute as to the amount due Geiger for the work to three arbitrators if they themselves cannot agree as to the same.

The case was sent to a referee, who found the following facts: "In accordance with the contract of 27 June, 1919, the plaintiff completed

the house in the way and manner specified in the contract of 27 September, 1918, and delivered to the defendant an itemized statement, showing that plaintiff had expended the sum of $1,190.80 in completing said house, and the plaintiff then and there offered to settle with the defendant upon this basis and to pay the defendant the balance due upon the indebtedness secured by the deed of trust to E. A. Harrill, trustee, after deducting all cash payments theretofore made, plus said sum of $1,190.80, but the defendant declined and refused to make settlement upon this basis. The parties, therefore, being unable to agree upon the amount expended by plaintiff in completing the house, appointed arbitrators, in accordance with the contract of 27 June, 1919, and thereupon the plaintiff selected W. J. Galloway and the defendant selected J. H. Austin, and the parties agreed upon one Cole as the third arbitrator. Thereupon the three arbitrators were furnished with an itemized statement of the amount claimed by plaintiff to have been expended by him in completing said house, together with bills and receipts evidencing the amounts paid by him, and the three arbitrators and plaintiff and defendant went over the house and inspected the same, and on 27 January, 1920, W. J. Galloway and J. H. Austin, two of the arbitrators, filed an award in writing, whereby they found that plaintiff had expended the sum of $1,135.36 in completing said house. A copy of the award was furnished to plaintiff and another to defendant. Although the contract of 27 June, 1919, provided for three disinterested arbitrators, both plaintiff and defendant construed the contract to mean that the third arbitrator was not to act, except in case of a disagreement between the other two arbitrators. That upon the arbitration there was no disagreement between the two arbitrators first selected and agreed upon between the parties, and for the reason the third arbitrator did not act or sign the written award. That the work of completing said house in the way and manner provided by the contract of 27 September, 1918, should have been performed and completed by the plaintiff in accordance with the contract of 27 June, 1919, at a cost and expense to him of not exceeding $750. That after said house was completed and finished, certain material was left over, the cost of which had been included in the statement furnished by plaintiff to the arbitrators, and which was allowed by them, and said material is still in the possession of the plaintiff. That the only cash payments which have been made by plaintiff to defendant on account of the indebtedness secured by the deed of trust to E. A. Harrill, trustee, are the following: $70.25, paid on or about 1 December, 1918, being three months interest; and the further sum of $3,000, paid in cash on 1 September, 1919. That if the award of the arbitrators is valid and binding, then a true and correct statement of the indebtedness due by plaintiff to defendant secured by the deed of trust to E. A. Harrill, trustee, is as follows: "Then follows

a statement of the account between the parties by the referee showing a balance due by Geiger on the indebtedness secured by the deed of trust to Harrill of $855.41 (as shown in finding No. 11), allowing him for the value of all work done and for all expenditures by him in completing the house, and giving him the benefit of the award of arbitrators."

The referee then says in his report: "If the award of the arbitrators be not final and binding, then a correct statement of the indebtedness due by plaintiff to defendant and secured by the deed of trust to A. E. Harrill, trustee, is as set forth in finding No. 11, with the exception that the credit of $1,135.36 as of 27 January, 1920, should be only the sum of $750 as of that date. The evidence before the referee was insufficient to authorize or justify the allowance of any damage in favor of or against either of the parties. The balance due by plaintiff to defendant is secured by the deed of trust to E. A. Harrill, trustee, registered in Book 110, at page 452, and is a first lien upon the property therein conveyed."

The referee concludes as matters of law:

"1. That the arbitration agreement and the award therein are valid and binding on the parties.

"2. That plaintiff is indebted for balance of debt to defendant secured by Harrill's deed of trust, in the sum of $855.41, with interest from 27 January, 1920, until paid, which is secured by the said trust deed, and recommends a sale of the property to pay it." There are other findings not material to this appeal.

Report of referee confirmed by the court, and judgment thereon for defendant for the balance due on debt, and for a sale of the property for its payment.

Defendant excepted and assigned the following errors: "The defendant excepts to the first conclusion of law of the referee herein for that the same is erroneous, and for that the referee should have found that the arbitration and award was not legal or binding upon the defendant E. F. Caldwell." This exception was overruled, and the report of the referee confirmed, and judgment rendered accordingly. Defendant appealed.

W. R. Jones for plaintiff.
J. Chesley Sedberry for defendant.

WALKER, J. The referee (Mr. Lawrence) acted wisely in presenting a report in the alternative views based on the construction of the arbitration and award and the evidence. He held himself bound by the award, and in this he was also correct, but we are of the opinion that the arbitrators adopted a mistaken view of the arbitration. It is clear from the terms of the submission to them that the plaintiff was not to

be allowed a credit of more than $750 for work done by him on the balance of the debt due by him to Caldwell. This, it seems to us, is the plain and only allowable construction of the submission. The confusion as to its meaning arose from the fact that they had separated a part ($750) of an entire debt due by Geiger to Caldwell from the whole thereof ($1,750), and referred to the $750 as if it was a separate and distinct debt evidenced by a note or some other instrument for its amount ($750), whereas the balance of the debt, originally $4,750, was $1,750, but the meaning and intention of the parties is so plainly manifest that this peculiar and confusing way of expressing it is altogether immaterial. We search for the contract and construe it according to the real intention of the parties, and when this is discovered, and especially when, as in this case, it is so easily found, we do nothing more than execute it.

In paying or reducing the amount of Caldwell's indebtedness to him for his work on the house, the plaintiff could offset it by his debt to Caldwell for the balance of the purchase money due for the lot and secured by the Harrill deed of trust, but only to the amount of $750. This was, therefore, the limit of the power conferred upon the arbitrators in determining the balance due by Geiger to Caldwell. The learned referee considered this matter, and would have given Geiger a credit for only $750 had he not been of the opinion that he was bound and concluded by their award allowing him more than that amount. In thus holding, he overlooked the fact that the arbitrators had exceeded their power and jurisdiction, if it may be so called, and to the extent that they did so, he was not bound by their decision, but could decide for himself.

Turning to the authorities, we find it settled that the submission furnishes the source and prescribes the limits of the arbitrators' authority, without regard to the form of the submission. The award, both in substance and in form, must conform to the submission, and the arbitrators are inflexibly limited to a decision of the particular matters referred to them. 5 Corpus Juris, 124. A submission is in itself a contract, or agreement, or so far partakes of its nature as to be substantially within the principle applicable to contracts as "the basis of the arbitration and award is the submission." *Sprinkle v. Sprinkle,* 159 N. C., 81; *Millsaps v. Estes,* 137 N. C., 536; *Dist. of Columbia v. Bailey,* 171 U. S., 176. As a legal proposition, defendant is correct in contending that an award may not extend beyond the meaning and scope of the submission, unless waived by the conduct of the parties, or by some other recognized method of enlarging the range of inquiry, which is not shown here. Such improper action on the part of the arbitrators is void, certainly as to the excess, and if not on matter independent and severable, its effect may be to render the entire award invalid. *Robert-*

son v. Marshall, 155 N. C., 167. An award must be made strictly in pursuance of and in agreement with the submission, which must not, in its terms, be exceeded, and the arbitrators should regularly award as to all things referred to them, though an award may be good as to part, and void as to the remainder (if the parts are separable), where the arbitrators have acted in excess of authority. *Millinery Co. v. Ins. Co.,* 160 N. C., 130; Watson on Arbitration, marg. p. 176; *Stevens v. Brown,* 82 N. C., 460. In *Cutler v. Cutler,* 169 N. C., 482, it was held that an agreement to arbitrate is a contract, and from it the arbitrators derive their authority to bind the parties by their decision, and it is well settled that the arbitrators cannot exceed the authority conferred upon them by the agreement.

The award exceeded the limit set by the terms of the submission, and, as argued by the defendant, it was, at least to that extent, not authorized and void, and did not bind the defendant or the arbitrators. But this is, as to the latter, on matter substantially separable from the rest of the award and independent of it. The arbitrators did what they were authorized to do, although they did more, but as this does not vitiate what was within their express power to do, we may hold it valid as to it, and void as to the excess.

The parties, as reported by the referee, treated the submission as, in the first instance, to two of the arbitrators, and in the event of disagreement between them, the third then to act in conjunction with the others. But the last was not required to be done, as the two agreed, and rendered his participation unnecessary. This was the correct view as taken by the referee. The very nature of the transaction, as disclosed by the entire record, clearly sustains his conclusion upon this part of the case.

The objection to the form of the single exception and assignment of error is not well taken. It substantially presents the real point intended to be raised, namely, that the award in its present form is not legal and binding upon the defendant, because the arbitrators exceeded their powers. It would be placing a very technical and strained construction upon the exception of defendant should we decide otherwise.

The judgment will be modified and the case remanded, so that the report of the referee may be modified by the court, or recommitted to the referee for that purpose, by allowing the plaintiff $750, as a credit on the account, instead of the amount now appearing in the referee's account as stated by him, this being his alternative ruling, if the award is not valid and binding upon defendant, except as modified, which it is now held by us to be. The other grounds of objection to it are untenable.

As thus modified, the judgment of the court is affirmed, and will be enforced.

Modified and affirmed.

CHARLES McIVER ET AL. v. WINSTON McKINNEY ET AL.

(Filed 15 November, 1922.)

1. Wills—Interpretation—Intent.

The intent of the testator, as gathered from the words he has used in his will, will prevail in giving effect to the will, not so much depending upon what the testator intended to express as what he actually expressed therein, considering all its provisions in their related entirety; and while presumptions as to his meaning are usually subordinated to his intention, they are not to be disregarded as an aid to the discovery of such intention when such construction is reasonable and in accord with the language used.

2. Same—Presumptions—Residuary Clause—Intestacy.

Where reasonably permissible, the law presumes that it was not intended by a testator to die intestate as to any part of his property, and the law will accordingly, in proper instances, presume that by a residuary clause the intestate intended to dispose of the property that he has not disposed of specifically in other parts of his will.

3. Same.

In one item of his will a testator devised his home lands to his wife for life, therein not specifically designating those to take in remainder; and in another item thereof disposed of the residue of his estate, if any, to his wife and daughter, in equal proportions, share and share alike: *Held*, it was the testator's intent that the remainder of his estate devised in the first item should vest under the residuary clause.

4. Same—Equity—Conversion.

Where a testator directs that his real estate be sold and the proceeds first applied to the payment of his debts, and should any surplus remain, it should be divided among certain beneficiaries, such beneficiaries take the surplus as personalty under the doctrine of equitable conversion, subject to the law of descent applicable to property of that character.

5. Same—Statutes—Husband and Wife.

Where a daughter takes the lands of her father, after the death of her mother, as a residuary legatee under his will, but as personalty under the equitable doctrine of conversion, and then dies intestate, without child or the representative of such child, leaving a husband surviving, the daughter acquires her mother's interest, under the provisions of C. S., 137, and her husband, upon her death, is entitled to the estate as her personalty under the provisions of C. S., 7, subject to the rightful demands of creditors; and C. S., 137 (8), relating to instances where a married woman dies intestate, leaving a husband and a child, or the representative of such child, has no application. Public Laws of 1921, ch. 54.

APPEAL by petitioners from *Harding, J.*, at April Term, 1922, of SURRY.

Civil action, heard on an agreed statement of facts.

John M. Doss died leaving a last will and testament the two material items of which are as follows:

"Second: I give and devise to my beloved wife, Mary M. Doss, the tract of land on which I now reside, containing three hundred acres, more or less, bounded by the lands of Wesley Wooten, F. Parker, McKinney, and others, for her natural life in satisfaction of her dower and thirds in all my lands."

"Fifth: My will and desire is that all the residue of my estate (if any), after taking out the devises and legacies above mentioned, shall be sold and the debts owing to me collected, and if there should be any surplus over and above the payment of the debts, expenses, and legacies, that such surplus shall be equally divided and paid over to my said wife and daughter in equal proportions, share and share alike."

The action was instituted as a proceeding for partition of the land described in the second item of the will. The facts agreed are as follows: The petitioners and the defendants, Winston McKinney and W. E. McKinney, are the collateral heirs of the testator, John M. Doss, who died on 3 September, 1915; the defendants R. F. Saunders, Caroline Haymore, Charlotte Bowles, Louise Saunders, Fletcher Saunders, Lillian Jackson, Lucy Kirkman, J. W. Saunders, Robert Perkins, Virginia Perkins, and Mary Perkins are the collateral heirs of Mary M. Doss (widow of the testator), who died intestate on 14 May, 1918; and the defendant W. C. McKinney is the surviving husband of Sarah Doss McKinney (the only child of John and Mary Doss), who died intestate, without issue, 3 February, 1921, at the age of nineteen years. The land described in the petition as tracts 1, 2, 3, 4 is the land embraced in item two of the will. The testator devised to his daughter Sarah a tract in Yadkin County and three houses and lots in Mount Airy, which, with ten acres sold by her guardian and the land described in the second item of the will, was all the real estate owned by John Doss at the time of his death. The executor named in the will died before the testator, and the widow qualified as administratrix *c. t. a.* of John M. Doss on 7 September, 1915, and made a final settlement of her administration on 7 August, 1917. The personal property was more than sufficient to pay all the testator's debts and the funeral expenses. The widow and Sarah Doss resided on the home place, described in the second item, until the widow's death, and Sarah remained there until her marriage. With the exception of the ten acres referred to above, none of the testator's land has been sold. W. C. McKinney was appointed guardian of Sarah Doss McKinney on 25 November, 1918, and E. F. McKinney was appointed her administrator 1 September, 1921. On 17 May, 1918, L. P. Jones qualified as administrator of Mary M. Doss, and made his final settlement 23 May, 1919. W. C. McKinney was appointed administrator

d. b. n., c. t. a., of John M. Doss 20 September, 1921; and as guardian of Sarah McKinney he took charge of her real and personal property and managed it up to the time of her death. The will was written by the executor named therein, who was not a lawyer.

The petitioners contend that the testator did not dispose of the reversionary interest in the land described in item two, and that upon the death of his daughter the title descended to them as heirs at law. The heirs of Mary M. Doss contend that the testator devised to her an undivided one-half interest in the land, that she held such interest as purchaser, and that they have acquired her title. W. C. McKinney contends that the fifth item of the will operates as an equitable conversion of the reversionary interest into personal property, that upon the death of Mary M. Doss her interest went to her daughter, Sarah Doss McKinney, and that W. C. McKinney, as husband of Sarah, acquired her interest.

The court adjudged that W. C. McKinney is entitled to the proceeds to be derived from the sale of the land, and appointed a commissioner to make the sale. The petitioners and the heirs of Mary M. Doss excepted and appealed. The land described in item two will be referred to as the "home place."

T. W. Kallam, J. F. Hendren, and McMichael, Johnson & McMichael for petitioners.

J. H. Folger for the heirs of Mary M. Doss.

Carter & Carter for W. C. McKinney, appellee.

ADAMS, J. In the second item of the will the testator devised the home place to his wife for her natural life, without therein disposing of the reversionary interest. The appeal therefore presents the direct question whether the provision in the fifth item operates as an equitable conversion into personal property of the interest remaining after the expiration of the life estate, for it is admitted that no other clause in the will affects such interest.

In *Sisson v. Seabury*, 1 Sumn., 235, Fed. Cas., No. 12, 913, *Judge Story* said: "The difficulty of construing wills in any satisfactory manner renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempts even to classify them, much less to harmonize them, is full of the most perilous labor. *Lord Eldon* has observed that the mind is overpowered by their multitudes, and the subtility of the distinctions between them. To lay down any positive and definite rules of universal application in the interpretation of wills must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty.

The unavoidable imperfections of human language, the obscure, and often inconsistent, expressions of intention, and the utter inability of the human mind to foresee the possible combinations of events, must forever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical and formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present an infinite variety of combinations, and thus involve an infinite variety of shades of meaning, as well as of decision."

Nevertheless, it is generally conceded that in the construction of a will the cardinal purpose is to ascertain and give effect to the intention of the testator—not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety. *Patterson v. Wilson,* 101 N. C., 586; *Francks v. Whitaker,* 116 N. C., 518; *Chewning v. Mason,* 158 N. C., 579; *Dunn v. Hines,* 164 N. C., 114; *Taylor v. Brown,* 165 N. C., 157; *McCallum v. McCallum,* 167 N. C., 310. Moreover, presumptions, while usually subordinated to the maker's intention, are not to be disregarded as an aid in the discovery of such intention. Hence, in determining the question whether the testator disposed of the reversionary interest in the home place we may consider the presumption that the testator intended to dispose of his entire estate. The law presumes that one who makes a will does not intend to die intestate as to any part of his property. *Speight v. Gatling,* 17 N. C., 6; *Jones v. Perry,* 38 N. C., 202; *Blue v. Ritter,* 118 N. C., 580; *Peebles v. Graham,* 128 N. C., 225; *Steadman v. Steadman,* 143 N. C., 351; *Allen v. Cameron,* 181 N. C., 124. We must therefore consider this presumption in connection with the fifth item of the will, which provides that the residue of the estate be sold and the surplus remaining after the payment of debts, legacies, and expenses be equally divided between the testator's wife and daughter. This is a residuary clause, which is to be construed so as to prevent intestacy, unless there is an apparent intention to the contrary. We are satisfied, after careful examination, that the will does not disclose an intention on the part of the testator to exclude from the residuary clause the reversion in the home place. The language is "all the residue of my estate," and the word "estate," as used here, denotes an interest in land or in any other subject of property. *Vann v. Edwards,* 135 N. C., 665; *Foil v. Newsome,* 138 N. C., 117. Even where the residuary clause is limited to personal property, it has been held that such clause operates as a limitation to the interest of the tenant for life, and passes it over as effectually

as if there had been an express limitation over of the specific thing. *Speight v. Gatling, supra; Saunders v. Gatlin,* 21 N. C., 86; *Hyman v. Williams,* 34 N. C., 94.

What, then, is the legal effect of the provision of the fifth item? We regard the unambiguous expression of the testator's "will and desire" that the property be sold as equivalent to his commanding an equitable conversion of the property not otherwise disposed of, including the reversion in the home place. "By equitable conversion is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. 'Nothing,' it has been said, 'is better established than the principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money or money land.' By this and similar declarations, the judges do not mean to assert a solemn piece of legal juggling without any foundation of common sense; but simply to lay down the practical doctrine that for certain purposes of devolution and transfer, and in order that the rights of parties may be enforced and preserved, it is sometimes necessary to regard property as subject to the rules applicable to it in its changed and not in its original state, although the change may not have actually taken place." Bispham's Prin. Eq., sec. 307; 1 Story's Eq. Juris., sec. 573 *et seq.; Duckworth v. Jordan,* 138 N. C., 521; *Clifton v. Owens,* 170 N. C., 613. The right of a testator to effect his purpose by directing that money be employed in the purchase of land, or that land be sold and turned into money is unquestionable, and those who claim under a will directing such conversion must take the property in its converted character, as if the conversion actually took place at the time of the testator's death, unless some other time is designated in the will. *Brown v. Wilson,* 174 N. C., 639; *Benbow v. Moore,* 114 N. C., 270; *Conly v. Kincaid,* 60 N. C., 594; *Brothers v. Cartwright,* 55 N. C., 116; *Elliott v. Loftin,* 160 N. C., 362; *Clifton v. Owens, supra,* pp. 616-617.

From the application of these principles it follows that the equitable conversion into money of the reversionary interest took place when the testator died, and that the money to be derived from the sale was to be divided between the widow and the daughter "share and share alike." The daughter, who was the sole surviving heir and distributee, acquired

the interest of her mother (C. S., 137), and upon the subsequent death of the daughter intestate, her surviving husband (the defendant W. C. McKinney) was entitled to her personal estate, subject, of course, to the claims of her creditors and others holding rightful demands against her. C. S., 7; *Bank v. Gilmer,* 116 N. C., 701; *Colson v. Martin,* 62 N. C., 125. C. S., 137 (8), applies only in case a married woman die intestate, leaving a husband and a child, or the representative of such child. Public Laws of 1921, ch. 54.

The judgment of the Superior Court is

Affirmed.

CONESTEE CHEMICAL COMPANY, INC., v. W. C. LONG ET AL.

(Filed 15 November, 1922.)

1. **Judgments—Term—Presumptive Date—Signed Out of Term—Consent.**

The provisions of C. S., 613, that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it.

2. **Appeal and Error—Findings by Court—Consent—Evidence.**

Where the judge finds by consent the facts controverted in the action, his findings are not reviewable on appeal to the Supreme Court when supported by evidence.

3. **Same—Judicial Sales—Confirmation—Discretion of Court.**

The confirmation of a judicial sale by the Superior Court judge is a matter within his sound discretion, and will not be reviewed by the Supreme Court on appeal when it has been exercised reasonably and not arbitrarily.

APPEAL by defendant from *Lane, J.,* at December Term, 1921, of RICHMOND.

On 4 March, 1920, the defendant Long executed and delivered to the plaintiff a chattel mortgage and crop lien to secure his promissory note to the plaintiff in the sum of $4,795, due on 15 November, 1920. The defendant made default in payment, and in Richmond County a consent judgment was rendered against him on 3 June, 1921, for the amount of the note, with interest, and a commissioner was appointed to sell at

private sale so much of the mortgaged property as was seized under proceedings in claim and delivery. The commissioner sold 59 bales of cotton at 9 cents, and realized $2,121.39, and made report of his sale on 1 August, 1921. At the September Term, 1921, the defendant filed written objections to the confirmation and several affidavits were filed. The cause was continued, and it was agreed that the judge might render final judgment outside the district in vacation. After finding the facts from the evidence his Honor signed a judgment on 31 August, 1922, confirming the sale and crediting the amount of the note with the proceeds. The defendant excepted and appealed.

J. Chesley Sedberry and J. G. McCormick for the commissioner.
W. R. Jones and Stack, Parker & Craig for defendant.

ADAMS, J. In the judgment to which the parties expressly consented it was provided that the commissioner should make sale within sixty days from the date of the order. The judgment was rendered as of the May Term, 1921, but his Honor found the facts to be that it was "signed and entered" on 3 June, and that the sale was made on 1 August, and within the time prescribed. The relation of a judgment to the first day of the term applies when the judgment is rendered during a term and docketed during the same term, or within ten days after the adjournment. C. S., 613. The statute does not purport to apply to a judgment signed out of term, and a judgment *nunc pro tunc,* though by agreement, is not allowed to take effect by relation to the prejudice of third parties. *Hardware Co. v. Holt,* 173 N. C., 310; *Ferrell v. Hales,* 119 N. C., 199. The defendant's first assignment of error therefore cannot be sustained.

The second and third assignments involve questions of fact. There was evidence to support each finding, and it is well established that in such cases the facts as found by the trial judge are not subject to review in this Court. *Harris v. Smith,* 144 N. C., 439; *Jordan v. Bryan,* 103 N. C., 59; *Strauss v. Frederick,* 98 N. C., 60.

The defendant further assigned as error his Honor's confirmation of the commissioner's sale and the order directing the clerk to credit the judgment with the proceeds of the sale, less the expenses. In our view of the law it is not necessary to discuss the various contentions in behalf of and in opposition to the order confirming the sale. Whether a judicial sale should be confirmed is ordinarily a matter within the sound equitable discretion of the court. True, the discretion must be exercised reasonably and not arbitrarily; but if it appears that the sale was free from deception and unfair advantage, and that the order of confirmation was made in the exercise of a discretion which was not abused, the

courts "will not be astute to find objections." *Sutton v. Craddock,* 174 N. C., 276; *Thompson v. Rospigliosi,* 162 N. C., 147; *Vaughan v. Gooch,* 92 N. C., 529; *Wood v. Parker,* 63 N. C., 379.

We have considered all the exceptions and have concluded, upon the whole record, that the defendant cannot claim the relief sought as a matter of legal right. The judgment is therefore

Affirmed.

JOHN G. CARPENTER, ADMINISTRATOR OF BENJAMIN L. CLARK, DECEASED, v. ATLANTA AND CHARLOTTE AIR LINE RAILWAY COMPANY ET AL.

(Filed 22 November, 1922.)

1. Actions—State—Governmental Agencies—State Highway Commission—Statutes.

The statutes creating the State Highway Commission enumerate their powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or impliedly giving it the right to sue and be sued, but manifestly as an agency of the State for the purpose of exercising administrative and governmental functions. Public Laws 1915, ch. 113; Public Laws 1919, ch. 189; Public Laws 1921, ch. 2, sec. 10.

2. Same—Constitutional Law.

A State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, by statutes or in cases authorized by provisions in the organic law, instanced by Art. II, Const. U. S.; Art. IV, sec. 9, Const. of North Carolina.

3. Same—Officials.

A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not against its officer or agent, whose acts are alleged to have caused the injury complained of.

4. Same—Private Corporations.

C. S., 1126, giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental agency of the State, but only to private and *quasi*-private corporations.

5. Same—Torts.

The principle upon which a governmental agency is not liable to an action in tort committed by its agents, rests upon public policy, and the State Highway Commission being a governmental agency, is immune from suits of this character, whether empowered by the statutes concerning it to sue and be sued or otherwise, there being no statute or constitutional provision authorizing it.

6. Same—Principal and Agent—Private Torts.

The principle upon which the immunity of the State from suit does not extend to its officers and agents for a trespass committed in breach of an individual's legal rights under conditions prohibited by law, though they have assumed to act by authority of the State, can have no application when the State is the real party against which the relief is sought, and the party that will be affected or controlled by an adverse judgment, if rendered.

7. Same—Statutes—Constitutional Law.

An officer or agent of the State is not liable to one injured by a breach of his administrative duty requiring the exercise of his judgment or discretion, when it is imposed solely for the public benefit, and he has acted within its scope without malice or corruption.

8. Pleadings—Demurrer—Governmental Agencies—Torts.

The plaintiff in this action sued the State Highway Commission for damages for the death of his intestate, alleged to have been caused by its failure to provide a safe place for the intestate to work in pursuance of his dangerous duties as defendant's employee: *Held*, a demurrer confined the scope of the inquiry to whether the action could be maintained against the defendant commission, in its capacity in which it was sued, if regarded as a general appearance, and was properly sustained.

9. Summons—Service—Principal and Agent—Governmental Agencies—State Highway Commission—Actions.

A summons served on the chairman alone, and as such of the State Highway Commission, does not present in the action the question of the individual liability of its agents or employees for a tort alleged to have been committed by them.

APPEAL by plaintiff from *Webb, J.*, at September Term, 1922, of GASTON.

The State Highway Commission demurred to the complaint. Demurrer sustained. Plaintiff appealed.

Mangum & Denny for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash and W. L. Cohoon for State Highway Commission.

ADAMS, J. The plaintiff alleges that Sam Finley, who was employed by the State Highway Commission to surface certain roads in the county of Gaston, by agreement with the Southern Railway Company, built a tank, or tanks, on the railroad's right of way in the town of Lowell within a few feet of overhead wires which were charged with an electric current of high voltage; that these tanks contained asphalt, which was to be used in surfacing the roads then in process of construction; and that the plaintiff's intestate, a road inspector in the employ of the Highway Commission, went to one of the tanks in obedience to orders given him, and mounting a ladder undertook, by means of an iron rod,

to dig or cut into the asphalt, when the rod came in contact with one of the wires and communicated the electric current to his body, causing his death. The plaintiff further alleges that the Highway Commission negligently permitted Finley to place the tanks in dangerous proximity to the wires and negligently failed to furnish for the plaintiff's intestate a safe place in which to work, or to warn him of the danger to which he was exposed.

The Highway Commission demurred on the ground that the complaint does not state a cause of action against them in that the commissioners are agents of the State engaged in the performance of a public service, and are not subject to suit for the cause alleged. The demurrer was sustained, and the plaintiff excepted and appealed.

The appeal presents the question whether the allegations in the complaint constitute a cause of action which can be maintained against the State Highway Commission in the Superior Court. It is not necessary to consider the alleged cause of action against Finley (who is named as a defendant) for the reason that Finley has never been served with process and is not in court, and because, moreover, the demurrer was filed only by the Highway Commission.

In 1915 the General Assembly established a State Highway Commission, to consist of the Governor and six others, and afterwards increased the number of commissioners, enlarged their duties, and more clearly defined their powers. Public Laws 1915, ch. 113; Public Laws 1919, ch. 189; Public Laws 1921, ch. 2. Section 10 of the act of 1921 clothed the commission with the general supervision of all matters relating to the construction of the highways of the State, including the execution of contracts, the selection of the materials to be used, the control for the benefit of the State of any existing county or township roads, the regulation of the use of the roads and of the police traffic thereon, responsibility for the maintenance of all highways other than streets in towns and cities, and other enumerated powers. The commission was not incorporated with the right to sue and to be sued, but was manifestly established as an agency of the State for the purpose of exercising administrative and governmental functions.

The principle is firmly established that a State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, except in cases authorized by Article XI of the Constitution of the United States, or by some provision in the State Constitution represented, for example, by Article IV, section 9, of the Constitution of North Carolina. In *Beers v. Arkansas,* 20 Howard, 527, *Chief Justice Taney* said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks

proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *U. S. v. Clark,* 8 Pet., 436; *U. S. v. Eckford,* 6 Wall., 484; *R. R. Co. v. Tenn.,* 101 U. S., 337; *U. S. v. Lee,* 106 U. S., 196; *Moody v. State Prison,* 128 N. C., 12; *Jones v. Comrs.,* 130 N. C., 452.

It is true that a suit against the officials of a State is not necessarily a suit against the State, for the nature of the action must be determined by the substance of the relief sought. *Ins. Co. v. Herriott,* 91 Fed., 715; *Bain v. State,* 86 N. C., 49. But where a suit is prosecuted against an officer or agent who represents the State in action and liability, and the State is the real party whose action would be controlled by the judgment and against which relief is sought, the action is in effect a suit against the State. *North Carolina v. Temple,* 134 U. S., 22; *Louisiana v. Steele,* 134 U. S., 230; *Smith v. Reeves,* 178 U. S., 436.

The plaintiff insists, even if these propositions be conceded, that the original jurisdiction of the Supreme Court conferred by Article IV, section 9, of the State Constitution is not to be exercised if by the ordinary process of the law a plaintiff can regularly constitute his case in court and obtain relief against the defendant (*Bain v. State,* 86 N. C., 50), and that the instant action can be maintained on two distinct grounds: (1) that authority for the commission to sue and to be sued is implied from the character and purpose of the legislation by which it was established; and (2) that the action was instituted for the recovery of damages caused by the negligence of the officers or agents of the State and not as a suit againt the State.

As to the first ground, we understand the plaintiff to admit, in accordance with the decisions, that the power to sue and to be sued given under C. S., 1126, applies only to private and *quasi*-public corporations, and not to the governmental agencies of the State. *Moody v. State Prison, supra.* Besides this, the mere right to sue and to be sued, even if expressly granted the commission, would not destroy the public policy on which immunity from a suit in tort is made to rest. In *Moody's case, supra,* it is said: "But even if such authority was given, it would cover only actions ordinarily incidental in its operation, and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to 'debts and other liabilities for which the State Prison is now liable,' and extending liability for causes not heretofore recognized. *Grate Co. v. Commonwealth,* 152 Mass., 28. 'The exemption of the State from paying damages for accidents of this

nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy, which deny its liability for such damages.' *Bourn v. Hart,* 93 Cal., 338." In *Jones v. Comrs., supra,* it was held that counties, as instrumentalities of the State, are not liable in damages in the absence of a statutory provision giving a cause of action against them, and even if such authority were given it would not extend to causes of action in tort. The cases cited by the plaintiff are not in conflict with these decisions. In *Ellis v. N. C. Institution,* 68 N. C., 424, the action was based on a contract which was collateral or incidental to the purposes for which the institution was established. In the case of *Bain v. State, supra,* the object of which was to ascertain the facts relating to the plaintiff's interest in land occupied by the defendant, this Court held that Article IV, section 9, of the Constitution did not apply, because the plaintiff could obtain the relief sought in an ordinary action at law. And in *County Board v. State Board of Education,* 106 N. C., 83, the defendant was empowered to sue and be sued, and the action was prosecuted to enforce the performance of a ministerial duty.

As to the second ground relied on by the plaintiff, we concede the proposition that the immunity of the State from suit does not save its officers and agents from liability for a trespass committed in breach of an individual's legal rights under conditions prohibited by law, even when they act or assume to act by authority of the State. This doctrine is maintained in courts of the highest repute and is illustrated in numerous decisions. In *Poindexter v. Greenhow,* 114 U. S., 270, it appeared that the plaintiff owed certain taxes to the State of Virginia; that the defendant, as treasurer of the city of Richmond, was charged with the duty of collecting the tax, and made demand on the plaintiff for payment of the taxes due; that the plaintiff thereupon tendered to the defendant in payment thereof 45 cents in money and certain matured coupons issued by the State of Virginia by virtue of an act of the General Assembly; that the defendant refused to accept the coupons and money in payment of the plaintiff's tax, and levied upon and took possession of certain personal property belonging to the plaintiff for the purpose of selling the same to pay the taxes; and that the plaintiff then brought his action in detinue for the recovery of the property levied on by the defendant. The defendant objected that the suit could not be maintained because it was substantially a suit against the State of Virginia, to which it had not assented, and that the defendant acted only in an official capacity and was guilty of no personal wrong. In deciding the question, *Mr. Justice Matthews* said: "A defendant, sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that

the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of 26 January, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the Government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense."

This principle is sustained in *Scott v. Donald,* 165 U. S., 58; *Elmore v. Fields,* 153 Ala., 345; *Burroughs v. Commonwealth,* 224 Mass., 28. In *Hopkin v. Clemson College,* 221 U. S., 636, on which the plaintiff chiefly relies, the facts were that the defendant maintained an embankment on the eastern side of the Seneca River to protect its lands from overflow, but its construction narrowed the channel of the river and caused the current of the stream to flow across the banks of the plaintiff's lands, causing injury. The appeal raised the question whether a public corporation can avail itself of the State's immunity from suit in a proceeding against it for so managing the land of the State as to damage or take private property without due process of law. The college was not acting in a governmental capacity. In reference to the question, the Court said: "Again, and still treating the question as though involved in the plea to the jurisdiction, that is not an action against the college for a tort committed in the prosecution of any governmental function. The fee was in the State, but the corporation, as equitable owner, was in the possession, use, and enjoyment of the property. For protecting the bottom land, the college, for its own corporate purposes and advantages, constructed the dyke. In so doing it was not acting in any governmental capacity." With respect to the question of liability, there is a well defined distinction between institutions which are regarded as ministerial agencies of the government and

those which exercise political or governmental functions like counties, municipalities, or commissions created for the construction and maintenance of the public highways. The duties of such governmental institutions are more than ministerial. The apposite principle is this: If an action cannot be prosecuted against its officers or agents when the State is the real and only party in interest, it is equally true as a general proposition that a State cannot be held liable for torts committed by its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability. And the test by which the question of the individual liability of an official or agent of the State for tortious personal injury is to be determined has been stated in our decisions. For the negligent breach of a public duty administrative, ministerial, and imposed entirely for the public benefit a public officer may not be held individually liable to a person who has been injured by his negligence, unless the statute creating the office or imposing the duties makes provision for such liability; and where his powers involve the exercise of judgment or discretion he is not liable to any private person for neglect to exercise such powers nor for the consequence of the lawful exercise of them if he keeps within the scope of his authority and acts without malice or corruption. *Hipp v. Farrell,* 169 N. C., 552; *S. c.,* 173 N. C., 169; *Snider v. High Point,* 168 N. C., 608.

We have referred to the doctrine of the individual liability of a public officer or agent because the questions relating to it were discussed in the argument here, but it should be noted that the members of the Highway Commission are not sued as individuals. The plaintiff caused the summons to be served only on the chairman, and seems to have dealt with the commission as if it were a corporation. If the demurrer be treated as a general appearance, such appearance was limited and confined to the capacity in which the commission was sued.

The judgment sustaining the demurrer is

Affirmed.

SETH ROBERTS AND WIFE v. MAYS MILLS.

(Filed 22 November, 1922.)

1. Employer and Employee—Master and Servant—Contracts—Consideration—Bonus—Supplementary Contracts.

An offer of a bonus by an employer to such of his employees working for wages by the week, as would continue to work for a designated period of months, is a supplementary contract to that by the week, and becomes binding on the promissor, without express agreement by the employee, when the latter continues to work under the inducement offered.

2. Same—Discharge of Employee—Damages—Quantum Meruit.

Where an employee by the week continues to work during the period for which his employer has offered a bonus, and is discharged without lawful excuse by the employer before the ending of the term, he is entitled to recover his weekly wage, under his contract relating thereto, to the time of his discharge, and upon his supplementary contract for the bonus to that time upon a *quantum meruit*, the question as to whether the employer had a reasonable ground to discharge his employee being for the jury upon conflicting evidence.

3. Same—Husband and Wife.

Where the employees of a manufacturing plant, working for a bonus under the promise of their employer, are husband and wife, living together in the tenant house on the company's premises, the discharge of the husband accompanied with an order to leave the premises he was occupying with his wife, is an implied discharge of his wife also.

APPEAL by plaintiffs from *Finley, J.*, at March Term, 1922, of MECKLENBURG.

The plaintiffs brought this action to recover $46.70, alleged to be due for wages for work for the week ending 13 September, 1920, and for the recovery of $191.83 bonus, and for $553.60 claimed as damages for breach of contract of employment, the same being wages for the period from 13 September, 1920, to 25 December, 1920, at the rate of pay theretofore earned by plaintiff and his wife.

It was admitted that the plaintiffs were in the employment of the defendant working in his cotton mill during January, 1920, and had been employed theretofore for probably two years; that during the early part of January, 1920, the following notice was posted by the defendant in his mill: "15 January, 1920. On 15 November we posted notice stating that we had made preliminary estimate of our accounts for the year 1919, sufficiently definite to warrant our announcing that on 29 December we would make an increase of 10 per cent in the wages of all mill operatives, and also would again pay the 5 per cent bonus at Christmas time in 1920. We have now completed our accounts for 1919, and find that it is possible for us to not only advance wages 10 per cent, which was done on 29 December, but also to pay 10 per cent bonus at Christmas time in 1920 instead of 5 per cent bonus. Therefore, a 10 per cent bonus will be paid at Christmas time in this year to those who have been continuously in the company's employ since this present month of January. Mays Mills, Incorporated. Maysville, N. C."

The defendant admitted the claim for $46.70 for wages earned in the week prior to 13 September, 1920, and tendered an offer of judgment for this amount, but denied the right of either of the plaintiffs to recover on account of the claim for bonus or for unearned wages on account of

alleged breach of contract of employment. The court below gave judgment for the $46.70 admitted by the defendant, and held that neither of the plaintiffs was entitled to recover on the other claims.

From the above judgment the plaintiffs appealed.

Marvin L. Rich and J. F. Flowers for plaintiffs.
Tillett & Guthrie for defendants.

CLARK, C. J. This case presents, for the first time in this Court, the construction of the effect of an offer by employers to extend a bonus to employees provided they remain a specified length of time, which offer is accepted by the employee entering upon his employment upon such inducement. Should the employee fail to execute his part of the agreement by remaining for a specified time, or is dismissed for failure to do efficient work, or for any other good cause he forfeits his claim to the bonus offered. The question here presented is, Can the employer arbitrarily terminate such agreement at any time without legal and sufficient cause.

In this case the evidence of the plaintiff was uncontradicted that he saw the notice of the offer of a bonus of 10 per cent posted in the mill, and thereby he was induced to stay and work until he could draw the bonus; that before the offer of the bonus was made he intended to quit, and would have done so but for its being raised to 10 per cent. His wife and coplaintiff makes the same allegation. There was evidence that the work of the plaintiffs was entirely satisfactory to the employers. He testified that there was no complaint of the work of himself and wife. The foreman, J. D. Norwood, under whom the plaintiff worked, testified that the character of his work was good; that he had no occasion to complain of it, and if there had been any complaint it would have been made to him, and that he had received no complaint in regard to it. He also testified that he had known the plaintiff some four years, and his general reputation was good, and his general reputation as a workman in a cotton mill was good. The witness Robinson, who discharged the plaintiff at the direction of the superintendent, Dawson, stated that he had known Roberts and wife since 1917, and that the work of both was satisfactory to the company. In short, the evidence is that the work of the plaintiff and his wife was entirely satisfactory, and that their discharge was not caused by any dissatisfaction with their work, but because of criticism which Seth Roberts is alleged to have made outside the mill of an officer, but which he denied. Welsh, the chief executive of the mill, testified: "I gave instructions to have Roberts discharged, and my reasons were that he was critical of an officer of the law we had employed there to keep the place clean. I had no other reason."

The plaintiff objected to all the testimony relative to the matters that occurred outside the mill and that were not in any way connected with his work, and excepted to the refusal of the court to exclude such testimony. The plaintiffs contend that the 10 per cent bonus offered was a part of the stipulated compensation for work to be performed, and that the defendant would have no right to discharge the plaintiffs for the reason assigned, and thereby defeat the plaintiffs in their purpose to remain in the mill and work according to the offer contained in the notice as to all who remained continuously in its employment until Christmas. They also contended that the allegations of the conversation outside the mill, if true, which they denied, did not authorize their discharge by the defendant, there being no complaint as to their work; that the defendant could not discharge them without any legal reason authorizing them to do so, and that in effect they did this, and are liable to the plaintiffs for 10 per cent of the wages earned at least up to the time of the discharge as a part of the stipulated compensation for the work actually done.

The plaintiff also excepted because the court instructed the jury that if they believed the evidence and found the facts in accordance therewith to answer the first issue "No," and to save trouble that he would answer it for them "No."

There was conflicting evidence as to the conversation on account of which the plaintiff Roberts was discharged, and we need not in this case pass upon the question whether there was sufficient ground for discharge for whether there was such conversation was a disputed issue of fact, upon which the jury alone was competent to pass. The language which the witnesses for the defendant testified that the male plaintiff used, and for using which was discharged, was as follows: The witness Welsh testified that he "gave instructions to have Roberts discharged, and his reason was that he was critical of an officer of the law that the company had employed to help keep the place clean; that he had no other reason."

L. R. Parker, witness for the defendant, testified that he was an employee of the mill and superintendent of the Sunday School there, and he heard Roberts, on 20 August, 1920, state, in the presence of other employees, "Oh, hell, the way they have Sunday School now they have not a fitten place to go to. The Bible did not teach us to have Sunday School the way they do; that the way it was one man should speak at a time and the way they had Sunday School there, it was not fitten to go to, all chattering at one time." The witness says he told Mr. Brymer about that conversation, and Welsh, the vice president and general manager, had Roberts discharged. Brymer also testified that he was a deputy sheriff, and he had arrested some boys 16 and 17 years old and summoned them to court; that on Monday morning thereafter, some

of these boys being in the crowd, and the matter being mentioned, the plaintiff Roberts spoke up and said: "I consider that a dirty trick for you to be out that time of night bothering the boys. It was not your damned business." The witness says he told Welsh about this conversation of Roberts. Welsh stated that Parker and Brymer had made the above reports to him and he gave orders to have Roberts discharged.

The plaintiff testified that he did not make the statement that the Sunday School was an unfit place for people to go to. He says that in regard to the boys, he stated to defendant's witness, "I don't care if these boys are arrested for gambling, but why do they think they should have a chain-gang sentence? Most of the boys work at night and sleep Saturdays and don't care to go to bed, and were out there for pastime mostly, and furthermore, they did not bother you."

The judge, upon this conflicting evidence, instructed the jury that "If the jury believed the evidence, and find the facts in accordance therewith, then answer the first issue 'No.'" The defendant was entitled to have the jury pass upon the evidence and find the truth of the allegation; and further, whether it justified the discharge of the plaintiff from their employment, on which matter we do not need to express an opinion until the facts are found as to what was said.

In 34 Cyc., 1650, it is said that when there is a reward offered, "When the plaintiff has performed part of the service and is prevented by the offerer, or by those for whose acts he is responsible, from completing the work he is entitled to the whole reward, or at least to a compensation on a *quantum meruit.*"

It has become a very general policy with large employers of labor to offer a bonus or additional compensation to employees who shall render continuous and efficient service for a specified period of time. This is not a gratuity or gift, but is an offer on the part of the employer, with whom the offer originates in order to procure efficient and faithful service and continuous employment, and when the employee enters upon the service upon that inducement it becomes a supplementary contract of which he cannot be deprived without sufficient cause. In *Payne v. U. S.*, 269 Fed., 873, it is held by the Court of Appeals of the District of Columbia that "A bonus is not a gift or gratuity, but a sum paid for service or upon a consideration, in addition to or in excess of that which would ordinarily be given."

In *Kennicott v. Wayne Co.*, 16 Wall., 471, the Court approved the following definition from Webster: "It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would originally be given."

In *Youngsberg v. Lamberton,* 91 Minn., the Court held that "where one party agreed to render service to the other for a year for a fixed

salary and received as a bonus a percentage of the business of his employer at a specified time, the employee, if discharged, had a right of action accrued up to that time for the profits or bonus earned."

The posting of the notice and offer of a bonus for continuous work under the circumstances above set out, payable on the following Christmas, was a proposal on the part of the mill and the acceptance by the plaintiff by setting in to work until the end of the year, made a contract, provided he did his work satisfactorily, and the discharge of the plaintiff, unless for sufficient cause, would amount to a breach of the contract, and was a wrongful discharge. The defendant could not relieve himself of payment of the bonus earned up to that time unless the discharge was upon sufficient cause.

In 2 Labatt Master and Servant, 1323, sec. 452, it is held that such bonus is a part of the stipulated compensation, and in note 3 it says: "Where it was agreed that the servant was to receive a gift of twenty pounds if he remained to a certain date, it was held that the jury was entitled to take this into account in assessing the amount of damage recoverable for wrongful dismissal."

In 26 Cyc., 1308, it is said: "When the parties mutually terminate a contract of employment before the expiration of the term, a bonus already earned is recoverable." The posting of the notice was an offer to the employees then in the mill that if they would remain until the end of the year they would have the 10 per cent bonus. The plaintiffs accepted this offer in good faith, and in good faith entered upon the performance of their contract resulting from their acceptance, and the employer was liable at least to the extent of a *quantum meruit* if they discharged the employee without sufficient cause. Even, therefore, if the parties had agreed to terminate the relationship existing between them, the employee would be entitled to the bonus earned; 26 Cyc., 1308, above set out. If they were wrongfully discharged under the authority of 2 Labatt M. & S., 1323, above quoted, they were entitled to have the bonus earned.

Certainly the plaintiffs were entitled to have the jury pass upon the fact whether the discharge was justified by their conduct. If the jury believed the testimony of the plaintiffs, their contract, based upon the notice and their acceptance of the offer therein contained, was breached by the defendant without cause.

According to 2 Labatt, p. 1323, the so-called bonus was "a part of the stipulated compensation," and the defendant having accepted the benefit of the continued labors of the plaintiffs could not deprive them of the bonus earned up to that time by discharge from their employment without legal and sufficient grounds. The offer, in accordance with the notice, was the payment of 10 per cent additional to the regular wages

for those who should remain in their service until the following December, and it should have been submitted to a jury whether that contract was breached by the defendant. The fact that the plaintiffs were at liberty to quit work whenever they chose does not alter the case, for by the terms of the offer, which was accepted by the plaintiffs, the latter would lose the bonus of 10 per cent if they voluntarily left the work before the end of the year. It was, therefore, a breach of the contract if the defendant discharged them and prevented the performance of their part of the contract without cause that would justify the termination of their contract of employment. The jury must first find the facts and then it would be a question of law whether the conduct of the male plaintiff was sufficient ground for his discharge.

The subject is nowhere more fully and clearly discussed than in *Zwolanek v. Mfg. Co.*, 150 Wisconsin, 517, in which it is held that "an offer by an employer to permit his employees to participate in its surplus earnings, provided they were in the regular employ of the employer for 4,500 hours during 100 consecutive weeks, was in the nature of an offer of a reward for constant and continuous service. Such contract may be made orally, or in writing, either to a particular person or class, or to any and all persons complying with its terms. Until the acceptance of such offer by beginning the performance of the service required, it is merely a proposition; but when the offer, including its terms and conditions, is accepted by performance before it lapses or is revoked, it becomes a binding contract, subject to the laws governing contracts generally. Performance of such service constitutes an acceptance; and thereafter the offer cannot be revoked so as to deprive a person who has acted on the faith thereof of compensation. Where a person performing part of the service for which a reward is offered is prevented by the offerer, or those for whose acts he is responsible, he is entitled to the whole reward, or at least compensation on a *quantum meruit.*" In that case the Court, in speaking of this system of offering bonuses to retain experienced labor in their employment for a certain length of time upon the promise of extra compensation, says that such custom, which is now beginning to be very generally adopted, is beneficial to the employer as well as to the employee. This is self-evident, for it is the employer and not the employee who makes the offer, and who continues or discontinues it as he may find it to his interest. The Court in that case says very pertinently of this system: "It tends to induce employees to remain continuously in the employ of the same master, and to render efficient service, so as to minimize the probability of discharge. It also tends to relieve the employer of the annoyance of hiring and breaking in new men to take the place of those who might otherwise voluntarily quit, and to insure a full working force at times when jobs are plentiful and

labor is scarce; to allow the employer in such case to repudiate liability on the ground stated would come perilously near conniving at the participation of a fraud; and no court should say that in such case the by-law merely affected the corporation and not third parties. If the corporation desires to have their so-called 'by-laws' affect only the corporation and its shareholders, then they should refrain from exploiting them to third persons for the purpose of inducing such persons to act in reliance thereon.

"We regard this law as being simply the offer of a reward to employees for constant and continuous service. The defendant made an offer of extra or additional compensation to any employee who performed a certain number of hours service within a given period, provided net profits were earned, and provided the employee did not quit or was not discharged before a stated time. A reward is a sum of money or other compensation offered to the public generally, or to a class of persons for the performance of a designated service. 34 Cyc., 1730."

In that case the Court further said: "It is not necessary that the person performing this service for which a reward is offered should give notice to the offerer that he accepts the offer; for in such case the party making the offer impliedly dispenses with the actual notice and the doing of the act completes the contract," citing numerous cases. "While the mere offer, not assented to, does constitute a contract, an acceptance of the terms of an offer of reward by any person who complies therewith by performing this service creates a complete and valid contract, provided the performance takes place prior to the withdrawal of the offer. Acting upon an offer, and complying with its terms and conditions, constitutes an acceptance. *Wilson v. Stump* (103 Cal., 255), 42 Am. St., 111," citing a large number of cases to the same effect.

"It is manifest that the statute of frauds has no application to the case. Until the offer is accepted by beginning performance there is no contract, executory or otherwise. When it is accepted by beginning work the obligation is fastened upon the defendant to pay what is due under it, and it is not essential that the employee should inform the employer that he relied on the offer in undertaking the work."

The Court further held that while as a general proposition the party making an offer of a reward may withdraw it before it is accepted, the offerer of a reward must be held to the exercise of good faith and cannot arbitrarily withdraw the offer without sufficient cause. The employee, by accepting such offer by beginning work, is not obligated to serve a specified time. The penalty is that if he quits work, or is discharged for legal cause, he forfeits the bonus, for the terms of the employment are express that it must be continuous employment for the time specified,

and there is an implied agreement that during employment he shall in good faith render efficient service and not give legal and sufficient ground for discharge.

It is true the wife in this case was not in terms expressly discharged, but peremptory order was given to the husband to get out of the house immediately, and this reasonably implied that his wife should go, too. At least, the management so understood it, for they made no demur to her leaving on that ground.

It appears in this case that the contract for employment was by the week, and hence either party could terminate it at the end of any week. The offer of a bonus and its acceptance by entering upon the work was a supplementary contract for a reward in consideration of the employee remaining in the service for the specified time. It did not change the terms of the contract of employment by the week, but by this agreement the employee, if he failed to remain the specified time, forfeited all claims to the bonus, and on the other hand, if the employer discharged the employee without good and sufficient cause, he was liable to the employee for the bonus lost thereby. Inasmuch as the employee knew that the employment could be terminated at the end of any week, he is entitled, upon such violation of the supplementary contract for continuous service, upon a *quantum meruit,* for the length of time he served at the rate of 10 per cent on the wages earned up to that date, according to the employer's offer. The employee is not entitled to recover damages for the wages for the unexpired time for the contract of employment was terminable at the end of any week, nor can he recover the bonus for the unexpired time for the bonus for continuous employment was based upon the continuance of the service, which under his contract the employer could terminate. He is entitled to recover if discharged without legal and sufficient cause the bonus of 10 per cent up to the time of the discharge, for that is the extent of the wrong done him by wrongful discharge.

In this case it should have been left to the jury to determine whether the alleged conversation took place at all, and if so, whether it was good and sufficient cause for the discharge. If it was not, then the plaintiff and his wife are entitled to recover upon a *quantum meruit* for the bonus up to the time they were wrongfully discharged.

The system of offering bonuses for continuous employment has been adopted by many employers, in their own interest, as well as being a step towards a better understanding between employers and employees. The enforcement of such contract can work no harm to employers, for they can discontinue the practice by failing at any time to renew such offers. Some years ago the hours of employment in industrial establishments in this State, especially in the cotton mills, were unlimited

by law. By statute the hours have been reduced to 60 per week, and most, if not all, of the larger cotton mills voluntarily have reduced this to 56 hours, and also increased the rate of compensation as this defendant has done. The employment of children of any age was formerly permissible, but now is restricted by law. Although there has been no legislation requiring it, many of the factories, at least the most prosperous ones, are fitting up their tenement houses with lights, water, and sewerage, and many have established facilities for attendance on the public schools and church. The adoption of the system of offering a bonus in addition to the regular pay for continuous employment is part of the same system for the amelioration of the dealings between these companies and their employees.

The employee being liable to a forfeiture of all bonus if he quits before the specified time, it would be a breach of faith and, as one of the authorities above quoted says, "perilously near the perpetration of a fraud," if the employer were not liable for a breach of such supplementary contract on his part to the extent at least of payment of the bonus earned up to the time of the discharge, upon a *quantum meruit* basis, when he has discharged the employee for whatever motive if the ground was not legal and sufficient for termination of the offer of extra compensation for continuous service in the employer's service.

New trial.

J. A. FAY & EGAN COMPANY v. G. EDWARD CROWELL.

(Filed 22 November, 1922.)

1. **Vendor and Purchaser—Contracts—Warranties—Return of Goods—Fraud—Principal and Agent—Evidence—Burden of Proof.**

Where the purchaser of machinery under a written contract has agreed that if he did not return the machine within thirty days it was to be regarded as an acceptance, shutting off all warranties, expressed or implied, and defends an action to recover the purchase price on the ground that the selling agent had fraudulently induced him, by his promise, upon which he relied and acted, not to return the machine within that time, the burden is on the defendant to establish the false representations, and that the plaintiff's agent was authorized to make them, by evidence *aliunde*, the agent's declarations, and his demurrer to the complaint is properly overruled.

2. **Same—Declarations—Evidence Aliunde.**

While a vendor of goods may subsequently waive the stipulations of warranty in the written contract of sale, made in its behalf, the burden of proof is on the purchaser relying thereon to show that plaintiff's agent had the authority from his principal to waive these stipulations, either expressly or implied from the character of the agency.

3. Pleadings—Amendments—Courts—Discretion—Appeal and Error.

It is within the sound discretion of the trial judge to allow amendments to pleadings, which will not be reviewed in the Supreme Court, when there is no suggestion that he had abused the discretionary powers he has exercised. C. S., 547.

APPEAL by plaintiff from *Ray, J.*, at October Term, 1922, of STANLY.

Civil action to recover balance due on ten promissory notes executed by the defendant and delivered to the plaintiff for a certain quantity of mill machinery.

Defendant admitted the execution of the notes and contract, but set up in his amended answer that by the false and fraudulent representations and promises, made by plaintiff's sales manager, he was induced to keep said machinery to his injury, beyond the 30-day period, allowed in the contract of purchase for its return in case of rejection, and that therefore said stipulation in regard to the return of said property has been waived.

Plaintiff demurred to the allegations set out in the defendant's amended answer, and from an order overruling said demurrer, plaintiff appealed.

Sinclair, Dye & Clark for plaintiff.
R. L. Smith & Son for defendant.

STACY, J. This case was before us at the Fall Term, 1921, and is reported in 182 N. C., 532. We held there, upon the record as presented on the first appeal, that the plaintiff was entitled to a directed verdict for the balance due on the unpaid notes. When the cause went back and was again reached for trial, the defendant was allowed to amend his answer and to set up, by way of recoupment, set-off or counterclaim, an allegation to the effect that during the 30-day period within which said machinery was to be tested and returned, if not satisfactory and as represented, the plaintiff's sales manager falsely and fraudulently assured the defendant that said machinery would be made good, and any and all defects remedied by the plaintiff.

Defendant avers that he relied upon said verbal assurances, inducements and representations, believing them to be true, and for this reason did not return the machinery within the time required by the contract, and he now contends that on account of such fraud and deceit this provision of the contract has been waived by the plaintiff, and that he, the defendant, is no longer required to observe the stipulation in regard to the time limit for returning the machinery.

The clause in the contract here referred to is as follows: "And that a retention of the property forwarded, after 30 days from its arrival at

destination, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty, express or implied."

We will not review the action of the trial court in allowing the defendant to amend his answer in the manner as indicated, for this was a matter resting in his sound discretion. C. S., 547. There is no suggestion of any abuse of discretion. *Brewer v. Ring and Valk,* 177 N. C., 485.

In the case of *Randall v. J. A. Fay & Egan Co.,* 158 Mich., 630, it was held that the identical clause in the contract now before us, with respect to a retention of the property for a period of 30 days, being made, as it was, for the benefit of the seller, could be waived by a duly authorized agent of Fay & Egan Company (defendant there, plaintiff here), agreeing, as he did in that case, within the 30-day period, to remedy all defects and to make the machinery in question satisfactory to the purchaser, which was not done. The agent there in question was a state agent, or, as described by the company, a "Michigan agent."

In the case at bar we have the additional allegation that such promises were fraudulently made, and that the defendant relied upon them to his hurt, etc. We are not now interested in whether the defendant can make good his allegations with proof. At present they stand on demurrer. And it would seem that a "sales manager" would presumably have sufficient authority to waive the stipulation in question; but, as to the authority of the agent, the defendant must assume the burden of proof. This may not be shown by declarations of the agent himself, but it must be established by evidence *aliunde. Piano Co. v. Strickland,* 163 N. C., 250; *Medicine Co. v. Mizell,* 148 N. C., 384; *Machine Co. v. Hill,* 136 N. C., 128.

This general rule in regard to the waiver of such stipulations has been recognized by us in a number of cases. *Bland v. Harvester Co.,* 169 N. C., 420; *Fairbanks v. Supply Co.,* 170 N. C., 315. This last case contains an elaborate discussion of the whole subject, with full citation of authorities by *Associate Justice Walker.* See, also, 24 R. C. L., 252; 35 Cyc., 440; note 50, L. R. A. (N. S.), 796.

Construing the allegations of the answer in a favorable light for the pleader (C. S., 535), we think the demurrer was properly overruled.

Affirmed.

IN RE WILL OF MRS. MONTIE McINTOSH SEYMOUR.

(Filed 22 November, 1922.)

1. Wills—Animo Testandi.

A paper-writing to constitute a valid will must by the written terms show, among other things, the intent of the maker to dispose of his property to take effect after his death, and when such intent does not so appear, extraneous evidence is inadmissible for that purpose.

2. Same—Disposition of Estate—Powers of Attorney—Principal and Agent.

A paper-writing signed by the wife under seal stating that she was of "sound mind and body," and "investing" her husband "with full power of attorney over all moneys, real estate, liberty bonds, and all other property owned by me at this date, for the purpose of acting for me in all business matters," etc., designating the property specifically, is but the appointment of her husband as her agent or attorney in fact, without any disposition to him, and ineffectual as a will; and its interpretation otherwise cannot be upheld by the added words, "this also constitutes my last will," for this can only refer to the paper that is in itself ineffectual as a will.

ISSUE of *devisavit vel non,* heard before *Brock, J.,* and a jury, at February Term, 1922, of MOORE.

The alleged testatrix was married to F. A. Hastings Seymour on 12 July, 1921, and died on 26 September, 1921. On 26 July she signed the following instrument:

This is to certify that I, Mrs. Frederick Augustus Hastings Seymour, née Montie Elizabeth McIntosh, being of sound mind and body, do this 26 July, 1921, invest my husband, Frederick Augustus Hastings Seymour, with full power of attorney over all moneys, real estate, Liberty Bonds, and all other property owned by me at this date for the purpose of acting for me in all business matters, etc. (A description of her real and personal property follows.)

This also constitutes my last will.

Given under my hand, this 26 July, 1921.

MONTIE E. McINTOSH SEYMOUR. [SEAL.]
MRS. F. A. HASTINGS SEYMOUR. [SEAL.]

Witnesses:

MRS. ELLA J. DUNLAP.
WILLIAM B. DUNLAP.

Mrs. Seymour acknowledged the execution of this paper-writing on 3 August, and it was registered in the office of the register of deeds of Moore County on 5 August. On 4 November, 1921, F. A. Hastings

Seymour, the surviving husband, presented it to the clerk of the Superior Court and had it probated in common form as the last will and testament of Mrs. Montie E. McIntosh Seymour, or Mrs. F. A. Hastings Seymour, and at the same time obtained letters of administration on the estate of the alleged testatrix. On 17 November, 1921, Mrs. Seymour's next of kin (her brothers and sisters) filed a *caveat* alleging, besides undue influence and the want of mental capacity, that the words "This also constitutes my last will" were inserted after her signature was affixed, and that the paper-writing upon its face does not constitute a last will and testament. At the close of the propounder's evidence his Honor held as a conclusion of law that the instrument in question is not the last will and testament of Mrs. Seymour, and instructed the jury to return a negative answer to the issue, "Is the paper-writing propounded for probate the last will and testament of Montie McIntosh Seymour?" Upon the return of the verdict, judgment was rendered for the caveators, and the propounder excepted and appealed.

George L. Peschau, R. L. Burns, and Rountree & Carr for the propounder.

Robert Ruark, U. L. Spence, and H. F. Seawell for the caveators.

ADAMS, J. The appeal presents the sole question whether the instrument which was probated in common form is sufficient in law to constitute the maker's will and testament, for the caveators concede that if his Honor's instruction was erroneous issues should have been submitted to the jury on the questions of undue influence and the want of mental capacity. It was shown on the trial that the entire paper-writing, excepting the signature of the two witnesses, is in the handwriting of the maker, and that the words "This also constitutes my last will" were inserted some time after the remainder of the instrument had been prepared, but before it was signed. The maker acknowledged the execution of the paper before a justice of the peace, and upon the clerk's certificate of probate it was recorded during her lifetime in the office of the register of deeds of Moore County as a power of attorney. After her death it was admitted to probate in common form as her last will and testament.

One of the essential elements of a will is a disposition of property to take effect after the testator's death. A testament has been variously defined to be the "declaration of a man as to the manner in which he would have his estate disposed of after his death"; "continuing title to the testator's property after his death in such persons as he shall name"; "a just sentence of our will, touching that we would have done, after our death"; "the expression of that which one may lawfully require to

be done after his death"; and "the legal declaration of a man's intention, which he wills to be performed after his death." 1 Jarman on Wills, 26; Schouler on Wills, 1; Gardner on Wills, 1; Redfield on Wills, 5; *Payne v. Sale,* 22 N. C., 458. It is true that no particular form of words is necessary to express an intention to dispose of a person's property after his death, and the use of inartificial language will not be permitted to defeat an apparent intention expressed in an instrument which complies with the formalities of law. *In re Edwards,* 172 N. C., 371. "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." 1 Jarman, 21. Accordingly it has been held that a letter, or a deed, or a paper-writing in the form of a contract, or other writing, will be valid as a will if it complies with the requirements ordinarily necessary to the execution of such an instrument. *In re Bennett,* 180 N. C., 8; *In re Ledford,* 176 N. C., 610; *Richardson v. Hardee,* 15 L. R. A., 635; *Milam v. Stanley,* 17 L. R. A. (N. S.), 1127; *Ferris v. Neville,* 89 A. S. R., 486. So the question whether a written instrument constitutes a will must be determined by applying the tests that are generally recognized and approved by the courts. Aside from questions regarding execution, Gardner says the test to determine whether an instrument is a will is the presence of the testamentary intent—the *animus testandi.* This may be manifested by an intention to appoint an executor or a guardian for minor children, or by making some positive disposition of the testator's property—neither the appointment of the executor or guardian nor the disposition of the property to take effect in any way until the testator's death. It should be noted, however, that every expression of intent, even if such intent is not to operate until the death of the person entertaining it, is not the expression of a testamentary intent. Apart from the appointment referred to, a written instrument to be a will must make some positive disposition of the testator's property, and if it fails to do this, it is not a will and testament. Gardner, *supra,* 15, 16. And on p. 19 the same writer says: "To determine whether the document itself discloses a testamentary intent, two tests are commonly resorted to, viz., whether the instrument operates to create any interest prior to the death of the maker, and whether it is revocable during the life of the maker. If under the instrument any interest vests, or if such interest fails to vest merely because of lack of delivery of the instrument, then it is not a will. In other words, if any interest either vests or is capable of vesting prior to the death of the maker, the instrument is not a will."

We have no hesitation in saying that the instrument in question, when tested by these principles, falls short of a testamentary disposition

of property. The maker certified "that I . . . invest my husband with full power of attorney . . . for the purpose of acting for me in all business matters." The husband was "invested" with authority to manage the property in *praesenti;* but in no way does the paper-writing purport to dispose of such property either during the lifetime of the maker, in which case it would not be a will, or after her death. The clause "This also constitutes my last will" does not operate as a disposition of the maker's property to take effect after her death, because the word "this" refers to the instrument in controversy, which is merely a power of attorney relating to the management of the property in her lifetime. Probably Mrs. Seymour intended to make a will and thought she had accomplished her purpose; but a will cannot be established by merely showing an intent to make one. Nor can this conclusion in any wise be affected by evidence offered to show that the alleged testatrix said "she wanted Fred to have what she had," and treated the instrument as her will. It contains no latent ambiguity to be explained by parol evidence; what the maker intended to say is clearly stated. "While extrinsic evidence may be admitted to identify the devisee or legatee named, or the property described in a will, also to make clear the doubtful meaning of language used in a will, it is never admissible, however clearly it may indicate the testator's intention, for the purpose of showing an intention not expressed in the will itself, nor for the purpose of proving a devise or bequest not contained in the will. It is a 'settled principle that the construction of a will must be derived from the words of it, and not from extrinsic averment.'" *Bryan v. Bigelow,* 107 A. S. R., 67; *McIver v. McKinney, ante,* 393.

An examination of the record discloses

No error.

JAMES WILLIAM McNEILL v. MAYS MANUFACTURING COMPANY AND BAXTER SHEMWELL.

(Filed 29 November, 1922.)

1. Limitation of Actions—Corporations—Merger—Novation.

The formation of a new corporation, with the same stockholders, to take over the assets of an existing corporation and assume its obligations, does not, in assuming the debts, create a new contract or novation of the old debts in contemplation of the statute of limitations, but is only a continuation thereof; and a creditor in his action against the new corporation to recover the debt due by the former one with which it has merged, must show that he has commenced his action within the statutory three years, when the statute has been pleaded, and may only recover for such items as fall within the time therein limited.

2. Limitation of Actions—Contracts—Debtor and Creditor—Novation.

A novation to repel the bar of the statute of limitations contemplates a new debtor and a contract in favor of the same or another creditor, and the statute in such instances begins to run from the date of the new promise.

3. Same—New Promise.

Where the creditor has received a promise on behalf of his debtor that the amount owed him would be paid, when the former should have received sufficient funds, etc., the statute of limitations begins to run at the date when the promise, if sufficient, was made.

APPEAL by defendant manufacturing company from *Long, J.*, at February Term, 1922, of DAVIDSON.

The defendant Baxter Shemwell organized the Accounting Machine Company, a Nevada corporation. Subsequently he organized the Mays Calculating Machine Company in Delaware, and the plaintiff brings this action for services rendered in such organization during the months of January, February, and March, 1917; and in his complaint states that he "rendered all the above named, together with other legal services for the Mays Colculating Machine Company." Later on in the spring and summer of 1918 the said Baxter Shemwell organized the Mays Manufacturing Company under the laws of North Carolina for the purpose of taking over the business of the Mays Calculating Machine Company, and on 24 June, 1918, the defendant Mays Manufacturing Company, by a written agreement, did take over said business, together with all the assets and assumed all the liabilities of the said Mays Calculating Machine Company. The plaintiff alleges that thereby it received the benefit of all the plaintiff's services, and he estimates the value of his services at $1,500. At the trial a nonsuit was taken as to Baxter Shemwell.

The defendant, the Mays Manufacturing Company, pleaded a general denial, and also the three years statute of limitations. From the judgment against said company it appealed.

Sink & Brinkley and J. F. Spruill for plaintiff.
Parker, Stewart, McRae & Bobbitt for defendant.

CLARK, C. J. The defendant's 14th assignment of error is to the following instruction of the court: "Now, if you find that this defendant company took over the liabilities and property of the first company, in other words, assumed its indebtedness, and this was done in June, 1918, and you find that this action was started in July, 1920, and you find there was an indebtedness that was actually made by this company, and its predecessor to this plaintiff for services rendered, then it would not be barred by the statute of limitations."

This action was begun 13 July, 1920. The transfer from the Mays Calculating Machine Company to the Mays Manufacturing Company, this defendant, took place on 24 June, 1918. Most, if not all, the indebtedness sued upon was created in January, February, and March, 1917, and as to those services the plaintiff's action is barred by the statute of limitations, unless, as the judge here charges, by the merger there with defendant company created a new period for the beginning of the statute. He instructed the jury that the action would not be barred by the statute of limitations if the transfer took place in June, 1918.

The fact that the two companies had made a deal whereby the Mays Manufacturing Company assumed the indebtedness of the Mays Calculating Machine Company did not make a new contract as to such liabilities. The manufacturing company simply occupies the same position as the calculating machine company, both by the reason of the contract and because the two companies are composed, according to the evidence, of the same stockholders, directors, and officers. The defendant Mays Manufacturing Company does not deny its liability for the indebtedness of the calculating machine company. The question presented, however, is whether the statute of limitations began to run anew from the assumption of the indebtedness by the manufacturing company. In another part of the charge the court told the jury that the plaintiff was required to show that his services became due after 13 July, 1917. The defendant contends that this charge is conflicting and ground for a new trial. *Williams v. Haid,* 118 N. C., 486; *Vanderbilt v. Chapman,* 175 N. C., 14.

The court told the jury that "where a corporation engaged in a business transfers its entire property rights and franchises to a new company, incorporated and organized by the same stockholders and directors as the old one, and the new company continues the business and adopted the contracts of its predecessor, the effect of such a merger is to create and to substitute the new one as a debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. By a merger of an old into a new corporation and the novation of the debts of the old creates the new corporation, which is to all intents and purposes the same body and answerable for the contracts of the old company under a different name."

For this the plaintiff relies upon *Friedenwald Co. v. Tobacco Works,* 117 N. C., 544, where this proposition is laid down and the Court does use the word "novation," but while the effect of that decision is correct, as stated, to continue the same liability against the new company that existed against the former company, there is no reference to the effect upon the statute of limitations, which is the question here presented.

Indeed, the use of the word "novation" is an inadvertence. At that same term, in *Barrington v. Skinner,* 117 N. C., 48, the Court held that "the acceptance of new notes in renewal and in lieu of the former notes given for the purchase of property is not a novation or a relinquishment of the security afforded by the registration of an agreement that the vendor should retain title until such notes are paid."

Novation is defined in *Clark v. R. R.,* 138 N. C., 31, quoting 1 Parsons on Contracts, 217; 9 Cyc., 377, as follows: "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor."

"The discharge of a debt, due from one man and charging it to another man with the consent of all the parties concerned, illustrates the doctrine of novation. The discharge of the original debtor is a sufficient consideration for the promise of the substituted debtor to assume the debt. *Barnhardt v. Star Mills,* 123 N. C., 428; *Palmer v. Lowder,* 167 N. C., 331."

In 29 Cyc., 1131, it is held that "to constitute a novation by substitution of creditor or debtor there must be a mutual agreement among three or more parties, whereby a debtor, in consideration of being discharged from his liability to his original creditor, contracts a new obligation in favor of a new creditor."

In the case of a novation, there is a new debtor and a new contract in favor of the same or another creditor. In such case, the statute of limitations of course begins to run from the new promise.

But that is not the case here where the same debt is continued by the merger of an old corporation into a new one with the same stockholders and officers and the taking over of the assets and the liabilities of the old company. This is simply a change in name by the debtor. There is no new promise. The agreement is that the new company will take over, together with the assets of the former company, its liabilities. It is the same old debt, and the statute runs from the date of the creation of the debt in favor of the creditor. The court erred, therefore, in not granting the prayer of the defendant that the defendant was not liable for any indebtedness as to which 3 years had expired at the beginning of this action. Indeed, there is slight, if any, evidence of the creation of any indebtedness within the 3 years before the beginning of this action, and the statute being pleaded, the burden was upon the plaintiff to show what part, if any, of the indebtedness was created within 3 years before action brought.

The plaintiff testified that he was led to believe by Mr. Shemwell that the company was somewhat a matter of speculation and the realization of money was in expectancy, but that he would be paid for his services

whenever the company realized means to pay him. He contended, therefore, the statute of limitations did not run, and that the Mays Manufacturing Company assumed that indefinite liability.

For this proposition the plaintiff relies upon *Helsabeck v. Doub,* 167 N. C., 205. In that case the agreement was that A. should receive compensation for services rendered B. at the death of B.; that being a definite period for payment, the statute of limitations did not begin to run until the death of B. The same would be true as to a note or any other obligation maturing at a fixed time in the future, or on an event which must happen. In such case, the statute would begin to run from the maturity of the obligation, but where, as in this case, there is alleged a promise to pay at some future day when the debtor should receive sufficient funds, the statute began to run at the date of the promise, and there is not such a continuing indebtedness as to suspend the running of the statute and the assumption by the defendant of the debts of the former company in no wise affected the running of the statute.

The court should have granted the prayer of the defendant to charge that "the plaintiff is not entitled to recover in this action for any services rendered prior to 13 July, 1917, as all amounts due for services prior to that date are barred by the statute of limitations."

The case must go back for a new trial, and the plaintiff should show what part of the indebtedness, if any, was created within 3 years prior to the beginning of this action.

Error.

MARY HOWARD SPRINGS, ADMINISTRATRIX OF WILLIAM E. SPRINGS, v. TALLASSEE POWER COMPANY.

(Filed 29 November, 1922.)

Instructions—Evidence—Issues—Verdict Directing.

Requested prayers for instruction that the jury find the issues of negligence, contributory negligence, and assumption of risk in defendant's favor, "if they should find the facts from all the evidence considered in the light most favorable to the plaintiff," are properly refused, if the evidence on the issues is conflicting and sufficient to sustain verdicts in plaintiff's favor, in his action to recover damages for the wrongful killing of his intestate.

APPEAL by defendant from *Webb, J.,* at May Term, 1922, of UNION.

This is an action for the alleged negligent death of the plaintiff's intestate, who was killed by the electric current of the defendant company while painting the defendant's towers for transmission of its electric current. Verdict and judgment for plaintiff. Appeal by defendant.

Stack, Parker & Craig for plaintiff.
E. T. Cansler, R. L. Smith, and John C. Sikes for defendant.

CLARK, C. J. The usual issues, in such cases, of negligence, contributory negligence, and assumption of risk were submitted. The defendant asked the court to instruct the jury as to each of the three issues, severally, as follows: "If the jury shall find the facts from all the evidence considered in the light most favorable to the plaintiff, they will answer this issue 'No.'"

On appeal, the defendant abandons all exceptions except to the refusal of these instructions. Upon careful examination of the evidence, we find that there was sufficient evidence for the plaintiff to go to the jury upon each of these three propositions. There was evidence to the contrary on each of these issues, but that was a matter for the jury. In refusing the peremptory instructions asked we find

No error.

MYERS PARK HOMES COMPANY v. J. F. FALLS ET AL.

(Filed 29 November, 1922.)

Deeds and Conveyances—Lands—Subdivisions—Maps—Plats—Streets—Lots—Limitation as to Size and Frontage—Purchasers—Equity—Contracts to Convey—Title.

The plaintiff was a purchaser of a subdivision of land remaining undeveloped by the original owner, who had sold lots in his other subdivisions with restriction as to the size of the lots and their frontage upon the streets, each of the subdivisions being separate and distinct (*Stephens v. Home Co.*, 181 N. C., 335), without having adopted any definite plan or fixed purpose affecting the area or frontage of the lots in the subdivision acquired and being developed by the plaintiff, but had plats or maps made and recorded showing only a tentative or prospective plan of the sale of the entire property that were open to inspection by proposed purchasers. Having acquired the *locus in quo*, the plaintiff platted it into lots of smaller area and less frontage on the platted streets, and accordingly sold some of them, but the defendant refused to specifically perform his contract of purchase on the ground that the purchasers of lots of the other subdivisions, from the original owner, had acquired the right or equity of having the lots in this subdivision of the same size and frontage as the lots in the other subdivisions, in which they had purchased: *Held*, the equity relied on by the defendant did not apply to the facts of this case, and the defense that a good title could not be made by the plaintiff by reason of the limitations in the deeds to purchasers made by the original owner was untenable. Instances wherein lands have been platted into streets and lots, and sold upon the strength of representations made thereby, or covenants to that effect contained in the purchaser's deeds, have no application to the facts of this case.

APPEAL by defendants from *Webb, J.*, at October Term, 1922, of MECKLENBURG.

Controversy without action, submitted on an agreed statement of facts, the material parts of which are stated in the opinion.

From a judgment in favor of the plaintiff, the defendants appealed.

John M. Robinson and C. H. Gover for plaintiff.
C. W. Tillett, Jr., for defendants.

STACY, J. The following statement of the facts, taken from the case agreed, will suffice for our present decision:

On 1 April, 1922, defendants entered into a written contract whereby they agreed to purchase from the plaintiff a house and lot in a subdivision of Myers Park, a residential section near the city of Charlotte, N. C. Plaintiff executed and tendered deed, sufficient in form, to the defendants, who have refused to accept same, contending that the title to said property is defective. This suit is brought to compel specific performance. The *locus in quo* is known and designated as lot G in block 45, as shown on map or plat duly recorded in the office of the register of deeds for Mecklenburg County; said lot having a frontage of 75 feet and an area of a little more than a quarter of an acre. It is this small frontage and area that constitute the alleged defect in title.

Plaintiff acquired the property, in its present dimensions, from the Stephens Company, the original owners of the whole of Myers Park. It is the contention of the defendants that the Stephens Company could not convey the lot in question, or any other lot in Myers Park, to the plaintiff or other with a frontage of less than 100 feet and an area of less than one-half acre. In support of this position, it is alleged that the Stephens Company, before it sold the *locus in quo,* together with other lots, to the plaintiff, by its conduct and action *in pais* at least, had obligated itself not to convey lots in this subdivision in dimensions of less than 100 feet frontage and one-half acre in area.

Some twelve or thirteen years ago the Stephens Company became the owner of a tract of land near the city of Charlotte, containing approximately 1,100 acres. It undertook to develop this property into a desirable residential section, and gave to it the name of Myers Park. From time to time lots in various subdivisions of this property were placed on the market for sale after said subdivisions had been arranged and prepared for residential purposes, by the putting down of paved streets, installing gas, water, and sewer mains, providing for electric light connections, etc. We had occasion to consider the effect of the recordation and subsequent sale of lots by reference to maps of these

subdivisional plats in connection with the general map or "key map" in *Stephens Co. v. Homes Co.,* 181 N. C., 335. Reference to that case may aid, in a measure, to a better understanding of the facts here.

The Stephens Company advertised that it was developing Myers Park as a desirable residential suburb, and at the very beginning worked out a series of restrictions and limitations, which were incorporated in some but not all of the deeds executed by it in conveying lots sold in this territory. These restrictions, thirteen in number, are set out in full in the record but the ones more directly pertinent to the present appeal are the 8th and 13th, as follows:

"(8) No subdivision of any part of the above described property by sale, or otherwise, shall be made so as to result in a plat having an area of less than half an acre or a frontage of less than one hundred (100) feet."

"(13) It is expressly understood and agreed by the parties hereto that all of the foregoing covenants, conditions, and restrictions, which are for the protection and general welfare of the community, shall be covenants running with the land."

While the Stephens Company has held out and advertised itself as offering for sale high-class, restricted residential property, it has never advertised lots in Myers Park as being limited to those having an area of at least one-half acre or a frontage of at least 100 feet. Nor has it, by advertisement or representation, indicated or intimated that all or any part of its property would be sold only upon the terms set forth in restriction No. 8.

In the course of time the development of Myers Park reached the vicinity of the subdivision with which we are now concerned, and the Stephens Company had a plat prepared and recorded showing this subdivision as block 45; and, upon the map, said block was shown as being divided into lots of not less than one-half acre in area, and each with a frontage of not less than 100 feet. A number of lots were sold according to this plat and thereafter a revised plat was made and recorded showing all unsold portions of this subdivision, or block 45, to be subdivided into lots of about one quarter of an acre in area and each with a frontage of approximately 75 feet. After this revised plat had been recorded, the *locus in quo,* with a number of other lots, was conveyed by the Stephens Company to the plaintiff.

No written instrument, memorandum, or note has ever been executed by the Stephens Company, the plaintiff's grantor, or by any person in its name, expressly granting to the purchasers of lots previously conveyed, or other, any easement in the nature of the alleged restriction upon the land retained by it, of which the *locus in quo* constituted a part. Nor has it entered into any express covenant to hold the re-

mainder of its said tract subject to the restriction that no part thereof should be sold in lots of less than one-half acre in area, and each with a frontage of not less than 100 feet. No agreement has been made by it to exact such a covenant from future purchasers of any of the remaining lots in this development.

The only covenant in writing expressly affecting and referring to the lot in question, executed either by the Stephens Company or by the plaintiff, or by any agent lawfully authorized by either, is the covenant contained in the deed from the Stephens Company to the plaintiff, namely, "No subdivision of any part of the above described property, by sale or otherwise, shall be made." At the time this recital was incorporated in the deed, the dimensions of said lot were, as stated above, about one-quarter of an acre in area and with a frontage of approximately 75 feet.

For the purpose of satisfying the defendants, the plaintiff has procured from all owners of lots shown upon the subdivisional plat, upon which the lot in controversy appears, duly executed and acknowledged releases, waiving any and all rights which they may have to enforce said restriction and consenting that the Stephens Company shall sell lots in said subdivision of less than one-half acre in area and each with a frontage of less than 100 feet.

Notwithstanding these releases, the defendants refuse to accept the deed tendered, contending that the alleged restriction upon the *locus in quo* cannot be released except by the owners of all lots in all subdivisions in Myers Park. Though it is admitted by the defendants that Myers Park has been developed and tracts offered for sale in sections or subdivisions, as hereinbefore set forth, yet they contend that these component tracts or subdivisions constitute one single development, or a unity, and that owners of lots in other subdivisions have as much right to enforce the alleged implied restriction as those who own lots in block 45.

It is agreed that the Stephens Company has at no time actually or intentionally adopted any policy, plan, or scheme to sell all of its said property, or all of the lots in any subdivision thereof, in lots of not less than one-half acre in area or each with a frontage of not less than 100 feet. And it is further agreed that unless the recording of the said subdivisional plats, and the sales by reference thereto, amount, as a matter of law, to the adoption of such a plan of development, it has done no act which could be construed as adopting any definite or fixed plan with respect to the area or frontage of lots thereafter to be sold. On the contrary, it is conceded that it has always been the actual intention and plan of the Stephens Company to sell, in such localities as it might deem advisable, smaller lots than those provided for under the restric-

tion in controversy, and for said purpose to alter and to revise its said subdivisional plats, and it has, in fact, in a number of instances, altered and revised the same.

It is further agreed that at various times the Stephens Company has caused to be made maps of the entire territory within Myers Park, showing the developed portions thereof in accordance with the recorded subdivisional plats, and that it has also prepared tentative plans for the future development of other subdivisions; but that said maps were made and used solely for tentative purposes, and to give an idea of the general plan of the development. While these general plans were accessible in the office of the Stephens Company to purchasers, and may have been seen by many, yet in all conveyances all property sold within Myers Park has been described solely with reference to the recorded subdivisional plats. As stated, however, a number of these general plans had been prepared from time to time. Most of them disclosed neither the area nor frontage of lots, but one or more did show the dimensions of the proposed lots.

Upon these, the facts chiefly relevant, the defendants contend that the title offered is defective in that the lot in question is less than one-half acre in area and has a frontage of less than 100 feet; said dimensions being at variance with the negative restriction contained in some of the deeds executed by the Stephens Company to other purchasers of lots in Myers Park. Does such restriction apply to the *locus in quo,* under the facts and circumstances here disclosed? This is the question for decision.

It may be noted in the outset that the principles announced in *Conrad v. Land Co.,* 126 N. C., 776; *Collins v. Land Co.,* 128 N. C., 563; *Green v. Miller,* 161 N. C., 25; *Wheeler v. Construction Co.,* 170 N. C., 427; *Elizabeth City v. Commander,* 176 N. C., 26; *Wittson v. Dowling,* 179 N. C., 542, and other cases to like import, dealing with the dedication of streets, parks, and alleys for public uses, are not controlling here. Apparently for the first time in this jurisdiction the question is presented in its relation to a negative restriction affecting the size and dimensions of certain designated lots in a given territory.

The following general statement, which the defendants contend is applicable to the facts in hand, will be found in 18 C. J., 394: "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions upon its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either upon the theory that there is a mutuality of covenant and consideration or upon the ground that mutual negative equitable easements are created. Where parcels are sold with reference to such a uniform plan to persons

having notice thereof, the grantees may enforce the restrictions within this rule irrespective of the order of the several conveyances, and irrespective of whether the covenants run with the land, and without regard to whether the restriction is expressed in the separate conveyances, or whether the person against whom it is sought to enforce the restriction derived title from the same grantor."

Probably one of the best considered opinions on the subject, in which a number of English and American decisions are carefully reviewed, is *DeGray v. Monmouth Beach Club House,* 24 Atl. (N. J.), 388. In this case the doctrine is summarized as follows: "The law, deducible from these principles and the authorities applicable to this case, is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase. The right of action from this would seem to be dependent as much on the fact of the general scheme as on the covenant—a very important consideration in a case in which the question arises whether certain threatened acts are in violation of the covenant, if any ambiguity exists as to its scope and meaning."

It may be well to observe just here that the defendants are not undertaking as grantees to enforce a restrictive covenant, contained in their deed, against another grantee whose deed from a common source contains the same restrictive provision.

The defendants rely chiefly upon the decision in *Johnson v. Mt. Baker Park Presbyterian Church,* 194 Pac. (Wash.), 536. The controlling facts in this case were as follows: A development company platted a suburban tract of land near Seattle, Wash., and put it on the market with the intention of limiting the use of the various lots to first-class residential purposes. This plan or scheme was made known to the public, was systematically carried out, and was well understood by all purchasers of lots in "Mt. Baker Park." When more than three-fourths of the lots in said development had been sold—the deeds of all purchasers containing certain building restrictions—the development company undertook to sell one of the remaining lots to the Presbyterian

Church without placing any restrictions in its deed. The plaintiff, who had bought subject to the general restrictions, brought an action to enjoin the erection of the church on the lot purchased by the defendant, upon the ground that all the lots in said development were impliedly subject to the general restriction for residential purposes. The Court held that the general plan could be invoked by the plaintiff, and that the lot sold to the defendant could not be used for church purposes.

To like effect is the decision in *Brimson v. Bultman,* 38 N. Y. Supp., 209, where it was said: "The principle which supports the judgment in this action is that where an owner of land contracts with the purchasers of successive parcels in respect to the manner of the occupation and improvement of such parcels, he thereby affects the remainder of the land with an equity which requires it also to be occupied and improved in conformity to the general plan, and this equity is binding upon a subsequent purchaser of the remaining parcel, who has notice of the prior agreement, although his title be unrestricted."

Again, defendants cite *McQuade v. Wilcox,* 183 N. W. (Mich.), 771, as a persuasive authority in support of their position. This was a case where Mrs. Wilcox, the owner of a valuable farm near the city of Detroit, conceived the idea of platting a portion of it for a high-class residential subdivision. The plat was prepared and recorded. Its residential and restricted character was made the subject of advertisement, and pointed out in conversation as an inducement to prospective customers. A general plan was adopted to make it a high-class restricted residential district. To insure and to preserve the residential character of the subdivision, substantially uniform restrictions were inserted in the deeds executed by Mrs. Wilcox to the purchasers. One of the restrictions contained in each deed was to the effect that the lot thereby conveyed should be used only for residential purposes, and then followed this clause: "These conditions are for the benefit of all present and future owners of property in this subdivision, and are to remain in force until 1 July, 1935, and shall then terminate." Mrs. Wilcox reserved the home place for her own residence. She occupied this residence for a number of years, and after all but a few of the lots in the subdivision had been sold and expensive residences erected thereon, and other improvements made upon them in conformity with the restrictions and without a breach by any of the purchasers or other grantees, Mrs. Wilcox entered into a contract with one Ben. B. Jacob to sell him her home place, to be used for restaurant and cafe purposes, with this clause in the contract: "Music, dancing, and other legal amusements and uses are permitted." The plaintiff McQuade had bought a lot in this subdivision and had built a house upon it. He sought to enjoin the defendant from selling and authorizing the use of her residence for the cafe

purposes above mentioned. Mrs. Wilcox contended that no restriction had ever been placed upon her home property, and that, therefore, she was not bound by this alleged general plan. The Court held, however, that in view of all the circumstances it would consider McQuade and the other property owners in the subdivision as entitled to an equitable right to prevent Mrs. Wilcox's lot from being sold for the said cafe purposes, and the injunction was granted.

The following authorities are also cited by the defendants as supporting, either directly or in tendency, their view of the law: *Allen v. Detroit,* 133 N. W. (Mich.), 317; *Hancock v. Gumm,* 107 S. E. (Ga.), 872; *Tallmadge v. East River Bank,* 26 N. Y., 105; *Knapp v. Hall,* 20 N. Y. Supp., 42; *Duester v. Alvin,* 145 Pac. (Or.), 660; *Lowrence v. Woods,* 118 S. W. (Tex.), 551; *Bridgewater v. Ocean City R. Co.,* 49 Atl. (N. J.), 801; *Scott v. Roman Catholic Archbishop,* 163 Pac. (Or.), 88; *Hisey v. Eastminster Pres. Church,* 109 S. W. (Mo.), 60; *Stott v. Avery,* 121 N. W. (Mich.), 825; *Bostwick v. Leach,* 3 Day (Conn.), 476.

It will be noted that the controlling factor or basic principle in all of the cases cited above is the adoption or establishment, either directly or by implication, of a general plan or scheme, to be observed uniformly for the benefit of all purchasers throughout the entire territory. But, in the case at bar, we have it expressly admitted that the Stephens Company has at no time adopted any definite plan or fixed purpose with respect to the area or frontage of all the lots in Myers Park, unless the recordation of the subdivisional plats, as above set out, and the sale of lots thereby amount, as a matter of law, to the adoption of such a general plan or scheme. It is further admitted of record that the plaintiff has secured from all owners of lots, in the particular subdivision containing the *locus in quo,* duly executed and acknowledged releases, waiving all their rights, if any they have, to insist upon the alleged implied restriction, and consenting to the sale by the Stephens Company of the lot in controversy as well as other lots similarly situated.

Notwithstanding these releases, the defendants contend that all the subdivisions of Myers Park are but component parts of a single development, and, therefore, should be considered as constituting but one entire whole or unity. We had occasion to deal with this question in *Stephens Co. v. Homes Co.,* 181 N. C., 335, where it was held that each of these subdivisions was designed to be, and was in fact a separate, distinct, and integral subdivision.

While these admissions would seem to take the case at bar out of the principles announced in the decisions above considered, and upon which the defendants rely, it may be well to examine some of the cases holding a contrary view.

In *Bondurant v. Paducah & I. Ry. Co.,* 218 S. W. (Ky.), 257, the facts were that the West End Improvement Company, the owner of a large tract of land near Paducah, Ky., had platted the same into lots and streets. Lots were sold to the plaintiff and others by deeds containing a restriction providing, among other things, that the property conveyed should not "in any way become a nuisance to adjacent residents or damaging to adjacent property." The plaintiff alleged that in selling lots under such plat the West End Improvement Company had "adopted and used as a common system of regulation and improvement for residence-section purposes a series of covenant restrictions and conditions for the private benefit of each and all lots sold, as well as of each and all of the lots and lands therein still owned by such company." It did not appear that the deeds to the lots upon which the defendant had constructed its railroad contained any such provision as was contained in the deed to the lot of the plaintiff. In holding that a custom or system of restrictions could not form the basis of any action by one purchaser of lots against another to subject the property of the latter to such restrictions, where the deed to the latter contained none, the Court disposed of the proposition in the following manner:

"Whatever may have been the custom or system of restrictions and conditions adopted by West End Improvement Company in selling lots cannot form a basis for an action against a subsequent owner of one or more of the lots in such addition, in the absence of an allegation and proof that such conditions were embodied in the conveyance under which the defendants hold title. The mere fact that the deed from the West End Improvement Company to Flournoy, under which appellant holds title, contains a restriction as to use of the lots thereby conveyed, could in no wise be binding upon others acquiring lots within such addition, unless there was embodied in the deeds under which they hold title a similar restriction. It will be noticed, too, that it is not alleged that the West End Improvement Company made any agreement, or embodied in other conveyances, that it might make similar restrictions, but only that such was its custom.

"It therefore seems clear to us that neither the petition nor the proof was sufficient to justify a recovery from appellee for a violation of any covenant restrictions, since neither the restrictions in appellant's deed nor any other restrictions were alleged or proven to have been contained in any deed in appellee's chain of title to the lots upon which it constructed its railroad, or to have been binding in any way upon appellee."

In *Farquharson v. Scoble,* 177 Pac. (Cal.), 310, a suit was instituted in equity to enforce certain alleged building covenants, claimed to be provided for under a general building plan designed by the defendant, John Brickell Company, for the improvement, subdivision, and sale

of a certain tract of land situated in the city and county of San Francisco, fronting on the Golden Gate and known as Seacliff. The facts are succinctly stated in the opinion as follows:

"The substance of the allegations necessary for a discussion of the case is, first, that the Brickell Company adopted in the subdivision of the tract of land above referred to what courts have called a 'general building plan,' under which the parcels subdivided were to be used for high-class restricted residences. The complaint then alleges that in the formation of such plan an elaborate and detailed map was prepared by defendant showing the subdivision of the tract into lots, and that sales were made to plaintiff and others in accordance therewith and under the representation that all the subdivisions would be disposed of in conformity with such map and subject to certain restrictive building covenants designed for the development of the tract as a whole and for the benefit of every purchaser in particular. It further alleges that the defendant John Brickell Company had sold to the defendant Thomas Scoble parcels of land contiguous to the lots owned by plaintiff not in accordance with the subdivision as contained on the map under which it had represented the land would be sold, and subject to restrictive building covenants relating to the location of residence building with respect to side-line boundaries less onerous than those imposed on the adjoining property of plaintiff."

In sustaining the demurrer to the complaint, filed on the ground that no cause of action had been stated, and in holding that no implied covenant could be asserted against the land of the defendant, the Court's conclusions were thus in part expressed:

"In our opinion, the covenant here claimed cannot be implied from the mere making and filing of the map showing the different subdivisions, or by selling lots in conformity therewith. The right of an owner in such a case to dispose of the unsold portions of his lots singly or in bulk, or by subdivision into smaller parcels, is in no manner limited or impaired thereby. *Herold v. Real Est. Co.*, 72 N. J. Eq., 857; 67 Atl., 608; 14 L. R. A. (N. S.), 1067; 129 Am. St. Rep., 718; 16 Ann. Cas., 580. Of course, limiting and restrictive covenants, when valid, will be enforced; but when claimed courts will construe them strictly against the person seeking their enforcement, and when none are contemplated, they will not be created. In their absence a vendee cannot be held to a restrictive use of his property."

With reference to the second proposition considered by the Court, namely, whether the sale by the Brickell Company to the defendant Scoble could be restrained on account of the proposed deed containing restrictive building covenants less onerous or burdensome than those

imposed on other lots in the tract similarly located, the opinion of the Court continues:

"Plaintiff claims that they should be in conformity with those established in his deeds. But even as to those, no uniformity is shown to exist, for the dimensions as to the easterly and westerly boundaries are not uniform. That no general scheme or plan in this particular was ever contemplated is further indicated by other pleaded facts. None are contained in the printed form of deed adopted by the company. In that instrument the provisions as to the dimensions of the side-line restrictions are left blank, presumably to be filled in when fixed and determined by the company when selling a particular lot. In addition thereto, it affirmatively appears by the allegations in the complaint that the side-line distances, even when established and adopted, were subject to change by agreement of contiguous or abutting owners. Under such circumstances the side-line restrictions could be entirely done away with. How, then, can it be said that such restrictions were in accordance with any general plan? We conclude there was none.

"From what we have said we are of the opinion that the sale by the company of the lots to Scoble was not destructive of, or violative of, or inconsistent with, any general building plan adopted by the company."

It is to be noted here the Court based its conclusion that no general plan had been established upon the facts that no uniformity in the previous covenants had been shown to exist, since no general scheme or plan was contained in the form of deed adopted by the company and certain portions thereof were left blank, and since the side-line distances were subject to change by agreement of contiguous or abutting owners. In the case at bar, we have it conceded that no uniformity has been practiced by the Stephens Company in regard to the alleged restriction, touching the size and frontage of lots.

In *Herold v. Columbia Investment & Real Estate Co.*, 72 N. J. Eq., 857, it was held that the platting of a tract of land into streets and lots of a certain size and the sale of lots according to the plat did not perforce imply a covenant that the size of the remaining lots should not be changed, but that it was otherwise as to the streets. The essential facts were as follows: The owner of a tract of land, which it had laid out into certain lots and streets delineated upon a map of the property prepared under its direction and filed for recordation, sold some of the lots shown on the map to the complainant and others. Later another map was made and filed, upon which many of the lots delineated upon the original map, under which the complainant purchased, were divided into smaller parcels. In addition, an alteration was made in the location and character of certain streets shown on the original map.

The complainant insisted that these changes from the plan exhibited by the original map, if carried into effect, would materially interfere

with his enjoyment of his property, the reduction in the size of the lots by causing the erection thereon of buildings of small sizes and little value, and the alteration of the streets by destroying the quietude of his residence. All of this, he contended, would depreciate the value of his property. For these reasons, he sought to restrain the defendants from altering the streets and from selling any of the land contained in the tract, except by the lots as shown upon the original map. The complainant further sought to restrain the defendant from violating a so-called "neighborhood scheme," which he alleged had been put in force and become operative throughout the whole tract delineated upon the map, and by the provisions of which but one building was permitted to be erected upon a single lot, and was required to be located at a given distance from the front, rear, and side-lines thereof.

The Court held that the proof failed to show the existence of any alleged "neighborhood scheme," and that it was, therefore, unnecessary to consider the question of whether the purchaser had a remedy in equity against the vendor, or to restrain him from selling the remainder of his lots free from such restrictions.

As to the question with reference to the map, the Court said: "No such covenant is implied by the making of such a map and the sale of certain of the lots shown thereon; and the right of the owner to dispose of the unsold portion of his lots singly or in bulk, or by subdividing them into smaller parcels, and selling them in such parcels, is complete."

In regard to the attempt to alter and to narrow certain of the streets, delineated upon the original map, it was held that this was clearly an infringement of the rights of complainant, since it was reasonable to infer that the streets as shown induced the purchaser to buy portions of the tract laid out on the plan, and further, to imply a covenant that the streets should remain open, as appears from the following extract of the opinion: "The object of the principle is not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits the promise of which it is reasonable to infer has induced them to buy portions of a tract laid out on the plan indicated."

To similar or like effect are the following decisions: *Werner v. Graham,* 183 Pac. (Col.), 945; *Sprague v. Kimball,* 100 N. E. (Mass.), 622; *Ham v. Massasoit Real Estate Co.,* 107 Atl. (R. I.), 205; *Rice v. Roberts,* 24 Wis., 461; *Newton v. City of Dunkirk,* 106 N. Y. Supp., 125; *McCusker v. Goode,* 185 Mass., 607.

In the instant case, it appearing (1) that no general plan or uniform scheme has been adopted by the Stephens Company, which should be held to affect the entire development known as Myers Park, and (2) that releases have been secured from all owners of lots in block 45, the particular subdivision containing the *locus in quo,* we must conclude

that the title offered is valid and the plaintiff is entitled to a decree of specific performance. This was the holding of the court below, and we affirm the judgment.

This disposition of the case renders it unnecessary for us to consider, at this time, the remaining exceptions relating to the statute of frauds.

Affirmed.

B. F. WOOLEY v. O. C. BRUTON.

(Filed 29 November, 1922.)

1. Trials—Motions—Nonsuit—Evidence—Statutes—Waiver.

The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence, and his failure to renew his motion on all the evidence, is a waiver of his right under the statute, C. S., 567.

2. Statutes — Marriage — Penalties — License—Justices of the Peace—Ministers of the Gospel—Contracts.

C. S., 2498, requiring that a minister or officer shall not perform the marriage ceremony "until there is delivered to him a license for the marriage," is in pursuance of a public policy and requires an actual and not a constructive delivery of the license to the officer or minister before he shall perform the ceremony, and a mailing of the license before the performance of the ceremony, though the officiating officer had been assured thereof by telephone from the register of deeds, is not such delivery as will protect the justice of the peace from the penalty imposed by C. S., 2499.

STACY, J., dissenting.

3. Limitation of Actions—Marriage—License.

A summons was issued to recover the penalty against a justice of the peace, C. S., 2499, for performing the marriage ceremony without the delivery of the license therefor to him, C. S., 2498, within less than a year from the time he had performed it: *Held*, the plea of the statute of limitations, C. S., 443 (2), could not be sustained.

4. Appeal and Error—Objections and Exceptions—Briefs—Rule of Court.

An exception not set out in appellant's brief on appeal will be considered as abandoned. Rule 34, 174 N. C., 837.

APPEAL by defendant from *Ray, J.*, at the April Term, 1922, of MONTGOMERY.

This action was begun before a justice of the peace against, the defendant, a justice of the peace, for the recovery of the penalty of $200 for performing a marriage ceremony "without first having a marriage license therefor delivered him as required by law." Judgment having been rendered against the plaintiff, he appealed to the Superior Court,

where the action was tried *de novo*. The evidence showed that the defendant performed the marriage ceremony in question at Mount Gilead, in the county of Montgomery, on Saturday night, 22 January, 1916, and the defendant testified that he received the marriage license in the mail from Troy on Sunday, the day after the ceremony was performed. This action was begun on 19 January, 1917. Verdict and judgment for plaintiff. Appeal by defendant.

Bob V. Howell and Dockery & Wildes for plaintiff.
R. T. Poole for defendant.

CLARK, C. J. There were two issues submitted to the jury: (1) "Did the defendant unlawfully and without a license being first delivered to him, as required by law, perform a marriage ceremony between Dock Wooley and Lucy Barringer?" (2) "Is the plaintiff's right of action barred by the one-year statute of limitations governing the right to sue for penalty in such case?" The jury responded to the first issue "Yes," and to the last issue "No."

The motion for nonsuit made at the close of plaintiff's evidence was refused, but the motion was not renewed at the close of all the evidence. The motion for nonsuit at the conclusion of the plaintiff's evidence was waived by the introduction of evidence by the defendant and the failure to renew motion on all the evidence. C. S., 567. *Bordeaux v. R. R.*, 150 N. C., 530; *Smith v. Pritchard*, 173 N. C., 722.

It appearing that the summons was issued on 17 January, 1917, and that the illegal act complained of was committed on 22 January, 1916, we see no pertinency in the plea of the statute of limitations, C. S., 443 (2); and, indeed, the exception in that regard was abandoned, because not set out in the appellant's brief. Rule 34 of this Court, 174 N. C., 837.

The only exception left to be considered is the instruction of the court to the jury that if they believed all the evidence in the case to answer the first issue "Yes."

C. S., 2499, provides: "Every minister or officer who marries any couple without license being first delivered to him as required by law . . . shall forfeit and pay $200 to any person who sues therefor."

The defendant testified in his own behalf that one Harris came into his store late Saturday afternoon on 22 January, 1916, bringing Dock Wooley, whom he had arrested in Richmond County on a criminal charge; that said Dock Wooley wished to settle the matter, and he suggested that the best way was for Dock to marry the girl. Thereupon, he called up over the telephone O. P. Deaton, the register of deeds at Troy, the county-seat, related the circumstances, and Deaton told him

that he would issue the license, put it in the postoffice, and phone him, and that after the license had been issued and put into the mail he could go ahead and perform the marriage ceremony. Later that afternoon the register of deeds phoned him that the license had been issued and stamped, and was already in the postoffice, perfectly all right, and to go ahead and marry the parties; that this was about 8 or 9 o'clock; that he then performed the marriage ceremony. He did not receive the license until the next morning, which was Sunday.

C. S., 2498, emphasizes the requirement that the license must be first delivered to the officer before the solemnization of the marriage: "No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, *until* there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy." It is true that the marriage is not invalid because solemnized without a marriage license; *Maggett v. Roberts,* 112 N. C., 71; *S. v. Parker,* 106 N. C., 711; *S. v. Robbins,* 28 N. C., 23—or under an illegal license; *Maggett v. Roberts, supra*—but it is clear that both these sections of the statute require that the license shall be first delivered to the officer before the marriage is solemnized, else under the latter statute he is liable to the penalty sued for in this action.

The defendant relies upon the well settled principle of law that delivery of goods by a vendor to a common carrier is delivery to the vendee. *Hunter v. Randolph,* 128 N. C., 92, and cases there cited. But that case rests upon the ground that the carrier is the agent of the vendee, to whom the possession passes from the vendor upon the delivery of the goods to the carrier. He also relies upon *Lynch v. Johnson,* 171 N. C., 611, and cases there cited, which hold that where the holder of a legal title executes a good and sufficient deed to another for the latter's interest in land and deposits the deed in the postoffice in an envelope properly addressed, by mailing the deed the grantor parts with his authority and control over it, and this passes the title in the property to his grantee. But these cases have no bearing upon the words of the statute, C. S., 2498, which forbids any minister or officer to perform the ceremony of marriage "until there is delivered to him a license," for such marriage; and C. S., 2499, which imposes this penalty of $200 if the minister or officer shall marry a couple "without license being first delivered to him as required by law."

These are matters of public policy, and the sections above referred to clearly require an actual and not a constructive delivery of the license before the officer shall perform the ceremony. It is needless for us to

speculate upon the motive of the Legislature in making this explicit requirement of the actual delivery of the license. It is sufficient to say "the law is so written."

It should not pass without some notice that this action, which was instituted in January, 1917, has just reached this Court for decision—a period of nearly 6 years, which argues, together with so many other cases coming up before us similarly delayed, that there is a congestion in the administration of justice which should be remedied.

No error.

STACY, J., dissenting: The only point presented on this appeal is whether the defendant, a justice of the peace, performed the marriage ceremony in question "without a license being first delivered to him, as required by law." C. S., 2499. It is said in the opinion of the Court that this means "an actual and not a constructive delivery of the license before the officer shall perform the ceremony"; and hence it necessarily excludes the delivery to another for the officer. I do not think the statute, as enacted by the Legislature, is quite so exacting. In the case at bar the defendant, by request, called up the local register of deeds over the telephone, acquainted him with the circumstances, and obtained from him a promise to issue the marriage certificate and to mail it direct to the defendant. This was in January, 1916, before the passage of Public Laws 1921, ch. 129, requiring health certificates, etc. Later, in a telephone conversation with the register of deeds, the justice of the peace was informed, and correctly so, that the license had been issued and properly mailed, and that it was "perfectly all right to go ahead and marry them." Thereupon, the defendant performed the marriage ceremony.

Both of the officers, with full knowledge of the facts, understood and considered this to be a sufficient delivery of the license, "as required by law." It was the method mutually adopted for its delivery by the one and its receipt by the other. Unquestionably, what took place amounted to an issuance of the license. It was said in *Coley v. Lewis,* 91 N. C., 21, that a marriage license was issued "when the instrument, complete in form, passes out of the register's hands by his own act into the hands of another; and this, unaffected by directions as to terms for its subsequent use." To like effect is the holding in *Maggett v. Roberts,* 112 N. C., 71. And it is a universal principle of law that a delivery by specific authorization to a designated agent or agency is a delivery to the principal. 18 C. J., 477; 1 Words and Phrases, 1279. The statute provides for such delivery as is "required by law," and no more. The register of deeds, under the facts here disclosed, would not be permitted to say that he did not issue the license; and the justice of the peace

would not be heard to deny that he received it, or that it was delivered to him, prior to the marriage. "Delivery does not necessarily import an actual physical tradition of possession from one hand to another." *Ins. Co. v. Hall,* 210 Mass., 332.

It will be observed that neither the issuance of the certificate nor its delivery to the officiating officer is a prerequisite to the validity of the marriage. *Maggett v. Roberts, supra.* It is the status of the contracting parties that the State or society is primarily interested in, and not so much the manner and form of the "delivery" and return of the license. Can it be said that an officer who performs a marriage ceremony without first actually and physically having in his hands the marriage certificate, when, at his request, it has been duly delivered to and received by another for him, would be subject to the statutory penalty, and, therefore, guilty of a crime? I think not.

P. M. KING, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 29 November, 1922.)

1. Courts—Jurisdiction—Judgments.

The Superior Court is one of general jurisdiction, and reasonable intendment is presumed in favor of the validity of its judgments, which may not be impeached collaterally except for lack of jurisdiction of the cause or the parties, apparent on the face of the record; and in case jurisdiction has attached, the binding force and conclusions of such judgments is not impaired because it had been erroneously allowed, though the error may be undoubted and apparent on the face of the record.

2. Same.

Generally, jurisdiction is the power lawfully conferred upon a court to deal with the general subject involved in the litigation, and the subject-matter exists whenever the court has jurisdiction of the class of cases and the parties to which the particular case belongs.

3. Same—Pleadings—Evidence—Actions—Defenses—Government—Railroads.

The effect of the acts of Congress and the orders made by the United States Government in pursuance thereof, regarding actions at law and suits in equity against railroads, including death or injury to persons, etc., while such carriers were in possession, use, and control or operation of the United States Government, under the Director General of Railroads, etc., was not to create any question as to the jurisdiction of the State courts in matters theretofore cognizable by them, but only to afford immunity from suit when properly pleaded by the carriers and insisted on and maintained according to the course and practice of the courts.

4. Same—Appeal and Error—Final Judgments.

Where, during the control by the United States of railroads, a railroad subject thereto has permitted a judgment to be rendered against it without availing itself of the defense from liability under the Federal statutes and the Government orders made in pursuance thereof, and a final judgment fixing liability upon the railroad has been rendered, notice of appeal to the Supreme Court given, but not perfected, the judgment so rendered is not void for the lack of jurisdiction in our courts, and may not be declared void in an action brought to enforce it after the railroad has been returned by the Government to private control.

5. Same—Execution—Federal Statutes.

The effect of the inhibition that no execution shall issue against the property of a carrier that had been under Federal control, etc., provided by the Federal act restoring such railroad to private ownership, does not arise for interpretation before such execution is sought to be levied; but the question is considered on this appeal, the answer containing averment that the plaintiff is wrongfully seeking in the present suit to avoid the force and effect of the statutory provision; and *semble*, it would be lawful for the execution to issue on the defendant's property under a proper judgment.

6. Same.

The effect of the Federal statute terminating the control of railroads by the United States Government, 41 Statutes at Large, ch. 91, sec. 200, by correct interpretation, is to apply its provisions to judgments provided by the act, or, at most, to those and other judgments for such causes of action which had been permitted and obtained against the Director General under other and cognate legislation; and the effect of sec. 10, ch. 25, Federal Statutes of 1918 (40 Statutes at Large, p. 456), was to protect the properties taken over from physical interference by execution, under judgment by creditors or third parties, as a necessary inhibition to the efficient user of the roads by the Government in the successful prosecution of the war, and from its terms and purpose would cease when such necessity no longer existed, and the Government control had lawfully terminated.

7. Same—Multiplicity of Suits—State Statutes.

The defendant railroad, as lessor of the Southern Railroad Company, was sued in the Superior Court for damages for the alleged negligent killing by its lessee road of the plaintiff's intestate, during the United States Government control of railroads, including the lessee, as a war measure, and without interposing a defense under the Federal statutes and orders of the United States Government, a judgment final was obtained against the defendant in due course and practice of the courts. After the railroad's properties were restored to private ownership under the Federal statutes, the plaintiff brought his action upon the judgment theretofore rendered: *Held*, his second action may be prosecuted. C. S., 437-601.

APPEAL by defendant from *Long, J.*, at the April Term, 1922, of GUILFORD.

Civil action to recover on a judgment in favor of plaintiff against defendant road for $2,500 damages for negligent killing of plaintiff's intestate by defendant's lessee, the Southern Railway Company, heard on demurrer to the answer of defendant.

From the facts as presented in the pleadings, it appears that on 3 February, 1920, plaintiff's intestate was killed by negligence of Southern Railroad, its employees and agents while holding the defendant's railroad under a lease of defendant company, and operating same under and by virtue of defendant's franchise. That plaintiff having duly qualified as administrator of deceased, instituted his action against defendant for said alleged negligent killing, and filed his complaint therein, setting forth the occurrence in detail and the facts tending to impute liability therefor to defendant. Defendant answered, denying any negligence on the part of its lessee as proximate cause of intestate's death, and alleging further that at the time of said killing defendant's road was not in possession of or being operated by its lessee, but was under the control and management of the Government of the United States, through the Director General, etc., and pursuant to the Federal legislation appertaining to the subject and the administrative orders made under and by virtue of same.

On these averments the cause was submitted to the jury at March Term, 1921, of said court, and verdict rendered on the following issues:

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

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

Judgment on the verdict for plaintiff. Defendant excepted and prayed an appeal, which was never perfected or further prosecuted. That said judgment not having been paid, plaintiff instituted the present action to March Term, 1922, and filed complaint therein, averring the existence of said judgment, that same remains wholly unpaid, and demanding judgment for the $2,500, and interest. To this complaint defendant answered admitting the recovery and existence of the judgment sued on, but alleged that same was not a valid or binding judgment because it was obtained for the wrongful death of intestate caused by the negligence of the employees and agents of the Government of the United States while the properties of defendant were being operated and controlled by the Director General of Railroads under and by virtue of the acts of Congress and the orders of the President of the United States, and for that reason said judgment is illegal and void. Defendant alleged further, in effect, that this alleged negligent killing took place when its road and all equipment, etc., was in control and charge of the Government under the acts of Congress and orders aforesaid, and at a

time when one of the agents and employees, etc., of defendant or its lessees were engaged in operating said road or in any way responsible for said death, and to hold it liable for such an injury under such circumstances would be to take defendant's property without due process of law, etc. And in supplemental answer, filed by leave of court, alleged further that the present action on the judgment in behalf of defendant was in the endeavor to evade in some way the provision contained in the act of Congress known as the Transportation Act of 1920, sec. 206 (*g*), in terms as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

And defendant pleads further provisions of said Transportation Act in bar of recovery on the judgment.

To which said answer plaintiff files demurrer in terms as follows: "Comes now the plaintiff and demurs to the answer of defendant herein, upon the ground that the matters and things alleged in said answer were set up, or might have been set up, in the defense in the original action, and this judgment sued upon is *res adjudicata* as to all such matters; also plaintiff moves for judgment upon the pleadings."

There was judgment sustaining demurrer in terms as follows: "This cause coming on to be heard upon plaintiff's demurrer to the answer of defendant, it is now considered and adjudged by the court that said demurrer be and the same is hereby sustained. It is further considered and adjudged by the court that the plaintiff have and recover of defendant $2,500, with interest thereon from 21 March, 1921, and the further sum of $95.65, with interest from same date, and the cost of this action to be taxed."

Defendant excepted and appealed.

W. P. Bynum and R. C. Strudwick for plaintiff.
Wilson & Frazier for defendant.

HOKE, J. It appears from an inspection of the record that plaintiff holds a judgment of the Superior Court against defendant for $2,500 damages, and costs, purporting to be a final determination of the rights of these litigants, unchallenged by appeal or other procedure in the cause wherein the same was entered. The court being with us one of general jurisdiction, every reasonable intendment is presumed in favor of the validity of its judgment and the same may not be impeached

collaterally except for lack of jurisdiction of the cause or the parties, apparent on the face of the record. *Caviness v. Hunt,* 180 N. C., 384; *Stocks v. Stocks,* 179 N. C., 288; *Moore v. Packer,* 174 N. C., 665; *Settle v. Settle,* 141 N. C., 553-573; *Carter v. Rountree,* 109 N. C., 29; *Doyle v. Brown,* 72 N. C., 393; *Harvey v. Tyler,* 69 U. S., 328-343; 11 Cyc., p. 691.

And in case jurisdiction has attached, the binding force and conclusiveness of such judgment is in no way impaired because the same has been erroneously allowed, though the error may be undoubted and apparent on the face of the record. *McNitt v. Turner,* 83 U. S., 352-366; *Cooper v. Reynolds,* 77 U. S., at p. 316; *Grignon's Lessee v. Astor et al.,* 2 Howard U. S., 319 and 340; *Weeks v. McPhail,* 128 N. C., 130; *Carter v. Rountree,* 109 N. C., *supra; Stillman v. Williams,* 91 N. C., 483-486; *McKee v. Angel,* 90 N. C., 60; *Jennings v. Stafford,* 23 N. C., 404; *Franklin Union No. 4 v. People,* 220 Ill., 355.

In *McNitt v. Turner, supra,* at p. 366, the correct principle is stated as follows: "It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice,* can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. *Grignon's Lessee v. Astor et al., supra,* was, like this, a case of a sale by an administrator. In that case this Court said: 'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' "

And in *Stillman v. Williams,* 91 N. C., *supra,* at p. 486, *Merrimon, J.,* delivering the opinion, said: "Although a judgment be irregular or erroneous, yet if the court granting it had jurisdiction of the parties and the subject-matter, it cannot be attacked collaterally for such irregularity or error."

We do not understand that appellant desires to question the general principles to which we have referred, but it is insisted that there is a lack of jurisdiction of the subject-matter in case of the judgment here sued on by reason of the acts of Congress and executive and administrative orders pursuant thereto, by which this and other roads in continental United States were taken over by the Government as a necessary step in the successful prosecution of the recent war, and particularly

by reason of General Order No. 50, in which the Director General in charge and control of the roads under these legislative and executive orders, provided, among other things: "That actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contracts binding upon the Director General of Railroads, claims for death or injury to the person or for loss or damage to property arising since 31 December, 1917, and growing out of the possession, use, and control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceedings but for Federal control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise, etc.

"Second, pleadings in all such actions at law, etc., now pending against the carrier company for a cause of action arising since 31 December, 1917, based upon a cause of action arising out of the operation, etc., may on application be amended by substituting the Director General for the carrier company as party defendant and dismissing the carrier."

Speaking in general terms, jurisdiction has been defined as the power "lawfully conferred upon a court to deal with the general subject involved in the litigation," and as to the subject-matter is said to exist wherever the court has jurisdiction of the class of cases to which the particular case belongs. *Cooper v. Reynolds,* 77 U. S., 308-316; *O'Brien v. The People,* 216 Ill., 354; *St. Louis, etc., R. R. Co. v. Lowdes,* 138 Mo., 533; 7 Enc. Supreme Court Reports, p. 738.

As heretofore stated, our Superior Courts are courts of general jurisdiction, having power, original or appellate, to hear and determine all criminal causes and all civil causes in law or equity arising and existent within the State. *Rhyne v. Lipscombe,* 122 N. C., 650. And while these orders, when made pursuant to legislation by Congress on the subject presented, have been fully sustained and approved as controlling on the rights of the parties when and to the extent that the same properly apply (*Missouri Pacific v. Ault,* 256 U. S., 554; *Northern Pacific R. R. v. North Dakota,* 250 U. S., 135), they do not, in our opinion, create or present here any jurisdictional question, but were only intended to afford immunity from suit when properly pleaded by the carriers and insisted on and maintained according to the course and practice of the court.

This order, No. 50, upon which appellant chiefly relies, clearly and in express terms contemplates that as a matter of jurisdiction the court may proceed to hear and determine the cause. A perusal of the Federal Control Acts will disclose that there were suits that could still be maintained against the carrier notwithstanding Federal control, and prose-

cuted to the rendition of the judgment. Again, the President is authorized from time to time by order or contract to withdraw certain roads, or portions of roads, from the effect and operation of such control, 40 Statutes at Large, ch. 25, sec. 14, and the Court of necessity must determine whether a given action before it comes within the effect and operation of the order in question, and this of itself would recognize jurisdictional power to deal with the controversy. This view finds support, we think, in *Mo. Pacific R. R. v. Ault, supra,* wherein *Associate Justice Brandies,* for the Court, in an opinion upholding the validity of order No. 50, and denying liability of the company for actions of this character refers to the fact that the immunity had been "seasonably claimed." And again, in the opinion, the conditions presented are likened to the case of a corporation in the hands of a receiver, where it is well understood that the appointment of a receiver does not have the effect at all of dissolving the corporation, and that the judgment of a court of competent jurisdiction obtained against the company will conclude both the corporation and the receiver, unless and until the same is set aside by motion in the cause or other direct proceedings. *Pringer v. Woolworth,* 90 N. Y., 502; Beach on Receivers, sec. 468. And it may be noted that in the recent cases of Supreme Court of the United States on this subject, wherein liability of the company was denied for injuries arising under and by reason of Federal control of the roads, *Ault v. R. R.,* 256 U. S., 554; *Western Union v. Boston,* 256 U. S., 662; *N. C. R. R. v. Lee, Admr.,* the immunity from liability was seasonably pled and was being insisted on and maintained according to course and practice of the Court, and in none of them so far as examined was there a suggestion of a want of jurisdiction in the Court to hear and determine the cause.

It is further contended that plaintiffs may not be allowed to further prosecute this suit because of the act of Congress terminating Federal control, 41 Statutes at Large, part 1, ch. 91, and which contains, among others, in sec. 206 (*g*), the provision that "No execution or process other than a judgment recovered by the United States shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of the railroad or system of transportation by the President under Federal control, etc."

It might suffice to say in answer to this position that plaintiff thus far has not undertaken to levy any process or execution against the property of the defendant road, and his proceeding, therefore, does not come within the literal terms of the provision on which he here relies, but inasmuch as the answer contains averment that plaintiff is wrongfully seeking in this present suit to avoid the force and effect of the

statutory provision just quoted, we consider it pertinent to say that in our opinion the judgment sued on does not come within the inhibition as stated.

There are two of these inhibitions appearing in the Federal legislation on this subject, the first in ch. 25, sec. 10, Laws of 1918, 40 Statutes at Large, p. 456. This section, after providing in effect that carriers while under Federal control were subject to all laws and liabilities of carriers, and that actions might be brought against them and judgments recovered "as now provided by law," closes with the provision: "But no process, *mesne* or final, shall be levied against any property under such Federal control."

This provision was clearly inserted to protect the properties taken over from physical interference at the instance of creditors or third persons, and as necessary to the efficient user of the roads by the Government in the successful prosecution of the war, and from its terms and purpose would cease when such necessity no longer existed and the governmental control had lawfully terminated.

The second inhibition, which is here pleaded and relied upon by defendant, appears in the statute referred to terminating governmental control of the roads, 41 Statutes at Large, ch. 91. That statute, after providing, in sec. 200, that "On and after 1 March, 1920, the President shall relinquish the possession and control of the railroads taken over by the Government, and cease the use and operation thereof," in sec. 206, clause A, provides in effect that actions at law, suits in equity, and proceedings in admiralty based on causes of action growing out of Federal control, may be brought against an agent to be appointed by the President with the limitation that such suits, etc., should be brought not later than two years from the passage of the act. Clause B directs that process in these actions may be served on any agent or officer of the carrier or on some officer or agent to be designated by the President. Clause C provides for prosecution of claims for reparation to the carrier before the Interstate Commerce Commission by reason of any unreasonable or unjust rates, etc., enforced to the carrier's prejudice during such Federal control. Clause D, that actions, suits, proceedings and reparations above described, pending at the termination of Federal control, may be prosecuted to final judgment by substituting the agent designated by the President as party. Clause E provides for payment of such judgment out of the revolving fund created by the act. Clause G, heretofore quoted, prohibits the levy of execution or other process against the property of the carrier when the cause of action, etc., grew out of possession and control of the roads by the President.

From a perusal of these sections of the act, and a proper consideration of its terms and purpose, we are of opinion that this second inhibition

applies, and was intended to apply to the judgments provided for by the act itself, or, at most, to these and other judgments for such causes of action which had been permitted and obtained against the Director General under other and cognate Federal legislation. The first inhibition, as stated, being to protect the roads from physical interference by third persons, creditors, or other, while in possession and control of the Government, and the second to protect the carriers in the possession and control of their own roads from physical interference by reason of any actions or judgments provided for and allowed by the Government, but this legislation, in our view, was never intended to protect the carriers from judgments in independent suits by claimants where they have failed to plead or properly insist on the immunity from liability which had been provided for their protection. The Government has made provision by its legislation to protect the carriers from molestation by reason of any judgments it has authorized and provided for, but it has not undertaken, as guardian *ad litem,* to avoid or destroy the force and effect of independent judgments against which the carrier has neglected or failed to interpose his proper defenses.

Plaintiff, then, holding a final judgment of a court of competent jurisdiction for $2,500, unpaid and unchallenged by appeal or any direct proceedings, is entitled to sue on the same, regardless of his right to issue execution thereon, the protection in this jurisdiction against persistent and harassing litigation of this character being a statutory provision that no such action shall be instituted more than once. C. S., 437-601; 2d Black on Judgments, sec. 958; 23 Cyc., 1502. On the entire record we are of opinion that his Honor made correct decision in sustaining plaintiff's demurrer to the answer, and his judgment to that effect is

Affirmed.

C. L. BAILEY, TRUSTEE, v. T. R. HASSELL ET AL.

(Filed 22 November, 1922.)

1. Corporations—Deeds and Conveyances—Seal—Statutes.

While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. C. S., 1126 (3).

2. Same—Adoption of Seal.

The simple word "seal," with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. C. S., 1126 (3).

3. Corporations — Deeds and Conveyances—Probate—Statutes—Validating Acts.

It is not necessary to the valid probate of a deed made by a corporation that it literally follow the statutory printed forms, C. S., 3326, if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that these officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seem to be cured under the provisions of C. S., 3354, and as to signatures of the officials by C. S., 3355.

4. Corporations—"Seal"—Probate—Statutes—Presumption.

Where a conveyance of land purports upon its face to be the act of a corporation, and the word "seal" with a scroll has been used thereon, it is competent to show that the corporation had adopted for the purpose the word "seal" with a scroll in the place of the corporate stamp seal, which had been broken and could not be used; and that the officials signed as such were thereto authorized by the directors and stockholders of the corporation, although the statutory form of the probate, C. S., 3326, had not been strictly, though substantially, followed, the presumption being that the officer taking the probate had complied with the requirements of the law as to corporate probate.

5. Same—Equity—Correction of Instrument.

Semble, the power of courts of equity to correct, reform, and reëxecute an instrument upon sufficient allegation and proof extends to the probate of corporate deeds, when it thereon appears that the president and secretary have executed it in behalf of the corporation in substantial compliance with the printed form of the statute. C. S., 3326.

6. Corporations—Seals—Probate—Parol Evidence—Appeal and Error.

Parol evidence of the action of the stockholders and directors of a corporation in adopting the word "seal" in a scroll as its corporate seal and authorizing the conveyance of its lands by its president and secretary is admissible, when it is made to appear that there were no minutes kept of the meeting at which this action was taken, and the finding of the trial judge thereon is conclusive, on appeal, if there was evidence to support it.

7. Evidence — Deeds and Conveyances — Probate — Parol Evidence — Written Instruments.

Where the probate of a corporation's deed for land is in substantial compliance with the statutory form, C. S., 3326, parol evidence is compe-

tent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf.

APPEAL by plaintiff from *Daniels, J.*, at the July Term, 1922, of WASHINGTON.

On or about 21 March, 1915, the Farmers Union Supply Company, a corporation, executed to T. J. Basnight a certain mortgage deed, recorded in Book 67, page 165, to secure the payment of money borrowed by it for the purpose of purchasing a lot and erecting a building thereon in which to conduct its business, it being the same property described in said mortgage. Sometime thereafter T. J. Basnight died and H. S. Basnight qualified as his administrator and made demand upon the supply company for payment of this mortgage in order to settle his estate. The supply company, being unable to make payment, procured B. F. Bailey to take this instrument up for it.

Later on, Mr. Bailey, he being the father of the plaintiff in this action, sold and assigned the said mortgage, with the indebtedness thereby secured, to the Bank of Roper, which paid him full value therefor. It appears from the record that no part of this indebtedness has been paid. Some time after he had transferred and assigned the mortgage, H. S. Basnight attempted to cancel the same of record, without the knowledge or consent of the holder of the note it secured.

On 31 December, 1918, the Farmers Union Supply Company, being desirous of acquiring title to the other half of the building, same being owned by J. O. Highsmith, borrowed from the Bank of Roper the sum of $5,750 and secured the loan by a deed of trust on the property, duly registered. It is admitted that the Bank of Roper advanced the full amount represented by this loan and deed of trust to the supply company, and that the latter used the same in purchasing the other half of the building from Highsmith.

It also appears that this loan and deed of trust were authorized by the stockholders and directors of the supply company. No part of this indebtedness has ever been paid.

On 14 January, 1921, the Farmers Union Supply Company borrowed from the Bank of Roper the sum of $4,800 for the purpose of taking up certain notes to a bank in Elizabeth City, and for the other purposes of its business. To secure this amount it executed to Hassell, trustee, the deed of trust recorded in Book 74, page 178. It is admitted that the Bank of Roper advanced the full amount shown in this deed of trust to the supply company, and that no part of the same has ever been repaid. It also appears that this loan and deed of trust were authorized by the stockholders and directors of the supply company.

It also appears that some time prior to the execution of the two last deeds of trust, the corporate seal of the Farmers Union Supply Company had been broken or misplaced, and that the stockholders and directors of the company, in a duly constituted meeting, had adopted the form of seal as it appears on said instrument as the corporate seal of the company. There was also evidence that the stockholders and directors of the supply company authorized and directed the execution of valid deeds of trust to secure the Bank of Roper, and that the president and secretary of the supply company, pursuant to resolutions to that effect, appeared before the notary taking the probates of the said instruments and acknowledged the execution of the same to be the acts and deeds of the Farmers Union Supply Company.

Some time after the execution of the said instruments, the Farmers Union Supply Company was adjudicated a bankrupt, and the plaintiff was appointed trustee of the estate. The Bank of Roper has also been adjudged insolvent by decree of the Superior Court of Washington County, and the defendant Litchfield has been appointed receiver of the said bank with power and authority to wind up its affairs and distribute the assets as appears from the record.

Plaintiff's only attack upon the Basnight mortgage, as appears, is that it was canceled of record, and this was the only issue with reference to that mortgage. Plaintiff attacks the two deeds of trust to Hassell, trustee, upon two grounds:

1. That the corporate seal of the Farmers Union Supply Company was not affixed to the said deeds.

2. That the deeds were not properly probated.

The jury returned the following verdict:

"1. Were the deeds of trust from the Farmers Union Supply Company to T. R. Hassell, trustee, offered in evidence, executed in pursuance of resolutions of the Farmers Union Supply Company authorizing the execution of the same? Answer: 'Yes.'

"2. Prior to the execution of the said deeds of trust aforesaid, had the word "seal" appearing upon said instruments been adopted as the corporate seal of the Farmers Union Supply Company pursuant to resolutions of its stockholders and directors in a meeting duly called and held for that purpose? Answer: 'Yes.'

"3. Were the said deeds of trust acknowledged by the president and secretary and treasurer in the form appearing upon said deeds of trust offered in evidence, in pursuance of the said resolutions of the stockholders and directors, and did the said president and secretary and treasurer appear before a notary public and acknowledge the execution of the said deeds as the act and deed of the said Farmers Union Supply Company? (Plaintiff excepts to the submission of this issue.) Answer: 'Yes.'

"4. Were the amounts represented by the deeds of trust aforesaid actually received by the Farmers Union Supply Company and used by it in the purchase of the property therein described and in carrying on the business of the company? Answer: 'Yes.'

"5. Was the cancellation of the mortgage from the Farmers Union Supply Company to T. J. Basnight unauthorized, as alleged in the answer? Answer: 'Yes.'"

The court rendered judgment upon the verdict, declaring therein that the mortgage and deeds of trust were validly executed by the Farmers Union Supply Company, and valid debts secured thereby, and were binding upon it as its subsisting obligations. The court further provided for a sale of the lands described in said deeds, and appointed a commissioner for that purpose, and then gave specific directions as to the payment of the debts and costs. Plaintiff excepted and appealed.

Zeb Vance Norman for plaintiff.
W. L. Whitley and Van B. Martin for defendants.

WALKER, J. We will consider the questions in the same order as they are presented in the record.

It may be taken as settled that a corporation may adopt, alter, or change a common seal at its pleasure. C. S., 1126, subsec. 3. "The power to have a common seal, and to alter or renew the same at will, is frequently conferred on corporations by statute, but such a power is one of the incidental and implied powers of every corporation when not expressly conferred." 14 C. J., sec. 404, p. 334; 7 A. & E. (2 ed.), p. 690 *et seq.; Railway Co. v. Hooper,* 160 U. S., 514.

In this State a corporation must convey its real property by instrument under seal, the same as an individual, but this does not necessarily mean that it must be done by attaching the ordinary common seal of the corporation. Any device used on the instrument, as and for the seal of the corporation, would be sufficient for that purpose, provided it was intended for and used as the seal of the corporation. "If a seal is necessary to a corporate contract, and authority is shown for the corporation to attach its seal thereto, it is by no means indispensable that use should be made of the ordinary common seal of the corporation. Any other seal would have the same effect, if adopted by the corporation, and this is ordinarily established by showing authority to execute a contract on behalf of the company under seal, and the fact of attaching some seal to the name of the corporation with intent to seal on its behalf." 7 A. & E. (2 ed.), p. 692 (citing numerous authorities from State and Federal courts, including the United States Supreme Court);

Taylor v. Heggie, 83 N. C., 244; 14 C. J., p. 336; Womack on Corporations (1904), p. 203, sec. 403; *Benbow v. Cook,* 115 N. C., 324.

There was evidence that all of the instruments in question were duly authorized by the stockholders and directors of the Farmers Union Supply Company, and that the stockholders and directors were present at these meetings. It further appears in the evidence that, prior to the execution of the deeds of trust to Hassell, trustee, the corporate seal of the Farmers Union Supply Company had been broken or misplaced, and that the stockholders and directors of the Farmers Union Supply Company had duly adopted the word "Seal" as the corporate seal of the said company, and that it was so used on the instruments in question. It appears from the testimony of the witness J. E. Singleton that all directors were present when this was done. Therefore, assuming this to be the fact, and the verdict of the jury has established the same, then the seal on the instruments in question is the corporate seal of the Farmers Union Supply Company. It appears from a perusal of the instruments in question that they are made for and in the name of the Farmers Union Supply Company, and it also appears from the attestation clause that they are executed for and in behalf of the Farmers Union Supply Company.

Plaintiff attacks the probates of the two deeds of trust to Hassell, trustee, contending that the same are not sufficient to authorize registration of the same. These probates appear in the record, and are substantially as follows: "The execution of the foregoing instrument was this day acknowledged before me by J. E. Singleton, president, and George B. Hooker, secretary-treasurer of the Farmers Union Supply Company, Inc., *the grantor,* for the purpose therein expressed. Let the same, with this certificate, be registered."

Then follows the signature and official seal of the notary and the fiat of the clerk of the Superior Court adjudging the probates to be correct and sufficient, and ordering the instruments to registration.

Plaintiff says that the probates do not follow the printed forms of probate as laid down in the Consolidated Statutes, and, therefore, that the same are invalid. But we are not able to concur in this view. The statute itself, section 3326, says, in part, "but (the same) shall not exclude other forms of probate which would be sufficient in law." It clearly appears from the probates of these instruments that the proper officials of the Farmers Union Supply Company, to wit, the president and secretary-treasurer, personally appeared before the notary and acknowledged the execution of the instruments as the acts and deeds of the Farmers Union Supply Company, and not as their personal act. Not only do the probates show this fact, but there is abundant evidence in the record to establish the same, and the jury have so found by their

answer to the third issue. What more could be required? Are the instruments to be adjudged void merely because the notary failed to incorporate full findings in the probates? Are the instruments to be adjudged void merely because the probates are deficient in matters of form and not of substance? The acts of the notaries in taking the probates in question were judicial acts. *"Omnia praesumuntur rite esse acta."* At least, it appears from the probates themselves that the proper officers of the corporation appeared before the notaries and acknowledged the instruments to be the acts and deeds of the grantor, the Farmers Union Supply Company. Plaintiff has offered no evidence whatever tending to impeach the probates upon the ground of fraud, or for other valid reason, and they are, at least, in substantial compliance with the law. *Starke v. Etheridge,* 71 N. C., 240; *Quinnerly v. Quinnerly,* 114 N. C., 145; *Heath v. Cotton Mills,* 115 N. C., 202; *Cochran v. Improvement Co.,* 127 N. C., 386; *Brown v. Hutchinson,* 155 N. C., 210; *Spruce Co. v. Hunnicutt,* 166 N. C., 202; *Moore v. Quickle,* 159 N. C., 129; *Power Corp. v. Power Co.,* 168 N. C., 219, and authorities cited; 1 C. J., sec. 192, p. 849.

The Court says, in *Withrell v. Murphy,* 154 N. C., 89, this being the case upon which the plaintiff principally relied: "It must appear, when read in connection with the deed, that the person making the acknowledgment was authorized to execute the instrument for the corporation; that he was known or proved to be the corporate official he represented himself to be, and that he acknowledged the instrument to be the act and deed of the corporation. The substantial showing of the requisite facts is all that is required, and where the instrument purports to be the act of the corporation the certificate will not be held defective because it recites that the person who executed it in behalf of and under authority from the corporation, acknowledged it to be his act and deed instead of that of the corporation." There is a clear distinction, in one respect, between the probate under consideration in *Withrell v. Murphy, supra,* and the probate of the instruments here, but not only is that case, as we consider it, not an authority to sustain the contentions of the plaintiff, but tends strongly to support the defendants' contentions.

It seems to us that the probates appearing on the several instruments are, at least, in substantial compliance with the law, and are certainly sufficient under our decisions, as above cited. The corporate seal appears upon the deeds of trust and also upon the record of the same, and, as stated in *Benbow v. Cook, supra,* at p. 332, "If R. E. Causey, the secretary and treasurer, was authorized to sign the instrument as agent, it will be presumed that what purported to be a seal, and would have been declared sufficient if attached to his signature as an individual, was

the seal of the corporation affixed in accordance with the recital in the attestation clause." However, the jury, upon competent evidence, has found, by its answer to the second and third issues, that the seal affixed to said instruments is the corporate seal of the supply company, and that the proper officials acknowledged the instruments before the notaries to be the acts and the deeds of the supply company, pursuant to resolutions duly passed by it to that effect. (*Starke v. Etheridge, supra.*) The scope of the answer is very comprehensive and inclusive, and we take it that there is now no doubt about the power of equity to correct, reform, and reëxecute written instruments upon sufficient allegations and proof, and that this power extends perhaps to probates, in some cases, as well as to other instruments. *Wynne v. Small,* 102 N. C., 133; *Quinnerly v. Quinnerly, supra; McCown v. Sims,* 69 N. C., 159; 24 A. & E. (2 ed.), p. 654, but we need not invoke that principle in this case.

It seems that parole evidence can be introduced in aid of probates in proper cases. It is contended that the execution and probate of the $5,750 deed of trust has been validated by C. S., 3354-3355. By examination of section 3354 it appears that it contemplates a conveyance signed by the president and secretary of a corporation, not in the corporate name, which clearly implies that no corporate seal is affixed, and in section 3355, which validates a probate upon the oath and examination of a subscribing witness, it seems to suggest that no proof of the corporate seal appears in the probate. The $5,750 deed of trust is dated 31 December, 1918, and should be held to be validated by these curative statutes, even assuming that the same is deficient, which we say is not the case.

Exceptions 1 to 13 all relate to the admission of evidence as to the execution of the mortgage and deeds of trust in question. There is no merit in exception No. 1, for the reason that plaintiff did not question the Basnight mortgage at all, but only contended that the same had been canceled of record. It seems to us that defendants were entitled to prove that the deeds of trust to Hassell, trustee, were duly authorized by the stockholders and directors of the supply company, and that the officers were directed to execute valid instruments to secure the money which admittedly was loaned to the supply company by the Bank of Roper upon the strength of these instruments; that they were also entitled to prove why the word "seal" was used on the instruments, and also that this word had been adopted as the corporate seal of the supply company in a meeting duly called and held for that purpose and attended by both the stockholders and directors of the supply company. There was no other or better way to prove these facts.

It is evident that a sufficient and proper foundation was laid for the admission of this evidence. It appears that no minutes were kept of these transactions, and defendants offered the minute book of the company to show the facts in corroboration of the testimony of the witness, J. T. McAllister and J. E. Singleton, to that effect. The court found as a fact that no minutes were kept, and admitted the evidence only upon this having been made to appear. The allegations of the answer are broad enough to justify this testimony, and we do not see why the same was not competent. Plaintiff was attacking the instruments for invalidity alleged by him, and the defendants should, in reply to this attack, be permitted to show the existence of the facts essential to the legality of the instruments, as alleged in the answer, that is, they should be allowed to show the true facts in regard to the seal, and why they used what purported to be a private seal, adopted at a regular meeting by the corporation called for the purpose of doing so, the sufficient reason being that the common or corporate seal had been lost or broken so that it could not be used, and that the one which was used as a substitute for it had the authority and official sanction of the company for its use. One of the enumerated powers of a corporation, as set forth in our statute, is "To make, use, and alter a common seal." C. S., 1126; Womack's Law of Private Corporations (Ed. of 1904), sec. 95. If a resolution authorizing the use of the private seal as that of the corporation was adopted, the failure to enter it on the minutes of the meeting at which it was passed does not affect its validity, and such corporate act can be proved by parol. Womack, *supra,* p. 221, sec. 436, citing *Handley v. Stutz,* 139 U. S., 417 (35 L. Ed., p. 227). See, also, *Clark v. Hodge,* 116 N. C., 761. No minutes having been kept, there was no way to show the authorization of the instruments except by parol, and no way to show the adoption of the word "seal" except in the same way. It was held by the Court in *Handley v. Stutz, supra,* that "a failure to enter a resolution of stockholders of a corporation on its book at the time it was adopted does not affect its validity; such corporate act can be proved by parol. Proceedings of a meeting of stockholders are binding upon those participating in it although it was held without call or notice, and outside of the State where the company was incorporated, there being no statutory restriction of corporate action to the limits of the State." The evidence as to what occurred before the notary does not contradict the probates, in any respect whatever, but only shows more clearly what the probates state, that the execution of the instruments was acknowledged as the act and deed of the Farmers Union Supply Company. This evidence was competent. There is a distinction between proving a fact which has been put in writing and proving the writing itself. Because a fact has been described in a writing does

not exclude other proof of the fact. For example, the proceedings of a corporate meeting of stockholders or directors are facts, and they may be proved by oral testimony where they are not so recorded. McKelvey on Evidence, p. 428.

The two exceptions, Nos. 9 and 11, relate to the admission of testimony by the court as to the probate of the instruments in question before the notaries. It will be observed that exception No. 9 was taken to the refusal of the court to strike out the answer to a question, and exception No. 11 is to permitting the witness to answer that he and the secretary appeared before the notary and acknowledged the instrument as the act and deed of the Farmers Union Supply Company, pursuant to resolutions of the directors of the supply company to that effect. This evidence does not contradict the probates at all, as it appears from the probates and the deed that the acknowledgment was made in behalf of the grantor, the Farmers Union Supply Company. The fact that the officers appeared before the notary pursuant to resolutions to that end has already been discussed, the evidence of it being competent in view of the fact that no written record was made of the resolutions. *Starke v. Etheridge, supra; Quinnerly v. Quinnerly, supra; Wynn v. Small, supra; Handley v. Stutz, supra.*

The exceptions Nos. 14 and 15 relate to the issues. It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. C. S., 584, and cases cited; *Potato Co. v. Jeanette,* 174 N. C., at p. 240. It is apparent that the two issues tendered by the plaintiff do not cover the controversy, containing, as it does, three separate causes of action. Plaintiff does not except to the issues submitted by the court, but his exception (No. 15) is directed only to the submission of the third issue. Clearly the third issue was proper. As said in the *Jeanette case, supra,* issues are properly framed upon the pleadings, and certainly the allegations of the answer called for the third issue, and there was ample testimony for the jury as to it. It will be found that the instructions of the court to the jury upon the various issues thoroughly cover the point sought to be raised by the plaintiff in the two issues tendered by him.

Exception No. 16 is taken to the refusal of the court, as plaintiff contends, to give to the jury certain requests for instructions. It is settled that the judge is not bound to follow the exact language of a prayer for instructions, and it is sufficient if he gives the substance of the same without weakening its effect. *S. v. Kincaid,* 183 N. C., 710. The judge substantially gave the first prayer for instructions in his general charge to the jury, and the second prayer for instructions could not have been given in the form requested. The evidence is that the

stockholders and directors were all present at the meetings when the executions of the instruments were authorized and the "seal" adopted. If this is true, it was a question for the jury. The evidence on this point seems to have been all one way and in favor of the defendants. No notice, though given, was necessary, because all were there. Womack on Corporations (1904), sec. 420, p. 212.

We have carefully read and examined the charge of the learned judge who presided at the trial, and find that it fully covered the law as to all the material questions presented in the case, and is unexceptionable. It seems that some objection was taken to the statement of contentions by the judge, and that further exception was taken to detached portions of the charge. Exceptions of this kind are not favored, and are not considered by this Court. The charge should be viewed as a whole, as we have often held, and a statement of contentions, if deemed by appellant to be erroneous, should be called to the attention of the court in due time, so that proper correction may be made. *Aman v. Lumber Co.*, 160 N. C., 369; *S. v. Montgomery,* 183 N. C., 747.

It appears that the Basnight mortgage was not in fact paid, although marked canceled on the record, and the jury properly found, upon the evidence, that the cancellation was unauthorized. In this connection we may refer again to the probate of this mortgage, which, if not originally valid when it was taken and the mortgage was registered, has been cured of the defect by C. S., 3354. But we do not mean to imply that it was originally defective. And further, it may be said that defects, if any, in the probate and registration of the deeds in dispute appear to be cured by C. S., ch. 65, art. 4, secs. 3329-3366.

As to the Basnight mortgage, the only objection appears to be that it was canceled of record on 22 March, 1918, but we also have considered and discussed the validity of the mortgage and the probate of it. The mortgage appears upon its face, when it is read and considered with the language of the probate, to have been executed by J. T. McAllister, as president, and R. D. Harrison, as secretary and treasurer, not for themselves but for and in behalf of the Farmers Union Supply Company, and that it was the deed of the latter and so executed and probated.

The case was well tried by the learned judge, with the assistance of an intelligent jury, and of counsel whose briefs and arguments in this Court fully attest their ability to represent and safeguard the interests of the respective parties in every respect, and after careful examination of the entire case, and especially with reference to the exceptions and assignments of error, no error has been found in the record.

No error.

STERLING MILLS, INC., v. SAGINAW MILLING COMPANY.

(Filed 6 December, 1922.)

1. **Attachment—Interpleader—Banks and Banking—Bills and Notes—Negotiable Instruments—Burden of Proof.**

   Where the forwarding bank intervenes and claims title to a draft of a nonresident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached, and upon its evidence tending to show *prima facie* that it was the purchaser of the draft for value, and is a holder thereof in due course, without notice of any defenses or equities, an issue of fact is raised for the determination of the jury. C. S., 3040.

2. **Same—Evidence—Questions for Jury—Trials—Instructions—Verdict Directing.**

   Where the forwarding bank of a nonresident debtor intervenes in the creditor's action, and claims the proceeds of a draft in the hands of a local bank, in attachment proceedings, and the intervener's officer testifies positively that the intervener was a purchaser for value, in due course, without notice of any infirmity, etc., in the paper, his further testimony, on cross-examination, as to general dealings with the attachment debtor, crediting it with drafts, and charging them back if not paid on presentation, raise the question of the intent between the forwarding bank and its depositor, as to whether the paid draft in question was acquired by the intervener in due course, C. S., 3040, or whether it had accepted the draft as a mere agency for collection, in which latter event the proceeds of the draft would be subject to attachment in the hands of the local bank; and on this conflicting evidence a direction of the verdict against the intervener is reversible error.

APPEAL by intervener from *Ray, J.*, at March Term, 1922, of IREDELL.

Plaintiff, a North Carolina corporation, with its principal place of business at Statesville, N. C., having a cause of action against the Saginaw Milling Company, a foreign corporation, instituted this suit in the Superior Court of Iredell County, and sought to obtain service upon the defendant by attaching the proceeds of a draft in the hands of the Peoples Loan and Savings Bank, Statesville, N. C., alleging that said funds belonged to the defendant.

Thereafter, on 19 August, 1921, the Second National Bank of Saginaw, Michigan, was allowed to intervene and to set up its claim of title to the proceeds of said draft.

Upon the issue thus raised there was a verdict and judgment in favor of the plaintiff. The defendant made no appearance and filed no answer. Intervener appealed.

Dorman Thompson for plaintiff.
John A. Scott, Jr., for intervener.

STACY, J. The burden was on the intervener to make good its claim and to show title to the property attached. *Moon v. Milling Co.,* 176 N. C., 410. In order to meet this requirement, the intervening bank offered evidence tending to show, *prima facie* at least, that it was a purchaser of the draft in question for value, and a holder of the same in due course, without notice of any defenses or equities. C. S., 3040; 1 Dan. on Neg. Inst., secs. 812 and 814 a; *Jackson v. Love,* 82 N. C., 405; *Hodge v. Smith,* 130 Wis., 326; *Scoville v. Landon,* 50 N. Y., 686.

After offering the draft in evidence, due execution of which was admitted by the plaintiff, E. W. Glynn, cashier of the intervening bank, testified as follows: "The draft was in possession of the Second National Bank with bill of lading attached; it belonged to the Second National Bank of Saginaw; the proceeds of payment of said draft belonged to the Second National Bank of Saginaw, Michigan. The Saginaw Milling Company did not own any interest in the draft when forwarded by the Second National Bank of Saginaw, and does not own any interest in the money paid for said draft by the Statesville Flour Mills, and later attached by the Sterling Mills. The Second National Bank of Saginaw does not owe the Sterling Mills anything. The draft was in the possession of the Second National Bank of Saginaw as owner and not as agent of the Saginaw Milling Company. It was forwarded by the Second National Bank of Saginaw to the Peoples Loan and Savings Bank of Statesville for presentment and payment as our property, owned by our bank, and not as agent of the Saginaw Milling Company."

On cross-examination, in reply to the question, "Does not your bank habitually credit the account of the Saginaw Milling Company with the amount of drafts on customers of said Saginaw Milling Company, giving permission to the Saginaw Milling Company to draw against such credits, and then charge up the Saginaw Milling Company with such papers as are not paid on presentation?" the witness answered, "Yes, that is, we collect back from Saginaw Milling Company such drafts as are returned to us refused. In this case, however, the draft was paid."

At the close of the evidence the court charged the jury: "If you believe the testimony in this case, you will answer the first issue 'No.'" Exception by intervener.

We think the evidence upon the issue as to whether the intervening bank was an agent for collecting the draft in question or a purchaser thereof for value, was sufficiently equivocal, if not contradictory, to require a finding by the jury, and that his Honor's charge, which virtually amounted to a direction of the verdict, was erroneous.

If the intervener held the draft as a purchaser for value, the proceeds derived therefrom could not be attached in the hands of the Peoples Loan and Savings Bank as the property of the Saginaw Milling Company; but, on the other hand, if the intervening bank acted merely as a collecting agent, the proceeds would belong to the defendant, and consequently they would be subject to attachment in the hands of the garnishee bank. *Worth Co. v. Feed Co.*, 172 N. C., 335; *Markham-Stephens Co. v. Richmond Co.*, 177 N. C., 364. Upon this point, the real determinative question is as to the intention of the parties; and this is a question of fact to be ascertained by the jury, where the evidence is conflicting. *Worth Co. v. Feed Co., supra.*

The case at bar is distinguished from *Temple v. LaBerge, ante,* 252, for there the testimony was susceptible of only one interpretation or of but a single conclusion. Here the evidence is conflicting. It may be sufficient to rebut the *prima facie* case, but this is a matter to be submitted to the jury under proper instructions from the court. *Currie v. R. R.*, 156 N. C., 426.

For the error, as indicated, in directing a verdict on evidence from which different inferences may be drawn, we are of opinion that the cause must be submitted to another jury, and it is so ordered.

New trial.

BURKE COUNTY ROAD COMMISSIONERS v. COMMISSIONERS OF BURKE COUNTY.

(Filed 6 December, 1922.)

1. Roads and Highways—County Commissioners—Highway Commissioners—Bonds—Proceeds—Funds—Statutes.

The commissioners of a certain county sold bonds, under the authority of a statute, for the completion of the State highway through the county, and for certain designated purposes, with later enactment reciting that the costs of the State highway had been more than was intimated, and there were no available funds to pay the county quota for such expenditure, and provided for an additional sale of bonds, which was made for that and other specified purposes. Thereafter a county board of road commissioners was established by legislative enactment, by which complete control over the roads was given it, with direction that all road moneys for the purposes theretofore arising from taxation or sale of road bonds shall be turned over and belong to them by virtue of their office. It was made to appear that the county commissioners had borrowed money from certain banks in anticipation of the proceeds of the sale of the bonds, and for the purposes specified in the act, which was recognized by later legislation as valid, and *it was held*, in a settlement between the

two boards, the county commissioners were entitled to a credit of such amounts as had been paid by it for the designated purposes in the act, including such as had been borrowed from the banks for such purposes, but not for any amount that may have been used by it for general county purposes.

2. Same.

In an action by a county road commission to compel the county commissioners to pay over to the plaintiff board, under the provisions of a statute, the money received from the sale of bonds for road purposes, authorized separately under the provisions of two statutes, and thereunder the defendant board, before the establishment of the plaintiff board, had expended moneys for the purposes designated in the statutes, the mere fact that these two statutes, under which the defendant board had acted, had been subsequently consolidated by statute, recognizing the designated purposes for which the bonds had been issued by the defendant board, but for the stated purpose of avoiding "confusion and complications" from the different maturity dates of the separate issues, and the different interest rates of each, does not affect the question as to the credit the defendant was entitled to, in its settlement with the plaintiff board, for the money expended for the designated purposes.

3. Same—Mandamus.

When the act of turning over by the county commissioners of certain funds arising from the sale of road bonds to a county board of road commissioners, entitled under the provisions of the act of its creation to receive them, is merely ministerial, *mandamus* will lie (*Board of Education v. Comrs.*, 150 N. C., 123), and it is not always essential to the maintenance of this remedy that it should be made to appear that the fund is still on hand, particularly where the question is one of bookkeeping between the parties to the action.

4. Same—Findings—Appeal and Error.

On appeal from a writ of mandamus issued by the Superior Court to the defendant board of county commissioners to compel them to pay over to the county board of road commissioners the money on hand from the sale of road bonds, etc., as required by statute, it did not appear by the evidence to what extent the defendant had paid out moneys for certain purposes, authorized by the statutes, and to which it was entitled to a credit, and the case was remanded in order that it may be determined upon proper evidence how much of the proceeds of the bond issue, if any, has been expended contrary to the provisions of the statute affecting the question, with direction that a peremptory or alternate writ of *mandamus* issue as the facts may then appear.

APPEAL by defendant from *Ray, J.*, at chambers, 3 July, 1922, from BURKE.

Civil action to obtain a *mandamus*, heard by consent.

The action is instituted by the Burke County Road Commission, established by Public-Local Laws of 1921, ch. 64, to compel the defendant board to turn over to them the proceeds of certain bonds for road purposes alleged to belong to plaintiff commission under and by virtue

of said statute and other acts appertaining to the subject. There was denial of liability or obligation on part of defendants. Jury trial being waived, cause was heard by the court, and judgment entered that a peremptory writ issue commanding defendant board to turn over to plaintiff $25,000, the proceeds of certain bonds which had been sold by defendant and illegally diverted and applied to other purposes of the county. Defendant excepted and appealed.

John M. Mull and Avery & Ervin for plaintiff.
Frank C. Patton, S. J. Ervin, and S. J. Ervin, Jr., for defendants.

HOKE, J. It appears that plaintiff board was constituted by Public-Local Laws of 1921, ch. 64, and given exclusive control of the laying off, establishing, building, altering, and repairing and maintaining all of the public roads of Burke County, and of the purchase of all the necessary equipment and material therefor. And in section 12 of the act it is provided in general terms that all road moneys for the designated purposes arising by taxation or sale of road bonds, etc., shall be turned over and belong to them by virtue of their office, etc.

It further appears that the fund, or a portion of it, the subject-matter of this controversy, arose from the sale of $65,000 road bonds of said county by the defendant board, and the proceeds of which and the disposition of same are affected and controlled by Public-Local Laws of 1921, ch. 213; Public-Local Laws, Extra Session, 1920, ch. 116, and Public-Local Laws of 1919, ch. 368. Under the last statute the commissioners of Burke County were authorized to issue and sell $80,000 of coupon bonds, payable at specified time and rate of interest, and in section 2 of the act it is provided that the proceeds of said bonds, when sold, shall be applied exclusively to the completion of the State highway through Burke County, including the bridges thereon, and to the purchase of a site and the erection thereon for a new home for the aged and infirm; and further, to the building of bridges and construction and repair of roads in certain remote townships of the county, this last purpose, however, being on conditions which do not seem to have been complied with, and the facts concerning them, therefore, in no way affect the issues in the present case. Under this statute $40,000 of the proposed issue were shortly thereafter sold, and the proceeds have been disbursed by commissioners without exception noted.

In Public-Local Laws, Extra Session, 1920, ch. 116, after reciting that the costs of the State highway in Burke County had been more than was estimated, and that there were no funds available to pay the county quota for such expenditure, it is provided that the board of commissioners of Burke County shall sell an additional $25,000 of road bonds

of specified date and interest rate, and in section 2 of the statute the proceeds from this $25,000 bond sale are directed to be applied as follows:

"That the proceeds of said bonds, when sold, shall be applied by said commissioners exclusively to the completion of the State highway through Burke County, including the bridges on said highway, and to the completion of the links of road beginning at a point on said State highway at Jones Berry's residence and running through the town of Rutherford College to the Johnson Bridge on the Catawba River, and the link of road from the town of Drexel to the said Catawba River, Huffman Bridge, and the balance of the funds as may remain of said $25,000 to be used to complete the Shelby road in Lower Fork Township of Burke County leading to the Three County Corner."

And Public-Local Laws of 1921, ch. 213, after reciting that $40,000 of the bonds as provided by the act of 1919 were still unissued, and that there was also the additional issue of $25,000 authorized by Public-Local Laws of 1920, ch. 116, and that these two bond issues, to mature at different times and bearing different rates of interest, were not unlikely to produce "confusion and complications," provides that the two statutes be consolidated and amended to read as follows: That the defendant board could issue $65,000 of road bonds, maturing at specified time, and to bear interest at a rate not to exceed 6 per cent, and directs that the proceeds of this $65,000 issue be applied as follows:

"That the proceeds of sale of said bonds, when issued, shall be applied exclusively to the payment of the debts now due the First National Bank of Hickory and the First National Bank of Morganton, which said debts were incurred in carrying out the provisions of said acts, and especially the completion of the State highway, and to the purposes mentioned and required in said chapter three hundred and sixty-eight, Public-Local Laws one thousand nine hundred and nineteen, and chapter one hundred and sixteen, Public-Local Laws one thousand nine hundred and twenty, Extra Session, as aforesaid, and to no other."

Under these various statutes the county commissioners of Burke had the power of sale of these bonds and the disposition of the proceeds until the enactment of chapter 64, creating plaintiff board, but while they had such power they could only apply the fund to the purposes designated in the statutes applicable and to none other. In the $40,000 issued under Public-Local Laws 1919, ch. 368, these purposes were "the completion of the State highway through Burke County, and the purchase of a site and erection of a new home for the aged and infirm." And under chapter 116, *supra,* Extra Session 1920, the purposes were "to the completion of the State highway through Burke County, including the bridges thereon, to the completion of two specified links therein,

and the remainder to the completion of the Shelby road in Lower Fork Township leading to the Three County Corner." "Exclusively to these purposes" being the language used in both statutes. And if defendant, prior to the constitution of plaintiff board, has paid out these funds for the purposes designated and none other, such payments will be upheld and defendants protected therein; but if, and to the extent that defendants have diverted these proceeds to general county or other purposes, such payments are without warrant of law, and same must be restored to the proper fund as provided and designated by the statutes under which same were raised. That is, the $40,000 being to complete highways and bridges, and to the procurement of a site and county home; and the $25,000 to the State highway through Burke County, including bridges, the two specified links thereof, and the remainder, if any, to the Shelby road. And we are of opinion that the subsequent act, chapter 213, *supra,* Laws 1921, by which the two former statutes were consolidated and amended did not have the effect of approving the payment out of these funds to the banks of Hickory and Morganton, regardless of the purposes for which such debts were contracted, but these payments were only authorized and approved to the extent that the money borrowed was used for the purposes as directed by the statutes, that is, to the extent that they were used for the designated purposes, they shall be recognized as valid vouchers in the distribution of these funds, and not otherwise.

Under these rulings, if the county commissioners have diverted these funds and used them for general county or other purposes, the plaintiffs are entitled to have same restored to the fund from which they have been improperly taken, and turned over to them to be used as the law directs.

And, as now advised, we think that remedy by *mandamus* is open to plaintiff. As said in *Brown v. Turner,* 70 N. C., 93, quoted with approval in *Board of Education v. Comrs.,* 150 N. C., at p. 123: *"Mandamus* will lie when an act merely ministerial is imposed by law, the relator shows a clear right and is without other adequate remedy." See *Drainage District v. Comrs.,* 174 N. C., 738. Applying the principle, we have recently approved such a proceeding to compel a defendant to turn over to the proper officials county funds admittedly on hand and withheld without lawful justification. *Tyrrell v. Holloway,* 182 N. C., 64. And well considered authorities are to the effect that it is not always essential to the maintenance of this remedy that it should be made to appear that the fund is still on hand, a principle particularly applicable where there has been a wrongful diversion of funds from one municipal purpose to another, and the question is more likely to be one of mere bookkeeping than the assertion of really antagonistic rights. *State ex rel Collector v. Dishaw,* 42 N. J., 141; *People ex rel Dannat v.*

Comptroller, 77 N. Y., 45; *People ex rel Dowing v. Stout,* 23 N. Y., 338; *Lansing v. Van Gorder,* 24 Mich., 456; *County Comrs. Pike Co. v. The State,* 11 Ill., 203.

While we are of opinion, and so hold, that plaintiff is entitled to have restored to their proper place and turned over to them all of these moneys that have been wrongfully expended contrary to the provisions of the statute, except for an amount reasonably required and intended for a site and new county home, an exception, however, that only applies to the disbursement of the $40,000 bond issue referred to and controlled by Laws of 1919, ch. 368, as recognized and approved by Laws of 1920, ch. 213, we do not think that a peremptory *mandamus* is justified in the present condition of the record for the reason that there are no facts in evidence that will enable a court to determine whether or to what extent this fund, or any of it, has been misapplied. True, the defendant avers under oath that it has all been expended under proper statutory authority, but in what purports to be an itemized statement, the great bulk of these expenditures is for money repaid to banks, but whether raised from sale of these bonds or borrowed in anticipation of their sale does not appear. And this verified account only shows an expenditure of $64,803.06.

While the defendants thus fail to support their averment, we do not discover any evidence to justify the finding of fact that at least $25,000 is available for application to these road projects, nor, as stated, to enable the court to determine what amount the defendants withhold or have wrongfully misapplied. We must hold, therefore, that the judgment for a peremptory *mandamus,* together with the finding that $25,000 is now available to be applied to these projects, be and the same is hereby set aside, and the cause is remanded to the end that it shall be ascertained and determined how the defendant had disposed of this $65,000 bond issue, and whether any and what part of same has been expended contrary to the provisions of the statutes affecting the question. And upon such findings that a peremptory or alternative writ of *mandamus* issue as the facts may then appear.

Judgment set aside, and cause remanded for further proceedings.

TRUSTEES OF LEES-McRAE INSTITUTE v. AVERY COUNTY.

(Filed 6 December, 1922.)

1. Constitutional Law—Taxation—Exemptions—Statutes.

The fundamental principle of our Constitution, as to the taxing of property, is that all property shall be taxed uniformly so as to equalize its burdens, except that which is either expressly exempted by the Constitution itself or by the Legislature within the limits prescribed by the Constitution; and the courts will strictly construe such exemptions, and resolve all doubts in favor of liability to taxation.

2. Same—Religious Purposes—Schools—Education—Lands—Rentals.

An institution created by statute to provide for the Christian education of boys and girls in a certain locality, and to do other institutional work, in which its property is exempt from taxation as long as it shall be used for "church, school, or charitable purposes," does not include within its tax exempting terms, either under its charter or under the general law relating to the subject, Laws 1921, ch. 38, sec. 72 (4); C. S., 7768, lands from which the rentals are applied to educational purposes alone; in this case, a tract of land three miles distant from that upon which the corporation conducts its operations, a portion of which has been cleared and rented out for a part of the crop, and also used for grazing purposes.

APPEAL by plaintiffs from *McElroy, J.*, at October Term, 1922, of AVERY.

This is a controversy without action. The plaintiffs sought to recover from the defendant $180 taxes, paid under protest, for the year 1921. The judge found the facts and rendered judgment as follows: "The plaintiff Lees-McRae Institute is located on a tract of land at or near Plumtree, in the county of Avery, on which the school is conducted, and the corporation is the owner of an additional tract of land located about three miles distant from said school; the said tract contains about 1,150 acres, and it had not been assessed for taxes until the year 1921, when the county commissioners of Avery County caused a levy of $150 to be assessed against said 1,150 acres of land; all the rents and profits from said 1,150-acre tract have been applied exclusively to educational purposes at said institute, and for no other purpose, and said property of 1,150 acres of land was not purchased and has not been held for the purpose of speculation."

"It is now considered, ordered, and adjudged by the court that the said 1,150-acre tract is not exempt from taxation, and the tax assessed and collected was authorized by law at the time said property was assessed for taxation." The plaintiffs appealed.

Love & Lowe for plaintiffs.

J. W. Ragland for defendant.

CLARK, C. J. The only question presented is as to the correctness of the ruling by the court that the property in question is liable to taxation. The plaintiff is a corporation, created by act of General Assembly, ratified 25 February, 1907. "To establish an institution to provide Christian education and manual training for boys and girls, and do other institutional work in the mountains of North Carolina." Section 7 of the act provides: "So long as the property owned, or to be owned, by such corporation shall be used for church, school, or charitable purposes the same shall be exempt from all taxes, State, county, or municipal." The plaintiff claimed exemption from taxation under this section of its charter and general laws, 1921 ch. 38, sec. 72, subsec. 4, which provides that "buildings, with the land they actually occupy wholly devoted to educational purposes, belonging to and actually and exclusively occupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other corporate institutions of learning, together with such additional adjacent land owned by such churches, libraries, and educational institutions as may be reasonably necessary for the convenient use of such buildings, respectively, and also the buildings thereon used as residences by the officers or instructors of such educational institutions," shall be exempt from taxation.

The 1,150 acres is located a distance of 3 miles from the school property. About 100 acres of this have been cleared and put in cultivation, a part of which has been rented for part of the crops, and the other portion of said cleared land has been used for grazing purposes. The rents and profits from said land have been applied exclusively for educational purposes and none other.

The ruling of his Honor is correct. The principle governing this case is well settled by our authorities. In *United Brethren v. Comrs.*, 115 N. C., 490, it is said: "The general rule is liability to taxation, and that all property shall contribute its share to the support of the Government which protects it. Exemption from taxation is exceptional. It needs no citation from reiterated precedents that such exemptions should be strictly construed, and if we have any doubts (which we have not) they should be resolved in favor of liability to taxation. *R. R. v. Allsbrook*, 110 N. C., 139." In that case it was said that the fundamental principle of our Constitution is that all property shall be taxed uniformly except that which is either expressly exempted by the Constitution itself, or as to which the power of exemption by the Legislature is left discretionary within the limits prescribed by the Constitution, citing *Redmond v. Comrs.*, 106 N. C., 122.

It certainly cannot be said that a tract of land, located three miles from the property actually used for the school (which is not assessed for

taxes), almost all of which is in forest, or at least not cleared, and that portion of it which has been cleared is rented out for a part of the crops and used for grazing purposes, comes within the definition or meaning of the language of the law which defines and describes property exempt from taxation, under the rules laid down in *United Brethren v. Comrs., supra,* in which case it was pointed out that while the Legislature had exempted property whose rental was applied exclusively to religious, charitable, or benevolent institutions, it had not extended such exemption to property whose rental is applied to educational purposes. This distinction is retained in the present statute, C. S., 7768, which provides: "No property whatever held or used for investment, speculation, or rent shall be exempt other than bonds of this State and of the United States Government, unless said rent, or the interest on or income from such investments shall be used exclusively for religious, charitable, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions."

In *Davis v. Salisbury,* 161 N. C., 56, *Hoke, J.,* fully discusses the question here presented, reviewing the case above cited, and the whole matter is so clearly stated with citation of authorities by *Judge Hoke* that nothing is left to be added. The whole subject was again reviewed by *Hoke, J.,* in *Southern Assembly v. Palmer,* 166 N. C., 75.

The fundamental principle of equality and uniformity in the taxation of property in the Constitution is based upon the sound principle that whenever property, which is not expressly exempted by the Constitution from taxation or within the discretionary authority given the Legislature to exempt property is left untaxed, it unjustly adds to the taxes of those who already are paying their fair share of taxation, the amount of taxes which the property thus illegally exempted should rightly bear.

The decision of his Honor must be

Affirmed.

J. J. EATON ET AL. v. MOORESVILLE GRADED SCHOOL.

(Filed 6 December, 1922.)

Judgment—Estoppel—Parties—School Districts—Taxation—Bonds—Injunction.

The taxpayers of a school district, except where some special private interest is shown, are real parties in interest in a suit by a resident and taxpayer of the district to enjoin the levy and collection of a special tax for school purposes therein; and where the final judgment of the Superior Court, unappealed from, has been rendered against the plaintiff in such

suit, without suggestion of fraud or collusion, the subject-matter is *res adjudicata* as to all the taxpayers and residents of the district, whether they have been made nominal parties to the suit or otherwise, and they are estopped from independent suits concerning the matters adjudicated.

APPEAL by plaintiffs from *Bryson, J.*, at May Term, 1922, of DAVIE.

Civil action to restrain the defendants from levying and collecting a special school tax in Mocksville School District, and to test the validity of a proposed bond issue, upon the alleged ground that the election, under which said tax and bonds were approved by a majority of the qualified voters resident within the district, was illegally held, and is therefore void.

From an order denying the application for injunctive relief, plaintiffs appealed.

E. H. Morris for plaintiffs.
A. T. Grant, Jr., for defendants.

STACY, J. The election in question was held on 6 September, 1921. A few days thereafter, Dr. A. Z. Taylor, a resident and taxpayer of the Mocksville School District, instituted an action to enjoin the issuance of the bonds and the levy of the special tax, mentioned in the present complaint, and for the purpose of having the election here contested declared illegal and void. The purposes of the Taylor suit were identical with those in the present case. There was a final judgment rendered in the Taylor case declaring the election to be legal and valid in all respects, and directing the proper authorities to proceed in the premises in accordance with the results of said election. Notice of appeal to the Supreme Court was duly entered of record, but was not perfected, and later it was abandoned.

Defendants contend that the matters now sought to be litigated are *res adjudicata,* by virtue of the judgment rendered in the Taylor case. This was the holding of the court below; and, upon this phase of the controversy, the following finding was incorporated in the judgment.

"The court further finds as a fact that the plaintiff in the former action, and the plaintiffs in this action reside within the territory embraced in said school district. That one of the plaintiffs in the present action was attorney of record for the plaintiff in the first action, and is attorney of record in this proceeding; that the bondsmen in both actions are the same; that the relief sought is identical. That the creation of the school district, the issuance of the bonds, and the levying of taxes affected all persons within said school boundary, and thus created a community of interest or privity, as between them, touching such matters as might

be involved in the issuance of bonds, and levying of taxes within said boundary, and for the purposes complained of by the creation thereof."

Except where some special private interest is shown, it seems to be established by the clear weight of authority that, in the absence of fraud or collusion, a final judgment on the merits rendered in a suit by a taxpayer (usually brought on behalf of himself and others similarly situated), involving a matter of general interest to the public, and instituted against a governmental body, or local board, which, in its official capacity, represents the citizens and taxpayers in the territory affected, is binding on all the residents of the district, if adverse to the plaintiff, and all may take advantage of it if the judgment be otherwise. *Bear v. Comrs.*, 122 N. C., 434; *Clark v. Wolf*, 29 Iowa, 197; *Lyman v. Faris*, 53 Iowa, 498; *Harman v. Auditor*, 123 Ill., 122; *Sauls v. Freeman*, 24 Fla., 209; *S. v. Rainey*, 74 Mo., 229; *Gallaher v. City of Moundsville*, 34 W. Va., 730; *Stallcup v. Tacoma*, 13 Wash., 141; *Montgomery City Council v. Walker*, 154 Ala., 242; *Henderson County v. Henderson Bridge Co.*, 105 A. S. R. (Ky.), 197, and note; *Haese v. Heitzeg*, 159 Cal., 569; 15 R. C. L., 1035.

The rule is thus stated in Freeman on Judgments, sec. 178: "A judgment against a county, or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter though they are not parties to the suit. . . . Every taxpayer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levy and endeavor to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor relitigate any of the questions which were or which could have been litigated in the original action against the county. If in an action against the officers of a county a tax is determined to be valid, a taxpayer of the county cannot afterwards maintain suit to enjoin the collection of such tax. An action having been brought by certain taxpayers of a town to enjoin the issue of bonds, a judgment against them was held to be conclusive upon all other taxpayers. A judgment against county commissioners, directing that a writ of mandate issue requiring them to assemble and call an election on the question of a change of the county site, is conclusive on all citizens of the county, because the commissioners are representatives of the county in the matter of their duties under the statute; and though they failed to avail themselves of any legal defense to the writ, the people of the county are concluded by the judgment." To like effect is Black on Judgments, sec. 584.

The principle stated in these sections, and fully supported by the authorities cited in the texts, is that a judgment against a governmental body, or in its favor, affecting a matter of general interest to all the

people in the territory, is binding not only on the official representatives, but on all the citizens of the territory, though not made parties plaintiff or defendant by name. In such cases the people themselves are regarded as the real parties in interest; and the matters settled therein may not again be litigated, in the absence of a showing of some special interest or private right. If this were not so, each citizen, and perhaps each citizen of each generation of citizens, would be at liberty to commence an action and to litigate the question for himself. Hence, the result might be an endless chain of suits. *Greenberg v. Chicago,* 256 Ill., 213; 49 L. R. A. (N. S.), and note; *El Reno v. Cleveland-Trinidad Paving Co.,* 25 Okla., 648; 27 L. R. A. (N. S.), 650.

Norton, J., in *State v. Rainey,* 74 Mo., 235, states the rule as follows: "It was there held (speaking of *Clark v. Wolf,* 29 Iowa, 197), that a judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof though not made parties defendant by name. This, we think, is so both on principle and authority, for in suits of the character mentioned the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on as a taxpayer to contribute his proper proportion to liquidate the demand which a judgment may establish."

Applying the above principles to the facts in hand, we agree with the following conclusion of the trial court, as expressed in the final paragraph of the judgment: "Upon the foregoing findings of fact, the court concludes, as a question of law, that these matters and things, the subject of the present action, have been adjudicated in the former action, in which final judgment has been entered, and that, on account of the community or privity of interests existing between the plaintiff in the former action, and the plaintiffs in the present action, the said judgment in the former action is an estoppel as to the present action, the same issues being raised therein, the same rights adjudicated, and the same interests affected."

The record presents no error, and this will be certified.

Affirmed.

J. J. HECKERT ET AL. v. ABERDEEN GRADED SCHOOL.

(Filed 13 December, 1922.)

1. Schools—School Districts—Consolidation—Nontax Territory—Election—Taxation Bonds—Injunction.

An exception to the issuance of bonds for school purposes by a district consolidated of special tax and nonspecial tax territory, on the ground that the question of taxation had not been separately submitted to the voters of the nontax territory, is untenable, when it appears from the record, on appeal, that the votes cast in the nontax territory had been separately counted, and found to be in favor of the proposition to issue the bonds, sought to be enjoined in the plaintiff's suit. *Board of Education v. Bray, post,* 484; *Barnes v. Comrs., ante,* 325.

2. Same—Notice of Election—Publication—Appeal and Error.

The issuance and sale of bonds for school purposes by a school district may not be successfully attacked on the ground that the notice of election was insufficient, when it is properly made to appear that, in accordance with the order of the board of commissioners, it had been previously advertised for four successive weeks in a newspaper published in the district; personal notice had been mailed to the individual electors therein; that wide publicity had been given it; that fair opportunity had been given the electors to cast their votes, and that practically a full registration had been obtained, which resulted in an overwhelming vote in favor of the proposition submitted.

APPEAL by plaintiffs from *Brock, J.,* at chambers in Wadesboro, 30 November, 1922, from MOORE.

Civil action to restrain the defendants from issuing and offering for sale certain school bonds, upon the alleged ground that the elections, under which the district in question was enlarged and the bonds approved by a majority of the qualified voters resident within the enlarged district, were illegally held, and are therefore void.

From an order denying the application for relief, plaintiffs appealed.

J. L. Morehead for plaintiffs.
U. L. Spence for defendants.

STACY, J. On 5 June, 1922, the trustees of the Aberdeen Graded School District petitioned the board of education and board of commissioners of Moore County to enlarge the boundaries of said district and to include therein certain contiguous territory, which embraced Pine Bluff Graded School District and other territory, in which there was not levied at that time any special tax for schools. Pursuant to this petition, an election was ordered and held on 11 July, 1922, in the territory proposed to be annexed; that is, in the Pine Bluff district and in

the nonspecial tax territory, and at said election a majority of the qualified voters resident in the territory to be added voted in favor of the enlargement. C. S., 5478, and C. S., 5530.

After the result of the election had been declared by the board of commissioners, the trustees of the Aberdeen Graded School District petitioned for an election for the purpose of issuing $75,000 of school bonds of the enlarged district. This election was duly ordered to be held on 12 September, 1922, and at said election 180 out of 223 qualified voters voted in favor of the issuance of the bonds, and 10 against it. This was comparatively a large vote out of practically a full registration.

At both of these elections a new registration of the voters was ordered for the territory voting at said elections. Notice of the new registration for the election of 11 July, 1922, was first published on 5 June, 1922, and the registration books were kept open from 8 June, 1922, to 1 July, 1922. For the election of 12 September, 1922, the first notice of the new registration was published on 11 August, 1922, and the registration books were kept open from 10 August, 1922, to 2 September, 1922.

Plaintiffs contend that the election for the enlargement of the Aberdeen Graded School District was invalid for the reason that the voters of the Pine Bluff School District and the nonspecial tax territory, both being included in the addition, were not each given the opportunity of voting separately upon the proposed enlargement, but that such vote was taken in the entire new territory as a whole.

Without suggesting any merit for this contention, we think it becomes academic in the face of an affirmative showing, as appears from the record, that a majority of the qualified voters resident in the Pine Bluff District and the original nonspecial tax territory, counting the votes cast in each separately, voted in favor of both propositions in both elections. *Board of Education v. Bray, post,* 484; *Barnes v. Comrs., ante,* 325.

The second contention of the plaintiffs is that the notices given in regard to the new registration were insufficient. Notice of each election was duly posted and published in the *Sandhill Citizen,* a newspaper published in the district, for four successive weeks, as required by the order of the board of commissioners; and, in addition thereto, notices in the form of letters were mailed to each of the voters, and a full and free expression had in both elections. Wide publicity was given throughout the district in both elections, and, as a result, a large majority cast their ballots in favor of the enlargement of the district, and the issuance of the bonds. We think this objection must be overruled on authority of *Hill v. Skinner,* 169 N. C., 405; *Briggs v. Raleigh,* 166 N. C., 149; *Younts v. Comrs.,* 151 N. C., 582. See, also, *Miller v. School District, ante,* 197.

The object of notice, both of the registration and election, is to give every qualified voter a free and fair opportunity to express his opinion on the question submitted to the people for their approval or disapproval; and there is no suggestion or allegation that this was not done in the instant case, nor that the result would have been otherwise if further notice had been given. Each voter was given personal notice by mail in addition to the published notices; and a large majority of them did register and vote. The registration books were kept open from 8 June to 1 July in the first election, and from 11 August to 2 September in the second election. "The failure to give notice for the full time before an election required by statute will not render the election invalid, if there were sufficient notice thereof and a full vote." 10 A. & E. (2 ed.), 630.

The judgment upholding the validity of the consolidation and the proposed issue of bonds must be sustained.

Affirmed.

S. P. COLE ET AL. V. THE SCHOOL COMMITTEE OF CARTHAGE GRADED SCHOOL.

(Filed 13 December, 1922.)

School Districts—Schools—Consolidation—Taxation—Bonds—Elections.

(For digest, see *Heckert v. Graded School, ante*, 475.)

APPEAL by plaintiffs from *Brock, J.*, at chambers in Wadesboro, 30 November, 1922, from MOORE.

Civil action to restrain the defendants from issuing and offering for sale certain school bonds, upon the alleged ground that the elections under which the district in question, to wit, the Carthage Graded School District, was enlarged, and the bonds approved by a majority of the qualified voters resident within the enlarged district, were illegally held, and are therefore void.

From an order denying the application for relief, plaintiffs appealed.

S. R. Hoyle for plaintiffs.
U. L. Spence for defendants.

STACY, J. The pertinent and controlling facts in the instant case are substantially similar to those in *Heckert v. Graded School, ante*, 475, just decided, and for the reasons assigned in that opinion—the two cases being governed by the same principles—it follows that his Honor below was correct in denying the plaintiffs' application for injunctive relief. The validity of the consolidation, and of the proposed issue of bonds, will be upheld.

Affirmed.

THE SKYLAND HOSIERY COMPANY v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 13 December, 1922.)

1. Evidence—Burden of Proof—Carriers of Goods—Express Companies—Loss of Shipment—Trials—Appeal and Error.

In an action against an express company to recover a certain amount of currency alleged to have been stolen while in the defendant's possession under its contract of carriage, and delivered to it in a bag also containing silver money, sealed and delivered in the same condition to the plaintiff, the consignee, and opened by the plaintiff in the absence of the defendant's agents or employees, when the loss was first discovered, the burden of proof is on the plaintiff to show this fact in issue, upon the principle that this particular fact, necessary to be proved, was peculiarly within the plaintiff's knowledge, and this principle involving an important and indispensable right, it is reversible error for the trial judge to place the burden of proof thereof upon the defendant.

2. Same.

In an action against a common carrier to recover for the loss of or damage to a shipment of goods under a contract of carriage, the plaintiff must show the delivery to the carrier; an undertaking on the carrier's part, express or implied, to transport them; a failure of the carrier to perform its contract or duty, *i. e.*, nondelivery of the goods or delivery in a damaged condition; and upon the failure of the plaintiff to thus make out a *prima facie* case the carrier is not required to offer any evidence.

3. Carriers of Goods—Express Companies—Contracts—Waiver—Limitation by Contract.

The principles of law involved in this action to recover for a part loss in the shipment of currency, etc., while in defendant company's possession under its contract of carriage, relating to a waiver by the defendant of the stipulation that demands for the alleged loss be made against the carrier in ninety days, etc., and the commencement of the suit within a year, etc., are decided in *Dixon v. Davis*, *ante*, 207; *Thigpen v. R. R.*, *ante*, 33.

APPEAL by defendant from *Lane, J.*, at the May Term, 1922, of HENDERSON.

Civil action to recover damages for failure to carry and to deliver a certain amount of money.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Was the currency in controversy delivered to the defendant at its office in Hendersonville, as alleged? Answer: 'Yes.'

"2. Was said currency delivered to the plaintiff by the defendant at its office in Flat Rock, as alleged? Answer: 'No.'

"3. Was claim in writing for the alleged loss of money presented to the agent of the defendant company by the plaintiff within 90 days from the date of the alleged loss, as provided in contract of shipment between plaintiff and defendant? Answer: 'No.'

"4. Was there a waiver of the right to have such claim made on the part of the defendant? Answer: 'Yes.'

"5. Was suit to recover for said alleged loss of money commenced within one year after said alleged loss by the plaintiff? Answer: 'No.'

"6. Was there a waiver of such agreement on the part of the defendant? Answer: 'Yes.'

"7. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$730, and 6 per cent interest from time of cause of claim, 20 September, 1919, to this date, 5 June, 1922.' "

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Smith & Arledge for plaintiff.
Michael Schenck for defendant.

STACY, J. It was alleged by the plaintiff that on 19 September, 1919, the First Bank and Trust Company of Hendersonville, N. C., delivered to the American Railway Express Company a bag of money, containing $730 in currency (treasury certificates) and $379.95 in silver coin, making a total of $1,109.95, the same being consigned to the Skyland Hosiery Company at Flat Rock, N. C. When the defendant delivered said bag to the plaintiff on the following day it was ascertained, according to the plaintiff's allegation, that the $730 in "currency" had been removed therefrom.

The defendant admitted receipt of a sealed bag, said to contain money, but denied, for want of sufficient knowledge or information, that it contained the treasury certificates, as alleged, and specifically denied that any amount of money was taken from said bag while in its possession or custody.

The defendant further alleged that the bag was delivered to the plaintiff at Flat Rock in the same condition, with the same contents, and under the same seal as when received by it at Hendersonville; that the plaintiff gave a clear receipt therefor; and that the plaintiff also failed to comply with the contract of shipment with respect to filing written notice of claim, and instituting suit within the time limits stipulated therein.

It was admitted on the trial by both parties that the bag in question was sealed when received by the defendant, and that it was also sealed

when delivered to the plaintiff. It will be noted that the issues relate only to the "currency" and not to the entire contents of the bag, as it is conceded the silver coin or specie was received by the plaintiff. With respect to the second issue, which was submitted over objection, his Honor placed the burden of proof on the defendant. In this we think there was error. In the first place, the issue, as framed, can hardly be said to arise on the pleadings. The defendant did not *allege* that it delivered the currency. It alleged that it delivered whatever it received. The plaintiff received the bag in a sealed condition, and it is admitted that no agent of the defendant was present when it was opened by the plaintiff. As to what it contained at that time is a fact peculiarly within the knowledge of the plaintiff. It is a rule of practically universal acceptance that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him the law casts the burden of proving such fact. *Re the Medea,* 179 Fed., 786. This is but a just and reasonable requirement, because the fact in issue, though it may amount to a negative in form, is capable of affirmative proof by the party who knows, or who can easily ascertain, the truth of the matter. "From the very nature of the question in dispute," says *Mr. Best,* "all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant." Principles of Evidence, sec. 274.

The rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary the burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the courts. *S. v. Falkner,* 182 N. C., 798, and cases there cited.

In an action against a common carrier to recover for the loss of or damages to a shipment of goods, the plaintiff must show: (1) delivery of the goods to the carrier; (2) an undertaking on his or its part, express or implied, to transport them; and (3) a failure to perform his or its contract or duty, *i. e.,* nondelivery of the goods or delivery in a damaged condition. 4 R. C. L., 915; 10 C. J., 372. "The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier

(as such), and their nondelivery or delivery in a damaged condition." *Mitchell v. R. R.*, 124 N. C., 239. But until this much is established, the carrier is not required to offer any evidence. *Mfg. Co. v. R. R.*, 128 N. C., 284; *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich., 51.

With respect to the remaining exceptions, those relating to the third and fifth issues, we are content to refer to the cases of *Dixon v. Davis, ante*, 207, and *Thigpen v. R. R., ante*, 33.

For the error, as indicated, the cause must be remanded for another trial.

New trial.

J. J. REDMON ET AL. v. NETHERLANDS FIRE INSURANCE COMPANY.

(Filed 13 December, 1922.)

1. Actions—Causes—Parties—Misjoinder—Pleadings—Demurrer.

The owner of certain lumber was indebted to two of the plaintiffs in a certain sum, and executed a deed in trust thereon to secure its payment, the trustee to dispose of the lumber for the payment of the debt and reconvey the balance thereof to the owner. The defendant insured the parties plaintiff, creditors of the owner, against loss by fire, payable to the trustee, and thereafter issued another policy, on the same lumber, payable to the creditors, and the person named in the deed of trust, as their interest may appear. The owner had assigned his interest in the second policy to a bank to secure a loan it had made to him, and a part of the lumber covered by the policies was destroyed by fire: *Held*, the owner, his creditors, and trustee in the deed of trust, and the bank were all variously interested, and properly united as parties plaintiffs in an action on the policy, and that the loss by fire was the common cause thereof; and that a demurrer for misjoinder of parties and causes of action was properly overruled, especially is this proper when it has been made to appear that the creditors secured by the deed of trust had acquired the interest of the owner and of the bank.

2. Same—Amendments—Statutes.

Upon the facts in this case, *it is held*, on appeal, that the trial court properly allowed the plaintiffs to amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of C. S., 547.

APPEAL by defendants from *Shaw, J.*, at chambers, 21 April, 1922, from MADISON.

The defendant demurred upon the ground that there was a misjoinder of both parties and causes of action.

Joe M. Burlinson owed the plaintiffs, J. J. Redmon and W. H. Redmon, trading and doing business as J. J. Redmon & Son, and as individuals, the sum of $20,000. Later Burlinson secured this debt by conveying to J. C. Redmon as trustee 1,250,000 feet of lumber, as set out in the complaint, said lumber to be disposed of by said trustee and sufficient of the proceeds realized therefrom to be paid by the trustee to said J. J. Redmon and W. H. Redmon to satisfy said debt of Burlinson, and the balance of said proceeds and any lumber unsold (after deducting certain necessary expense items) to be paid over and reconveyed by the trustee to said Burlinson.

On 27 July, 1921, the defendant insured J. J. Redmon & Son against the loss or destruction of said lumber by fire, issuing to them, as insured, a $20,000 fire insurance policy, payable to J. C. Redmon, trustee.

On 2 August, 1921, the defendant issued an additional policy insuring W. H. Redmon and J. J. Redmon against the loss or destruction of said lumber by fire issuing to them, as insured, a $5,000 fire insurance policy, payable to Joe M. Burlinson and J. C. Redmon, as their interest in said lumber might appear.

Prior to the issuance of either of said policies, Joe M. Burlinson was also indebted to the Bank of Yancey in the sum of $1,700, and after the issuance of the said $5,000 policy, assigned his interest in the same to said bank as collateral security for his said debt to them of $1,700. After issuance of said policies, and while both of same were in full force, 900,000 feet of said lumber was destroyed by one fire, and was valued, as plaintiffs allege in this complaint, at the sum of $27,000, and the plaintiffs further allege that defendant, by the terms of said insurance policies, became indebted to plaintiffs according to their respective rights and interests in said destroyed lumber to the extent of the face value of said policies, to wit, in the sum of $25,000.

The plaintiffs were permitted to amend their complaint to set out that the interests of the Bank of Yancey and of Joe M. Burlinson in the $5,000 policy had been acquired by J. J. and W. H. Redmon, and the demurrer was overruled. Defendant appealed.

George M. Pritchard and Guy v. Roberts for plaintiffs.
T. A. Hammond and Jones, Williams & Jones for defendant.

CLARK, C. J. The single exception is to the judgment permitting plaintiffs to amend and overruling the demurrer.

It was manifestly in furtherance of justice to permit plaintiffs to amend so as to show that plaintiffs, J. J. Redmon and W. H. Redmon, trading and doing business under the firm name of J. J. Redmon & Son,

had acquired the interest of plaintiffs, Bank of Yancey and Joe M. Burlinson, in the said $5,000 policy. This amendment eliminated all question as to misjoinder either of parties or actions, since from the very nature of the case J. C. Redmon, trustee, and W. H. and J. J. Redmon have the sole interest in the result of the action as to both of said policies.

The court, at any time before or after final judgment, can permit an amendment in furtherance of justice. C. S., 547. But irrespective of said amendment, there has been neither a misjoinder of parties or causes of action.

The Code of Civil Procedure provides that those united in interest must be joined as plaintiffs. It also provides that causes of action may be joined when they arise out of the same transaction, or transactions connected with the same subject of action. Plaintiffs are all parties united in interest, and the causes of action arise out of the same transaction, and a transaction connected with the subject of the action. *Quarry Co. v. Construction Co.*, 151 N. C., 349.

In *Pretzfelder v. Ins. Co.*, 116 N. C., 495, the plaintiff's stock of merchandise was insured in several different fire insurance companies, each of which companies, under the terms of the respective policies, was to pay its proportionate share of any loss occasioned by fire. Subsequently the goods were damaged by fire and the plaintiffs brought a single action on all of said policies, joining all of said fire insurance companies as defendants. The Court held that "there was not only no misjoinder of parties, but that the joinder was essentially proper."

In the *Pretzfelder case, supra,* the Court said that if separate suits had been brought, then the same propositions of law and the same evidence would have been to go over in five different actions, and at an expense of five times the court costs, and a needless waste of the Court's time, and with the prospect of five different juries assessing the loss at five different amounts.

The same and stronger reasons exist for joinder of parties and causes of action in this case. Both policies are issued by the same company, and to J. J. Redmon and W. H. Redmon. The same fire occasioned the loss under each policy. The same lumber is insured under each policy. Joe M. Burlinson, as debtor of J. J. Redmon and W. H. Redmon, to the extent of $20,000, and as owner of the excess of said lumber above the amount necessary to discharge said indebtedness, and not destroyed by fire, was interested in the result of each of said causes of action, the amount of lumber left to him after the extinguishment of his said debts depends upon the amount of money recovered in said causes of action. Joe M. Burlinson was also united in interest with other plaintiffs as

payee under said $5,000 policy. J. C. Redmon, as trustee, was interested in the recovery under both causes of action, in the $20,000 policy by express designation as the payee, and in the second or $5,000 policy according to his rights, and his only rights being that of trustee to sell said lumber and pay off said $20,000 debt. The Bank of Yancey was interested in the result of each of said causes of action in that it was entitled to hold the interest of Joe M. Burlinson in the $5,000 policy to secure its said debt of $1,700.

The above would be valid reasons for the joinder had not J. J. Redmon and W. H. Redmon, trading and doing business under the firm name of J. J. Redmon & Son, acquired the interest of the Bank of Yancey and of Joe M. Burlinson in said $5,000 policy, but with said interests so acquired there can be no misjoinder of parties nor of causes of action.

Affirmed.

THE BOARD OF EDUCATION OF BUNCOMBE COUNTY ET AL. v. BRAY BROTHERS COMPANY.

(Filed 13 December, 1922.)

1. School Districts—Schools—Consolidation—Statutes.

It is not necessary to the valid consolidation of nonspecial school tax districts with special school tax districts that it be approved by the voters of the nonspecial school tax districts, when the questions of taxation and bond issues are not involved, C. S., 5473, and especially so when the consolidation has been made according to the provisions of a Public-Local Law applicable to the county wherein the consolidation has been made.

2. Same—Taxation—Bonds—Nontax Territory—Elections.

Where a Public-Local Law relating to a county wherein special school tax districts and nonspecial school tax territory have been consolidated into one district does not require a separate vote by the nonspecial tax territory upon the question of special taxation and the issuance of bonds for school purposes, objection to the validity of such taxation and bonds for the failure to vote separately thereon cannot be sustained; and after such consolidation, the consolidated district is authorized to vote special tax rates for schools in the entire district, under the general law. Laws 1921, ch. 179.

3. Same.

Where special school tax districts and nonspecial school tax districts have been consolidated, and the district as a whole has voted, but separately as to each district, approving the question of special taxation for school purposes, and the election as to each, inclusive of the nontax territory, is upheld, counting the votes separately therein, the result of the election will be declared valid. C. S., 5530.

4. Same—Poll Tax—Property Tax.

Since the adoption of the constitutional amendment of 1920, a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts.

5. Constitutional Law — Contracts — Vested Rights—School Districts—Schools—Taxation.

The constitutional amendment of 1920 will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract.

APPEAL by defendant from *Lane, J.*, at November Term, 1922, of BUNCOMBE.

Controversy without action, submitted on an agreed statement of facts.

This suit is brought to determine the validity of certain school bonds, issued by the Swannanoa Consolidated Public School District pursuant to Public-Local Laws 1915, ch. 722, and authorized by an election held in said school district on 14 December, 1921. The legality of the consolidation of said district has been attacked, as well as the validity of certain special taxes, voted in said district by a majority of the qualified voters at an election held on the day above mentioned.

The district in question was established by the board of education of Buncombe County on 3 October, 1921, by consolidating one special tax district, Swannanoa, with three nonspecial tax districts, namely: Bee Tree, Pickens, and Azalia.

On the same date that the new district was formed, there was presented to the county board of education a petition of one-fourth of the freeholders in the new district; that is to say, in the new consolidated district, requesting that an election be called to ascertain the will of the people in the new district on the question of levying a special annual tax "to supplement the public school fund, which may be apportioned to said district by the county board of education," said tax to be not more than thirty cents on the $100 valuation of property and ninety cents on the poll.

On the same date, 3 October, 1921, the county board of education submitted this petition to the board of county commissioners of Buncombe County, together with a petition of the county board of education for an election in the new district, pursuant to Public-Local Laws 1915, ch. 722, on the question of issuing $50,000 of bonds of the district, and the levying of a special tax sufficient to pay the principal and interest of the same.

On the same date, 3 October, 1921, the board of county commissioners acted favorably on both petitions and ordered two elections to be held in the district on 14 December, 1921—one on the special maintenance tax and the other on the bond issue, and tax to pay the same.

In the notice which was duly given by the board of county commissioners on the question of issuing the bonds, it was recited that the bonds were to be voted and issued under the provisions of Public-Local Laws 1915, ch. 722, and the election authorizing the said special tax for maintenance was ordered under C. S., 5526. Both elections were duly carried in favor of the respective propositions by a majority of the qualified voters in said consolidated school district.

The bonds were duly advertised and sold to the defendant. The defendant now declines to complete the purchase and to pay for said bonds, contending that the election on the maintenance tax should have been held only in the former nonspecial tax territory, as provided by C. S., 5530; that is to say, the nonspecial tax territories should have been permitted to vote separately upon the question of said special tax. The defendant further contends that the bonds authorized at said election are not valid obligations of the said school district, for the reason that the consolidation of said district by the county board of education is void for the reason that the nonspecial tax territories were not permitted to vote separately. The matter was heard by his Honor, Henry P. Lane, judge of the Superior Court, and a decree was entered upholding the validity of the bonds, the validity of the special tax, and the validity of the consolidation, and from this judgment the defendant has appealed to this Court.

G. A. Thomasson and Charles N. Malone for plaintiffs.
George D. Robertson for defendant.

STACY, J., after stating the case: The defendant contends that the new Swannanoa Consolidated Public School District was not legally established in that the three nonspecial tax districts, Bee Tree, Pickens, and Azalia, were not allowed to vote on the question of consolidation. This was not necessary under Public-Local Laws 1915, ch. 722, a special statute applicable only to Buncombe County. Indeed, for the bare purpose of consolidation, no election is necessary under the general law. C. S., 5473. The county board of education in any county may, however, in its discretion, ask for an election on the question of consolidation or the new formation of a district, and submit the question of a special tax or the issuance of bonds at the same time, but it is not required to do so. C. S., 5526. *Hicks v. Comrs.*, 183 N. C., 394; *Perry v. Comrs.*, 183 N. C., 389. Of course, where the authorities elect to proceed in a

given way, under a general or special statute, they are required to observe the provisions of the law under which they are proceeding. *Proctor v. Comrs.*, 182 N. C., 56. It is only when it comes to levying special taxes and issuing bonds that more serious questions arise. *Hicks v. Comrs., supra; Perry v. Comrs., supra.*

In regard to the election for the special maintenance tax and the election on the question of issuing bonds in the case at bar, it is contended by the defendant that the original nonspecial tax territory should have voted separately on both questions. Such a separate vote for the authorization of the bonds is not required by Public-Local Laws 1915, ch. 722. And after the consolidation of school districts, even under the general law, it is provided that they "shall have authority to vote special tax rates for schools on the entire district in accordance with law." Public Laws 1921, ch. 179.

Furthermore, in those cases where the nonspecial tax territory is required to be given a separate vote under C. S., 5530, and although the district may vote as a whole, yet if a favorable majority vote be cast in said election by the voters in the nonspecial tax territory, counting said vote separately, the election will be upheld. *Burney v. Comrs., ante,* 274; *Barnes v. Comrs., ante,* 325.

But the validity of the consolidation and formation of this particular district, and also the validity of the bonds now in question were both approved by us in the recent case of *Wilson v. Comrs.*, 183 N. C., 638, and we must adhere to that decision. See, also, *Comrs. v. Malone,* 179 N. C., 110, and *Miller v. School District, ante,* 197.

We observe, however, that a poll tax as well as a property tax was authorized by both elections held on 14 December, 1921. This is not a county tax, but a special district tax. Hence, the poll tax must be held to be invalid under the constitutional amendment of 1920. *Hammond v. McRae,* 182 N. C., 754. See, also, *Burney v. Comrs., supra.* The property tax will be sustained. But it may be well to note that as to all liabilities heretofore incurred, and bonds previously issued under statutes or elections, requiring the levy of a tax on both property and poll, the authority and obligation to levy a tax on both will continue; for a state, no more by constitutional amendment than by statute, will be permitted to impair the vested rights of creditors held by them in assurance of their debt. *Smith v. Comrs.*, 182 N. C., 149.

As thus modified, the judgment of his Honor will be affirmed.

Modified and affirmed.

MRS. SARAH C. LEDBETTER v. D. L. CULBERSON.

(Filed 13 December, 1922.)

1. Wills—Interpretation—Intent—Irreconcilable Provisions.

In construing a will, the intent of the testator, as embodied in the entire instrument, must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment; and where, under this rule, it appears that a later item of a devise or bequest therein is irreconcilable with a former one, the general rule is that the last expression will prevail.

2. Same—Title—Contracts to Convey—Deeds and Conveyances.

By the first item of the will a testator devised and bequeathed to his wife "all of my property whatever and wherever found, . . . during her natural life only, the returns, income, and dividends accruing upon such stock as I may own at the time of my death" in a certain manufacturing concern; and provided in a later item that at the death of the wife the designated stocks and real estate not specifically including the *locus in quo* shall go to certain named collateral relations, with "remainder of my estate, both real and personal, not otherwise disposed of" to his wife, the title to vest in her absolutely and unconditionally at his death. After the testator's death the defendant contracted to purchase the *locus in quo* from the widow, and refused to accept her deed, denying her title under the will: *Held*, under a proper construction of the will, it was the intent of the testator that the fee-simple title to the lands in question should go to the widow under the later item of the will, which was reconcilable with the first thereof, and that the defendant comply with his contract of purchase.

APPEAL by defendant from *Long, J.*, at November Term, 1922, of RICHMOND.

Civil action, heard on case agreed.

It appeared that plaintiff, the surviving widow and principal devisee under the will of her husband, John L. Ledbetter, deceased, has contracted to sell to defendant a piece of her land, claiming to own same under the provisions of said will. Defendant, admitting the contract and title of John L. Ledbetter, as alleged, resists payment of the price agreed upon on the ground that the bargainor, under the terms of the will, did not have a good title. There was judgment for plaintiff, and defendant excepted and appealed.

W. Steele Lowdermilk for plaintiff.
Bynum & Henry for defendant.

HOKE, J. The title offered is dependent, as stated, on a proper construction of the will of John S. Ledbetter and the provisions of said will, and the facts more directly pertinent are stated in the "case agreed" as follows:

1. That John S. Ledbetter, at and before the time of his death, was a resident of Richmond County, North Carolina, and that his wife was Sarah C. Ledbetter, to whom he had been married for about 45 years.

2. That John S. Ledbetter died on or about 29 April, 1922, at the age of 73 years, without children or lineal descendants, leaving a last will, an exact copy of which is as follows:

LAST WILL AND TESTAMENT OF JOHN S. LEDBETTER, DECEASED

2 October, 1919.

State of North Carolina and County of Richmond.

I, John S. Ledbetter, of the State and county above written, doth hereby will, give, devise, and bequeath and by these presents doth will, give, devise and bequeath all of my property whatever and wherever found to my beloved wife, Sarah C. Ledbetter, during her natural life only, the returns, income and dividends accruing upon such stock as I may own at the time of my death in the Ledbetter Manufacturing Company.

The will then provides that on the death of his wife these stocks and certain specified real estate, not including the piece of land, the subject-matter of the contract, shall go to collateral relatives named, and closes with the following:

"I give, devise, and bequeath unto my said beloved wife, Sarah C. Ledbetter, to be hers and for own absolute and exclusive right, benefit and behoof forever, all the remainder of my estate, both real and personal, including money and choses in action, of which I may be seized and possessed. This item of my will bequeaths to my said wife all of my property of whatever kind and wheresoever located, not otherwise disposed of in this my will; and the title to all of same shall vest absolutely in my said wife unconditionally upon my death.

"I hereby constitute and appoint my said wife, Sarah C. Ledbetter, as the sole executrix of this my will, and I desire and direct that she not be required to make any monetary appraisement or returns of any sort or character to any court or courts of her actings and doings as such executrix, and she is specifically relieved from giving any bond for the performance of her duties as executrix of this will."

Upon these items of the will, defendant contends that as the first clause gives all the testator's property to his wife during her natural life only, this definite limitation is controlling, and that on the death of the wife the land not specifically devised will descend to the heirs at law of the testator, but the property in question, as stated, is not included in the specific or other devises to take effect at the death of the wife, and

comes as clearly under the last clause of the will that makes her the absolute owner of "all the remainder of my estate" to be hers in absolute and exclusive ownership forever.

If the first and last items of this will are in irreconcilable conflict, the general rule is that the last shall prevail. *Taylor v. Brown,* 165 N. C., 157-163; *Haywood v. Trust Co.,* 149 N. C., at p. 218; *Baird v. Baird,* 42 N. C., 266. But to our minds there is no such conflict presented. In *Smith v. Lumber Co.,* 155 N. C., at p. 392, it is given as the accepted and well recognized position in the construction of wills: "That the intent of the testator, as embodied in the entire instrument, must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment, before one clause shall be construed as irreconcilable with another, citing *Holt v. Holt,* 114 N. C., 241, and *Davis v. Frazier,* 150 N. C., 447." A statement that is in very general accord with the authorities on the subject. *Satterwaite v. Wilkerson,* 173 N. C., 38; *In re Knowles,* 148 N. C., 465-468.

Applying this wholesome rule of interpretation, we think it clear that in this will the testator intended his wife to have the ownership and control of all of his property, including the income and accruing dividends on his stock in the Ledbetter Manufacturing Company, for her life only. The will then making disposition of his stock and certain specified real estate, to take effect at her death, gave to the wife all the property that remained in absolute ownership forever.

We therefore affirm his Honor's decision that the title offered by the wife is a good one, and defendant must comply with his contract.

Judgment affirmed.

ADAMS, J., not sitting.

MOUNTAIN STATE MICA COMPANY v. J. E. BURLESON MINING COMPANY.

(Filed 13 December, 1922.)

1. Verdicts—Motion to Set Aside—Discretion of Court—Courts—Appeal and Error—Trials.

A motion before the trial judge to set aside a verdict and award a new trial on the ground that the verdict was contrary to the weight of the evidence is addressed to the legal discretion of the judge, and his denying the motion is not reviewable on appeal when no abuse of discretion is shown.

2. Appeal and Error—Evidence—Fraud—Instructions—Verdict.

Where the defense to an action to recover upon the notes sued on is fraud in the procurement of the notes, and the evidence is conflicting, an

exception by plaintiff that the judge failed to charge the jury that there was insufficient evidence of the fraud comes too late after a verdict in defendant's favor to be considered on appeal.

APPEAL by plaintiff from *Bryson, J.*, at the April Term, 1922, of MITCHELL.

M. L. Wilson, McBee & Berry, and Hudgins, Watson & Washburn for plaintiff.

Charles E. Greene, W. C. Newland, S. J. Ervin, and S. J. Ervin, Jr., for defendant.

ADAMS, J. On 10 March, 1920, the plaintiff sold to the defendant a lease on the Clarissa Mica Mine at the agreed price of $20,000, of which one-fourth was paid in cash and the remainder evidenced by three promissory notes, each in the sum of $5,000, payable respectively four, eight, and twelve months after date. The defendant paid the first two of these notes and declined to pay the third. The plaintiff then brought suit, and the defendant resisted judgment on the ground that the execution of the note had been procured by the fraud of the plaintiff's officers and agents. The execution of the note was admitted. The jury answered the issue as to fraud in favor of the defendant, and assessed its consequent damage at $5,000. Before the judgment was signed, the plaintiff made a motion to set aside the verdict and award a new trial on the ground that the verdict was contrary to the weight of the evidence. The motion was overruled, and the plaintiff excepted. The denial of this motion was discretionary and not appealable, no abuse of discretion being shown. *Clothing Co. v. Bagley,* 147 N. C., 37; *Cates v. Tel. Co.,* 151 N. C., 498. No other reason was assigned before judgment as ground for a new trial; but in the case on appeal appear certain exceptions to his Honor's instructions to the jury. These instructions relate to the issue of fraud, and the only ground of the exceptions is that his Honor did not charge the jury that the evidence on this question was not sufficient to warrant its submission to the jury. While the testimony of the witnesses was conflicting, there was evidence of fraud; but, at any rate, when the objection that the evidence is not sufficient is first made after the verdict it is too late, and will not be considered. A party who voluntarily submits his cause to a jury upon evidence to which no objection is made cannot, after taking his chances, be heard to complain that such evidence was insufficient. *Shields v. Whitaker,* 82 N. C., 516; *Leggett v. Leggett,* 88 N. C., 114; *Hemphill v. Hemphill,* 99 N. C., 441; *Holden v. Strickland,* 116 N. C., 185.

We find no error which entitles the plaintiff to a new trial.

No error.

MARGARET J. CAMPBELL v. CITY OF ASHEVILLE.

(Filed 13 December, 1922.)

Pleadings—Motion to Extend Time for Filing—Courts—Clerks of Court—Jurisdiction—Appeal and Error.

Under the provisions of Revisal, sec. 466, before those of Public Laws 1921, ch. 304, went into effect, the latter being an act to restore the Code of Civil Procedure in regard to pleadings and practice, and to expedite and reduce the cost of litigation, it was discretionary with the judge of the Superior Court to allow extension of time for the filing of pleadings, and where the complaint in an action had not been filed in the time allowed by law, under the provisions of the former statute, and the later procedure is in effect at the time of the plaintiff's motion for time to file complaint, such motion should be made before the judge, and not before the clerk of the court; and where it has been made before the clerk, and the judge has erroneously held that the clerk has power to extend the time for filing the complaint, the case will be remanded, on appeal, in order that the judge may treat the appeal from the clerk as if the motion had originally been made before him, and pass upon it in the exercise of his sound discretion.

APPEAL by defendant from *Shaw, J.*, at the April Term, 1922, of BUNCOMBE.

Wells & Swain and Jones, Williams & Jones for plaintiff.
George Pennell and J. W. Haynes for defendant.

ADAMS, J. In this action the summons was issued on 24 May, 1919, returnable to the July term under the practice then prevailing, but the complaint was not filed until 3 November, 1921. On 19 November, 1921, in pursuance of a motion duly served on the plaintiff, the defendant made a motion before the clerk to dismiss the action, and at the hearing the clerk granted the motion "as a matter of law under Public Laws of 1920, ch. 96." The plaintiff appealed, and the judge held that the clerk had power in his discretion to allow time in which to file the complaint and reversed the judgment. Thereupon the defendant excepted and appealed to the Supreme Court.

The act entitled "An act to restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite and reduce the cost of litigation" went into effect on 1 July, 1919, and Consolidated Statutes on 1 August, 1919. Public Laws 1919, ch. 304; C. S., 8107. At the time the summons was issued the following statute was in force: "The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff." Revisal, sec. 466. The clause "otherwise the suit may, on motion, be dismissed"

was omitted in the act of 1919, but was brought forward in Consolidated Statutes (sec. 505), and continued in effect until amended at the Extra Session of 1920. Public Laws, Extra Session 1920, ch. 96; Public Laws 1921, ch. 96. The Extra Session of 1921 convened after the clerk's judgment in this cause was rendered. The parties concede that the sole question presented is whether the clerk had legal authority to allow the complaint to be filed under the circumstances disclosed by the record.

In our opinion the appeal is not to be determined by the provisions of the acts of 1919 or 1920, either as originally enacted or as subsequently amended. The several acts restoring the provisions of the Code of Civil Procedure were evidently not intended to apply to cases in which the summons was issued before either of the acts went into effect, and was made returnable before the court in term. The authority of the clerk to extend the time for filing pleadings in a civil action is confined to cases in which the summons is returnable under the present procedure before the clerk at a fixed date, and not to cases in which under the former practice it was made returnable before the judge.

In the present case the summons was issued before either of these acts went into effect; the defendant was summoned to appear before the judge at the July term of the Superior Court; and whether the time for filing pleadings should be enlarged was a question to be determined by the judge as under the former practice and not by the clerk. We think the clerk had no jurisdiction to dispose of the motion, and that his Honor should have treated the appeal as a motion made originally before him, and should have exercised his discretion in saying whether in the administration of justice the plaintiff should be permitted to file her complaint. C. S., 637; *In re Anderson,* 132 N. C., 243; *Gwinn v. Parker,* 119 N. C., 19; *Bailey v. Comrs.,* 120 N. C., 388; *Woodsack v. Merriman,* 122 N. C., 735; *Church v. Church,* 158 N. C., 565; *Lloyd v. Lumber Co.,* 167 N. C., 97.

The judgment is reversed, and the cause remanded for further action by the presiding judge.

Reversed and remanded.

H. C. SUGG AND WIFE v. W. A. POLLARD.

(Filed 20 December, 1922.)

1. Judgments—Liens—Priorities—Lis Pendens.

The question of *lis pendens* does not arise in considering the priority of liens between judgments obtained and docketed at different times.

2. Judgments—Liens—Material Men—Laborers—Homestead—Waiver.

A debtor may not claim his homestead (Const., Art. X, sec. 4) against the lien of a judgment in favor of the furnishers of material, etc.; and were it otherwise, he must claim it in apt time or he will be deemed to have waived it; and this right being personal to him, it cannot be asserted by his creditors.

3. Liens—Material Men—Venue—Motions—Removal of Causes—Transfer of Causes—Waiver—Judgments—Statutes.

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of C. S., 469, making the venue where the plaintiffs or defendants reside, etc.; and where the venue is improper, the action may nevertheless be proceeded with to judgment, unless demand for a change of venue is made on motion, the failure to do so being a waiver of the right. Where a judgment establishing a lien of this character has been obtained by timely procedure in a different county from that wherein the building is situate, and the defendant debtor has appeared and has entered no objection, upon docketing the judgment in the county of the situs of the property, the court may appoint a commissioner to sell the property in subjection to the lien. *Semble*, this applies to instances where the statutes specify the venue.

4. Liens — Material Men — Removal of Causes—Transfer of Causes—Docket—Entries.

Where a judgment establishing a lien for material furnished and used in a building has been transferred and docketed in the county wherein the building is situated, the mere fact that the entry on the judgment docket in the latter county does not specify this kind of lien is immaterial when the judgment filed therein specifically does so.

APPEAL by defendant from *Brock, J.*, at chambers in New Bern, 28 November, 1922, from PITT.

This case was submitted upon an agreed statement of facts. It appears therefrom that on 25 May, 1921, J. W. Stout & Company filed notice of lien in the office of the clerk of the Superior Court of Pitt against the Farmville Auto Service Company, owners of the land and buildings duly described in said lien, on which they claimed a laborers' and material man's and mechanic's lien for the sum of $13,694.83—which was in due form and duly recorded in the lien book in said office. The land and buildings on which the lien was filed lie in Pitt County. On 27 June, 1921, Stout & Company brought an action in the Superior Court of Lee against the Farmville Auto Service Company in which the

plaintiffs asked judgment against the defendant in the sum of $13,694.83, and that it be declared a lien upon the property described in the complaint and lien, and that a commissioner be appointed to sell the said land under the lien filed in Pitt County above referred to.

At October Term, 1921, of the Superior Court of Lee judgment was rendered by *Cranmer, J.*, for the sum demanded, decreeing the validity of the lien and sale thereunder, and appointing a commissioner to make such sale, which judgment was transcripted and filed and docketed in the office of the clerk of Superior Court of Pitt on 2 December, 1921, more than 6 months from filing of the notice of the lien in Pitt. There was entered on the judgment docket of Pitt County a transcript of said judgment for the aforesaid sum, and interest from 1 December, 1920, until paid, and the judgment in full was certified and filed in the judgment roll in the office of the clerk of the Superior Court of Pitt.

After the docketing of the said Lee County judgment in Pitt on 2 December, 1921, and prior to the sale of the land in controversy, which was covered by said lien, several judgments were taken against the Farmville Auto Service Company, aggregating several thousand dollars, and docketed in the office of the clerk of the Superior Court of Pitt. Pursuant to the aforesaid judgment of J. W. Stout & Company against the Farmville Auto Service Company, which was taken in Lee and transcripted and docketed in Pitt, and to a supplemental order in Lee substituting Richard T. Martin in the place of D. B. Teague as commissioner to make sale of the land described in the complaint, said Martin proceeded to advertise said land under said judgment and decree, and exposed the same for public sale on the premises on 29 April, 1922. Mrs. Carrie E. Sugg bid $20,000 for said land at said sale, and was declared the purchaser. The said sale was reported to the Superior Court of Lee, and the said commissioner was ordered to make deed to the purchaser on her complying with the bid; said order being made by *Allen, J.*, at July Term, 1922, of Lee.

R. T. Martin made deed to said Carrie E. Sugg of said land and property on 8 August, 1922, the deed being in regular form, and made final report to the Superior Court of Lee, which was approved and the commissioner discharged by *Allen, J.*, at the October Term, 1922, of said County.

On 10 August, 1922, the plaintiffs and the defendant entered into an agreement in writing by which the plaintiffs Carrie E. Sugg and husband agreed to sell to the defendant the real property described in the complaint (which had been sold under said decree and purchased by her), for the sum of $24,500 in cash, and to execute a deed in fee simple with full warranties and covenants conveying to the defendant a good and indefeasible title in fee simple, free and clear from all encumbrances, said deed to be executed and delivered on or before 11 November, 1922.

In accordance with the terms of said written agreement, the plaintiffs tendered to the defendant, on 10 November, 1922, a deed complying with the terms of said written agreement in fee simple, with full warranties and covenants, but the said defendant refused to accept said deed of conveyance and to pay over to the plaintiffs the agreed sum, alleging that the plaintiffs did not have a good title and could not convey to him a good and indefeasible title to the land in controversy, but asserted that he is ready and willing to accept a deed and pay the alleged consideration provided the plaintiffs would convey to him a good and indefeasible title to said land in controversy. It is admitted that all the proceedings above set forth were regular. The court rendered judgment in favor of the plaintiffs, and the defendant appealed.

F. C. Harding for plaintiffs.
Julius Brown for defendant.

CLARK, C. J. The defendant assigns as error that the action for which judgment was recovered upon the lien and debt was not recovered in Pitt County, and no notice of *lis pendens* was ever filed in that county; that the suit "was brought by claimants in Lee County in June, 1921, for judgment and to perfect and foreclose the lien filed in Pitt County, and that Lee County was the wrong venue, as the action should have been brought in Pitt; and that the judgment taken in Lee in October, 1921, was docketed in Pitt 2 December, 1921, more than 6 months after filing of lien." The bare fact that judgment for the plaintiff and against defendant for the amount had been entered on the judgment docket, no mention of the lien being made on the docket in Pitt, is immaterial, for the judgment and decree in full was filed in the clerk's office of Pitt.

The defendant contends that the claimants lost their laborers' and mechanics' lien, and that the Lee County judgment docketed in Pitt was only a personal judgment, under which execution could issue, and the sheriff could not sell the property without having the homestead allotted, and the sale and deed of R. T. Martin, commissioner, was illegal.

It appears in the record that the judgments docketed subsequent to the docketing of the judgment of J. W. Stout & Company on 2 December, 1921, were all obtained after the docketing of the decree and judgment under which the plaintiff, Carrie E. Sugg, bought. The question of *lis pendens,* therefore, does not apply.

If this judgment had been merely a personal judgment against the defendant therein, and the sale was had under it, it would have conveyed a clear title to the purchaser independent of the lien, so far as appears upon the facts agreed. If the defendant in said judgment, the Farm-

ville Auto Service Company, was a corporation, as its title implies, it was not entitled to have the homestead set off, and if it was a partnership they made no claim to have the homestead allotted, and it does not appear that they had not already taken a homestead in other property. But the judgment taken in Lee recites the filing of the lien in due time and regularly, and decreed that the property should be sold thereunder, and, it is stated in the facts agreed, this was certified in full and filed in the judgment roll in the office of the clerk of the Superior Court of Pitt.

In the trial in Lee on the action to foreclose the lien, the defendants filed an answer and were represented by counsel, and the jury found, upon the issues submitted, that the contract for the construction of a garage building was made, as alleged; that the contractors, Stout & Company, completed the building 11 March, 1921, and that the balance due them was for $13,694.83, with interest as claimed, which was for labor and material furnished in the construction of said building alleged in the complaint, and that the plaintiff in apt time filed notice and claimed a lien in Pitt County, where the property was situated, upon which the garage was constructed, and the lien upon said building was regularly filed for the sum due. As against this lien, the homestead could not be claimed. Const., Art. X, sec. 4. *Broyhill v. Gaither,* 119 N. C., 445, and cases cited thereto in Anno. Ed.

It appears that the Farmville Auto Service Company was a partnership and not a corporation. If it had been the latter it could have claimed no homestead even if this had been merely a personal judgment. Being a partnership, the partners, if not already possessed of a homestead, could have claimed it against a mere personal judgment, but this was a personal privilege, and if the defendants, duly served with summons and appearing in the action, did not take any exception to the decree directing a sale of the property to satisfy the lien without the reservation of a homestead, they are estopped by the judgment. Indeed, they could have had no homestead as against the lien which was adjudged against them—and certainly the owners of judgments docketed against them subsequent to the docketing of the judgment in this case cannot avail themselves of the plea that the homestead should have been set off as against this judgment. The right to a homestead is a personal privilege.

The only defect set up by the defendant is that Lee County was the wrong venue for this action, in which both the debt and the lien were adjudged, and the sale directed to be made under the lien which had been duly filed in Pitt.

Prior to the Code of 1868, a defect of venue was jurisdictional and ground for the dismissal of the action on a plea in abatement. *Smith*

v. Morehead, 59 N. C., 361; *Killian v. Fulbright,* 25 N. C., 9. This was changed by the Code of Civil Procedure adopted in 1868. Therein the provision, now C. S., 463, required the following causes of action to be brought in the county in which the subject of the action or some part thereof is situated, *i. e.,* for recovery of real property; partition of real property; foreclosure of a mortgage of real property; and for recovery of personal property. C. S., 464, prescribes that actions for certain causes therein named should "be tried in the county where the cause of action, or some part thereof, arose," both of these sections adding, "subject to the power of the court to change the place of trial." C. S., 465, prescribes that actions upon official bonds and against executors and administrators, in their official capacity, shall be tried in the county where their bonds were given. C. S., 466, prescribes the venue for actions by and against domestic corporations; and C. S., 467, the venue in actions against foreign corporations. Section 468 prescribes the venue in actions against railroads; and section 469 provides: "*Venue.* In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement," etc., "subject" (as the other provisions are) "to the power of the court to change the place of trial." Section 467 provides specifically as follows: "If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties or by order of the court."

The lien sued upon in this action was duly filed in the county of Pitt, where the land lay. It is not provided in any of these sections where the action to foreclose such lien should be brought, but if it had been brought in any of those cases where the venue is specifically prescribed, still the error in the venue would not have been fatal, and a judgment obtained in any county where the action was brought would not have been invalid for error in the venue, "unless the defendant, before the time of answering expired, demanded in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court." It has been repeatedly affirmed that "failure to demand change of venue in apt time is a waiver of the right." *McArthur v. Griffith,* 147 N. C., 545; *Allen-Fleming Co. v. R. R.,* 145 N. C., 37; *Garrett v. Bear,* 144 N. C., 26, and numerous other cases cited under C. S., 470.

There is no venue prescribed as to an action to foreclose the lien under which this property was sold; and, therefore, for a stronger reason, this action, which was brought in another county than that

where the property lay, is valid. There was no motion to remove to Pitt County made by the defendant upon whom the summons in the action was duly served. Indeed, the proceedings in all respects, from start to finish, according to the facts agreed, were admitted to be regular except for the allegation that Lee County was the wrong venue. It appears from C. S., 469, that the venue was not required to be in any other county, and under C. S., 470, even if the venue was wrong, the failure to demand change of venue in apt time cured the defect.

If the action had been brought in Lee County to foreclose a mortgage upon land lying in Pitt, a decree of foreclosure appointing a commissioner to sell said land rendered in Lee, there being no motion to remove taken in apt time, would have been valid. C. S., 470.

Upon the facts agreed, the judgment must be

Affirmed.

W. M. PERSON, FOR HIMSELF AND OTHER TAXPAYERS, v. BOARD OF STATE TAX COMMISSIONERS, AND A. D. WATTS, REVENUE COMMISSIONER.

(Filed 20 December, 1922.)

1. Constitutional Law—Taxation.

The State Constitution vests exclusive authority in the Legislature to levy taxes, Art. V, sec. 3, which may not be interfered with by the courts, a coördinate part of the Government, when it is exercised within the constitutional restrictions. Art. I, sec. 8.

2. Taxation — Corporations — Shares of Stock—Shareholders—Constitutional Law.

Art. V, sec. 3, of our State Constitution requires legislative enactment for the levy of taxes, and objection to a statute that requires corporations to pay the taxes on every element of value that goes to make up their taxable assets, and specifically excludes the payment of taxes upon the shares of stock by the individual owner is untenable, and *mandamus* to compel the State Tax Commissioner to enforce the payment of taxes by the individual owner on his shares, contrary to the provisions of the statute, will not lie. The relation of the shareholders to the corporation, as creditors, discussed by ADAMS, J.

3. Constitutional Law—Mandamus—Actions—Controversy.

While either the relator or respondent may raise constitutional questions for the Court to pass upon in proceedings for *mandamus*, they must be material to the determination of the rights of the parties, so as to conclude them by judgment in the controversy presented to the courts; and the courts will not pass upon such questions when they merely present abstract principles not so related to the subject-matter of the action. Laws 1921, ch. 34, sec. 4.

STACY, J., concurring; WALKER and HOKE, JJ., concurring in both opinions; CLARK, C. J., dissenting.

PERSON *v.* WATTS.

PETITION for *mandamus,* heard on demurrer by *Calvert, J.,* at chambers in Raleigh, on 7 July, 1922. The demurrer was sustained, and the plaintiff appealed.

W. M. Person for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for the defendant.

ADAMS, J. At the session of 1901 the General Assembly constituted the Corporation Commission a Board of State Tax Commissioners, and imposed upon such board certain duties relative to the listing, assessment, and taxation of property. The statutes defining and circumscribing these duties, as modified or amended from time to time, have since been continued in force and effect; but on 8 March, 1921, the duties of the State Tax Commissioners were transferred to the State Department of Revenue to be performed after 1 May by the Commissioner of Revenue, except as otherwise provided, and thereupon the Tax Commission became *functus officio.* The original summons in the proceeding was issued against the Board of State Tax Commissioners on 6 May, 1922, and purports to have been served on the chairman of the board, but A. D. Watts, the commissioner of revenue, was thereafter made a party defendant, and the suit is prosecuted against him alone.

On the day the summons was issued the plaintiff filed his "complaint and petition." After reciting certain duties of the Tax Commission, the constitutional mandate that property shall be taxed by a uniform rule, and the statutory provisions for listing corporate property for taxation, he alleges in substance that all "exempting statutes" are unconstitutional, that shareholders in corporations by means of "device, camouflage, and fraud" evade the payment of all taxes except an "irreducible minimum on their visible property," and bear none of the burdens of government, but leave them to be borne by the "rural homesteader" and the dwellers in cities and towns. He further alleges that the contention that a tax on stocks is paid by the corporations in which they are held is a "smoke screen to hide the duplicity" of the owners from the "burdened taxpayers of the visible property of North Carolina," and that the "board of State taxation" should require not only the capital stock of corporations, but the stocks held by individuals to be listed for taxation at their true value in money.

The defendant demurred, and moved to dismiss the petition on the ground that it does not state a cause of action, and that the court had no jurisdiction to grant the relief demanded. His Honor sustained the demurrer, and the plaintiff appealed.

Shorn of verbiage, the contention of the plaintiff is this: That the Constitution of North Carolina, Art. V, sec. 3, provides that "laws shall

be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise"; that stockholders should therefore list for taxation in their own names all shares of stock held by them; that all statutes purporting to exempt the individual owner from the necessity of listing his stocks in this manner are void and of no effect; and that it is the duty of the defendant to enforce compliance with this construction of the constitutional provision.

On the other hand, the defendant insists that the plaintiff's contention is based on a misconception both of the constitutional requirement and of the laws enacted for the purpose of carrying it into effect, and that the existing method of taxing property, corporate and individual, is in strict compliance with the mandate of the organic law.

These respective contentions illustrate a situation out of which have arisen two theories concerning the taxation of investments in the stocks of corporations. The first is that the statutory method just referred to is such an evasion of Article V, section 3, of the Constitution as exempts from taxation practically all shares of stocks in corporations (with a few exceptions) organized under the laws of North Carolina, and that while the corporation should pay a tax upon the capital stock, the shareholder should likewise pay a tax upon his investment in or contribution to such capital stock, the alleged reason being that the shares or certificates of stock are the individual property of the shareholder, and are separate and distinct from the capital stock of the corporation. The advocates of the other theory concede that the property of a shareholder in the stock of a corporation is for certain purposes, and in a restricted sense distinct from the property owned by the corporation as a legal entity, but they say that shares of stock are, and for many years have been, returned for taxation by the proper officer of the corporation on behalf of the owner, and that the tax assessed thereon is paid by the company; that the situs of the shares for taxation is transferred from the residence of the owner to the place where the principal office of the corporation is situated, and that this method assures the taxation of all shares of stock, many of which, especially those of nonresident owners, had previously escaped taxation; that in no other way is the stockholder relieved of the direct payment of tax on his stock; and that under these circumstances the payment of a tax on his shares by the individual owner would amount to double taxation, which, while not prohibited by the Constitution, has not been sanctioned by the General Assembly. It is further insisted that this method has been adopted by the Legislature as the most effective means of securing the best financial returns from such taxation, and that provision has been made for imposing upon all classes of assessable corporate property, real and personal (including the capital stock, the franchise, and shares of stock), a just and equitable proportion of the burdens of government.

We have referred to these theories (to the first of which the plaintiff evidently adheres) for the purpose of showing the background of the plaintiff's position and the basis upon which his complaint is made to rest; and upon inspection of the complaint, the demurrer, the motion to dismiss, and the argument of counsel, we have concluded that there are several cogent reasons for holding that the instant proceeding has been improvidently instituted, and that it cannot be maintained.

In the first place, the relief sought could not be obtained in any event without the exercise of legislative functions, and the plaintiff's fatal error is found in the assumption that such functions may be exercised by the courts, notwithstanding the constitutional separation of the several departments of the government. The Declaration of Rights provides: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Art. I, sec. 8. As to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this State and in the United States is characterized by the care with which the separation of the departments has been preserved, and by a marked jealousy of encroachment by one upon another. In Black's Constitutional Law it is said: "It is a fundamental maxim of political science, recognized and carried into effect in the Federal Constitution and the constitutions of all the states, that good government and the protection of rights require that the legislative, executive, and judicial powers should not be confided to the same person or body, but should be apportioned to separate and mutually independent departments of government" (p. 83). "As the rule, it may be said that the American state constitutions now divide the powers of government, and provide that no person or body belonging to one branch shall exercise powers or functions belonging to the others. But even in the absence of such an explicit declaration, the creation of the several departments and the description of their respective powers would be sufficient to secure each against encroachments by the others" (*ibid.*, p. 86).

The power to levy taxes is vested exclusively in the legislative department of the government. Constitution, Art. V. "Within constitutional limits, the power of the Legislature in matters of taxation is supreme, and its action cannot be revised or annulled by the judicial department. Nor can the courts be authorized or required by statute to levy and collect taxes, as that is a legislative function and not judicial." Black Con. Law, 93. And *Judge Cooley* says: "It must always be conceded that the proper authority to determine what should and what should not constitute a public burden is the legislative department of the State. This is not only true for the State at large, but it is true,

also, in respect to each municipality or political division of the State; these inferior corporate existences having only such authority in this regard as the Legislature shall confer upon them." Cons. Lim., 698.

The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coördinate branch of the government. They do not assume to direct the course of legislation or to share in the making of the laws or to exercise any power to repeal a statute. They concede that the fundamental law guarantees to the Legislature the inherent right to discharge its functions and to regulate its internal concerns in accordance with law without interference by any other department of the government, and that their jurisdiction is limited to interpreting and declaring the law as it is written. It is only when the Legislature transcends the bounds prescribed by the Constitution, and the question of the constitutionality of a law is directly and necessarily involved that the courts may say, "Hitherto thou shalt come, but no further."

It is in the light of these principles that we must consider the following provision, which has been enacted at each biennial session of the Legislature since 1887: "Individual stockholders in any corporation, joint-stock association, limited partnership, or a company paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same." Laws 1921, ch. 34, sec. 4.

It is evident, therefore, that the plaintiff has resorted to the courts for a writ of *mandamus* to compel the defendant to subject himself to liability to removal from office by doing an act which the law expressly forbids, and the futility of his application is found in the principle, unquestioned and fundamental, that an officer, inferior or other, is not responsible at the suit of private parties for the nonperformance of an act omitted by him in obedience to the commands of the law. This has been repeatedly decided. In *Wilson v. Jenkins,* 72 N. C., 5, there was an application for a *mandamus* to compel the Auditor of the State to audit and the Treasurer to pay certain coupons representing interest on the bonded debt of the State. The Legislature had passed an act prohibiting the Auditor from recognizing any claim for principal or interest on any portion of the bonded debt, and prohibiting the Treasurer from paying any claim for such interest, except as therein provided. The trial judge rendered judgment in favor of the defendant, and *Chief Justice Pearson,* affirming the judgment, said: "The General Assembly has absolute control over the finances of the State. The Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders

of the General Assembly. It follows that the courts have no power to compel, by *mandamus,* the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, or the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the act of the General Assembly be void as violating the Constitution of the United States or of this State." To the same effect are *Shaffer v. Jenkins,* 72 N. C., 275; *Boner v. Adams,* 65 N. C., 639, and the dissenting opinion of the present *Chief Justice* in *White v. Auditor,* 126 N. C., 596.

But the plaintiff insists that this Court may declare an act of the Legislature unconstitutional, and that the statute in question is in conflict with Article V, section 3, of the Constitution, and hence should be disregarded. This question is hereinafter discussed, but to the suggestion there are two other answers which are conclusive against the plaintiff's demands. The first is this: Even if the act should be stricken out or declared to be ineffective, the plaintiff, upon the allegations in his complaint, would still be without remedy. It will be seen upon a casual reading that section 3, Article V, of the Constitution is not self-executing; in express terms it provides that laws shall be passed taxing property by a uniform rule; and unless such laws are passed property cannot be taxed. If the act were declared void, by what authority could the Court or the defendant enact a law commanding the shareholder to list his stocks for taxation? More than this, if the statute should be treated as of no effect, the parties would still be bound by another to the effect that the owner shall return for taxation only such investments, stocks, and bonds as are not taxed through the corporation itself. Laws 1921, ch. 38, sec. 40.

And the second answer is that the record does not present for decision the constitutionality of the statute as a concrete question. It is true that the prayer for relief does not necessarily determine the nature of the action, but the allegations in the complaint considered in connection with the plaintiff's demand for relief, present for decision an abstract question of law, merely a matter of academic interest. The plaintiff first prays the Court to "declare and adjudge any legislative enactment reducing and exempting property in North Carolina to be unlawful, unconstitutional, unjust, inequitable, and against public policy." This language evidently includes real and personal property held by the State and by counties, cities, towns, school districts, religious bodies, and educational and charitable institutions, besides such household and kitchen furniture, mechanical and agricultural implements, and other kinds of personal property as are expressly exempted from taxation; but we may reasonably assume that it is not the purpose of the proceeding to abolish the exemption which has been extended to such property.

It being unnecessary for this reason to consider the complaint in connection with the first prayer for relief, we may now advert to the second. The second prayer shows that the plaintiff's object is to obtain a *mandamus* requiring the defendant to list "all property in stocks, common and preferred," in the names of the owners at its true value in money. In *mandamus* proceedings the constitutionality of a statute may be raised in proper cases by the relator or by the respondent—by the respondent where he claims that the invalidity of such statute exempts him from the performance of a duty which it purports to impose; and by the relator where he claims that such statute, by reason of its invalidity, excuses the respondent from doing an act or performing a duty to the relator's hurt or injury. 18 R. C. L., 105. But on the face of the record neither of these conditions appears, or is in any way presented to the Court. The statute referred to is not affirmative, but negative in its character. It provides that the individual stockholder "shall not be required to pay any tax on said stock," and there is no statute requiring him to make such payment. If, for instance, instead of this negative enactment the Legislature had affirmatively required the Revenue Department to list for taxation all shares of stock in the names of the owners, leaving in effect the other existing laws with respect to the taxation of corporate property, or if the defendant had undertaken to list such shares in breach of the act, and a shareholder had sought to enjoin the listing of such stocks, a vital controversy would have arisen in which the rights of the parties could have been litigated. But not so in this proceeding; it presents no real or actual controversy by which litigated rights may be determined. Judicial tribunals are not moot courts. It is their duty, not to express opinions which can have no practical effect, but to decide questions of merit, to render judgments that may be enforced, to do practical work, and to put an end to litigation. *Crawley v. Woodfin,* 78 N. C., 6; *Parker v. Bank,* 152 N. C., 253; *Kistler v. R. R.,* 164 N. C., 366.

The plaintiff is equally ill-advised in the selection of his tribunal and in the choice of his remedial process. His forum is the Legislature, but if it were a judicial tribunal, *mandamus* could not avail him. While this writ, originally prerogative, is now substantially a proceeding to enforce legal rights, it is nevertheless limited by conditions that are not applicable to an ordinary suit at law, and is employed as an extraordinary remedy in cases where other remedies fail. It is generally invoked to enforce a ministerial act or duty, and in some instances to command the performance of an imperative public duty for which there is no specific remedy, and it is uniformly denied where, as in this case, it would be nugatory or unavailing. It is essential for the petition to set out the respondent's failure to perform a manifest duty imposed upon

him, and if he has committed no breach of duty, and has not left undone that which he should have done, the writ, if issued, would accomplish nothing.

It should be borne in mind that the petitioner does not sufficiently allege a breach of duty by the respondent. He alleges that it is the duty of the respondent to have listed on the tax books by the owners for the purpose of taxation investments in bonds, stocks, and joint-stock companies, but he further alleges that this duty is enjoined by Public Laws of 1921, ch. 38, sec. 3, and an examination of this section and others will show that the Department of Revenue is utterly devoid of power to say what property shall or shall not be taxed. The Board of Tax Commissioners was given general supervision of the system of taxation, and the administration of all assessments and tax laws, as well as of assessors and boards of equalization, to the end that all assessments of property should be made relatively just and uniform, and that all property should be assessed at its true value in money. It was authorized to receive complaints as to property liable to taxation that had been assessed fraudulently or improperly, or not assessed at all, and to make such orders as were necessary to correct the irregularity complained of, and when advisable, to reconvene the county boards of equalization and to direct them to raise or to lower any assessment in order to equalize as far as practicable the valuation of all classes of property. The Tax Commissioners were constituted, also, a Board of Equalization, with power to equalize the sundry valuations of real property in the several counties of the State. These, in brief, are the duties prescribed by statute, and from this legislation appear two conspicuous facts: (1) The Legislature refrained from the preposterous attempt to delegate to the Tax Commissioners authority to say what property should be taxed; and apart from this, and as incidental to the main question, it appears that (2) the powers conferred upon them involve the exercise of judicial discretion which the courts have no power to control. And these facts are equally applicable to the State Department of Revenue. In view of these things, and of established fundamental principles, it would be perfectly idle to say either that the courts may assume the office of legislation or control the exercise of judicial discretion in the performance of the duties required of a public officer. Public Laws 1921, chs. 38 and 40; *Brodnax v. Groom,* 64 N. C., 245; *Evans v. Comrs.,* 89 N. C., 55; *Battle v. Rocky Mount,* 156 N. C., 329; *Comrs. v. Board,* 158 N. C., 191; *Ward v. Comrs.,* 146 N. C., 534; *Burton v. Furman,* 115 N. C., 166; *S. v. Justices,* 24 N. C., 430; *Lutterloh v. Comrs.,* 65 N. C., 403; *Belmont v. Reilly,* 71 N. C., 260; *Edgerton v. Kirby,* 156 N. C., 347; *Key v. Board of Education,* 170 N. C., 797; *Dula v. Trustees,* 177 N. C., 426; *Board of Education v. Board of Comrs.,* 178 N. C., 305.

That the plaintiff cannot maintain his position is beyond cavil or peradventure; the proceeding must be dismissed; and the opinion could well be concluded with the announcement of this result. But, as indicated, the plaintiff insists that the so-called "exempting statute" should be declared unconstitutional; and while, as we have shown, the question is not presented on the record, and the courts, recognizing the exercise of the power to decide on the competency of a law as their ultimate and supreme function, will not ordinarily assume the task of determining grave constitutional questions unless necessarily presented, still the paramount importance of a question which assails the policy adopted by the Legislature for taxing corporate property, and continued with minor changes for well-nigh half a century, demands an expression of opinion by the Court.

The statute objected to simply provides that if the corporation pays a tax on its capital stock the shareholder shall not be required either to list or to pay a tax on his individual shares.

In his assault upon this statute the plaintiff says, in effect, that the Constitution requires the payment of a tax by the shareholder upon his individual stock, even when the corporation pays the tax on its capital stock. This is the plaintiff's fundamental and fatal error. In the Constitution of North Carolina there is no such provision. It is required that laws be passed taxing by a uniform rule all moneys, credits, *investments* in bonds, stocks, joint-stock companies, or otherwise. Constitution, Art. V, sec. 3. It is the investment that is to be taxed, not necessarily the shares or certificates of stock. What is meant by investment? It is the laying out of money in the purchase of property, or the amount of money invested, either by way of loan or in the purchase of stocks, securities, or any other kind of income-producing property. It is defined, also, as some species of property from which an income or profit is expected to be derived in the ordinary course of business. *Bank v. Barrett* (Cal.), 58 Pac., 914; *People v. Ins. Co.* (N. Y.), 8 Am. Dec., 243; *Ins. Co. v. Phillips,* 141 Mass., 535; *Drake v. Crane,* 127 Mo., 85; *People v. Feitner,* 167 N. Y., 1. The ordinary conception of "capital stock" is the fund, property, or other means contributed or agreed to be contributed by shareholders as the financial basis for the prosecution of the business of the corporation. *Dodge v. Motor Co.,* 3 A. L. R., 434. But this definition, as applied to the statutes regulating the taxation of the capital stock of a corporation, is altogether inadequate and misleading. Perhaps the greater part of the confusion in thought concerning the taxation of the stockholder's shares as well as of the capital stock has arisen from a mistaken notion of the property that is actually taxed under the name of "capital stock." What property does this term include? Much more than the money or other

property contributed by the shareholders as the financial basis of the business; it is not limited, as is frequently supposed, to the aggregate amount of the face value of the certificates of stock; but the "capital stock" of corporations which is actually taxed in accordance with the statute, as may be seen hereafter, embraces every element that can impart value to the stock, including every enhancement in value that accrues to the corporation from the success of its business. So, by virtue of the statute there is nothing of value possessed by a corporation that is allowed to escape taxation. Certainly there can be no doubt that the shareholder's "investment" is taxed as the Constitution requires. The truth is, the certificate of stock represents the shareholder's investment in the corporation as the landowner's deed represents his investment in the land. If the land is taxed, why tax the deed? If the capital stock is taxed, why tax the certificates which represent the capital stock? No doubt the Legislature possesses the power to repeal the statute and to tax both; no doubt it possesses the power to devise a system of taxation that would be more burdensome to all classes, but if the Constitution does not require it, why should such additional burden be imposed? It is not denied that shares of stock in a restricted sense are the individual property of the owner, and in such sense may be considered as separate from the capital stock. The holder may sell his certificate without the consent of the company, but in doing so he sells only his interest in the corporation. His interest as a shareholder may become adverse to that of the corporation, but by investing in the capital stock he parts with the individual control of his money. It is only in this limited sense that shares of stock are separate from the corporation. In a broader and more real sense the interest of the shareholder is inseparable from that of the corporation. In the larger sense there is but one property, for shares of stock have value only as the taxed property of the corporation has value. During his lifetime the owner can derive no income from his shares unless the business of the corporation earns a profit; and upon his death, when his personal property passes to his distributee, it is not the certificate that is subject to an inheritance tax, but under a special statute the value of the owner's interest in the corporation represented by the certificate, just as such tax is assessed, not upon the deed, but upon the value of the land which descends from the ancestor to the heir. It seems, therefore, to be unquestionable that if the corporation be required to pay a tax on the capital stock as it is valued under the statute and the shareholders a similar tax on all their shares double the amount of the money or property contributed by the shareholders is thereby taxed, and no play upon words can escape the logic of this conclusion. The Constitution neither forbids nor requires double taxation, but the Legislature has refrained from levying the

double tax. The Constitution requires that investments in stocks shall be taxed, but it does not forbid the exemption of shares from taxation when the capital stock itself is taxed. And as the controversy turns upon the validity or invalidity of the statutory exemption of shares of stock it is apparent that the question whether taxing the individual shares as well as the capital stock is called double taxation is not as affecting the merits of the appeal a matter of material concern.

We have examined the cases cited by the plaintiff, and have made a somewhat diligent search among the decisions of other states and of the Supreme Court of the United States and have failed to find a single authority among our own decisions or elsewhere that supports the plaintiff's argument as to the question under discussion. Several decisions were cited in which occur expressions to the effect that payment of a tax on the capital stock and on the holder's shares is not double taxation, but neither of them was decided on facts that presented the question of double taxation when the capital stock of the corporation was valued and taxed as it is in North Carolina. This fact should be kept in mind, for we are admonished by authority no less eminent than *Chief Justice Marshall* that every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. *U. S. v. Burr,* 4 Cranch, 470.

This Court has already expressed its opinion as to the constitutional validity of this exemption. Neither in *Belo v. Comrs.,* 82 N. C., 415, nor in *Worth v. R. R.,* 89 N. C., 305, nor in *Comrs. v. Tobacco Co.,* 116 N. C., 441, was this "exempting statute" considered; but the opinion of the Court in the last of these cases recognizes the power of the Legislature to require a corporation to list for taxation shares of stock on behalf of the stockholder, and to deduct from the total value of such shares the value of the property which it has listed in this State. In the opinion of the Court the *Chief Justice* said: "Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Buie v. Comrs.,* 79 N. C., 267. But under that method many shares failed to be listed for taxation. Besides the shares of nonresident owners, except those of national banks, escaped taxation in this State under the ruling in *R. R. v. Comrs.,* 91 N. C., 454. To remedy this, the provision was passed, which is section 14 of chapter 296, Laws 1893, and which requires the list of shares to be given in by the proper officer of the corporation which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the State in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated,

as was held in *Wiley v. Comrs.*, 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks. U. S. Rev. St., sec. 5219."

This decision is approved in *Pullen v. Corporation Com.*, 152 N. C., 556, in which *Manning, J.*, said: "It will be observed that in the section of the Machinery Act under consideration it is made the duty of the defendant commission to deduct from both the market and the actual value of the shares of stock, as ascertained by it, before fixing the taxable value of such shares, the aggregate of the real and personal property listed by the banking institution. The principle of deduction is further recognized in the cases of individuals and corporations, when they come to list their solvent credits, in that from their solvent credits they are authorized to deduct their obligations or debts due by them, and the balance is to be listed as their taxable solvent credits. This principle is recognized by the Supreme Court of Illinois as constitutional, in *Loan Assn. v. Keith,* 153 Ill., 609. The Legislature has for many years recognized this as an equitable system of taxation; it has been incorporated for more than twenty-five years in our system of taxation, and this notwithstanding that it has been well settled by repeated decisions of this and other courts that shares of stock are, in the hands of the shareholder, separate and distinct property from the property of the corporation.

"The fairness and justness of the principle of deductions in the method of ascertaining the taxable value of the subjects of taxation, in order to avoid the essential harshness and inequity of double taxation, was, we think, distinctly sanctioned as long ago as 1882, in *R. R. v. Comrs.*, 87 N. C., 414. That case was presented to this Court on appeal by both parties from the judgment of the Superior Court, and in delivering the unanimous opinion of the Court, *Chief Justice Smith,* as pertinent to the present matter, said: 'The commissioners object further that the assessed value of the preferred stock should be reduced by the value of the real estate and franchise as taxed separately in the several counties traversed by the road. The ruling of the Court in directing the reduction is obviously made to avoid the imposition of a double tax, since the value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock, and hence the General Assembly permits stockholders, in valuing their shares, to 'deduct their ratable proportion of tax paid by the corporation upon its property as such in this State. Sec. 8, par. 6.'"

In the later case of *Brown v. Jackson,* 179 N. C., 363, this statute (exempting shares from taxation when the capital stock is taxed) was

considered, and *Brown, J.,* said: "In conclusion, we do not question the validity of the statute hereinbefore quoted, which has been the legislative tax policy of this State for so many years. Acting within its constitutional powers, it is for the Legislature to determine the subjects of taxation, and it is not ours to declare what it shall include and what it shall omit." *Mr. Justice Allen* dissented on another ground, but recognized the constitutionality of the statute, saying: "I concur fully in the proposition that it is for the Legislature to determine the subjects of taxation, and think, under the facts in this record, it has said the shares of the plaintiff shall not be taxed."

This Court and the Legislature have apparently agreed in their construction of Article V, section 3, of the Constitution, so far as it relates to this statute, and although we are not bound by it, the legislative interpretation is entitled to our respectful consideration. So this Court has declared. In *Attorney-General v. Bank,* 21 N. C., 216, *Chief Justice Ruffin* said: "Besides the reasons for our opinion drawn from the provisions of the act itself, the most forcible one arises out of the contemporaneous construction put on the act by the stockholders, fiscal agents of the State and the Legislature. . . . Their acts, contemporaneously and continued consistently through a period of eighteen years, are such a strong proof of the sense in which the act was understood by those who passed it as to make their construction almost as authoritative as if the words admitted of no other."

Examination of the legislative policy concerning the taxation of corporate property reveals the intent, uniform and continuous, not to tax both the capital stock and the shares of the holder. This was the policy of the State before the Constitution of 1868 was adopted, and it has since been continued, as will appear by reference to the various acts.

"The stock or interest held by individuals in all corporations, excepting banks, shall not be listed or assessed among the individual property of the stockholders, but shall be listed by the corporation, and the corporation shall pay the tax thereon." Public Laws 1860-61, ch. 31, sec. 5.

"The tax list shall contain stocks in any incorporated company or joint-stock association and their estimated value; but the stock shall not be taxed if the company pays a tax." Public Laws 1869, ch. 74, sec. 12 (6).

Practically the same legislation was reënacted at each session until 1887, when the Legislature passed the "exempting statute," which with unimportant changes has since been continued in effect.

To understand the trend and significance of this "exempting statute," when considered in connection with Article V, section 3, of the Constitution, it is necessary to bear in mind the existing method of taxing corporate stock. For such purpose the following synopsis will be suffi-

cient. The proper officer of a corporation having capital stock is required to make a report in writing to the State Tax Commission (now the State Department of Revenue), stating the total authorized capital stock, the total authorized number of shares, the number of shares of stock issued, and the par value of each share, the amount paid into the treasury on each share, the amount of capital stock paid in, the amount of capital stock on which a dividend has been declared, the date and the amount of the dividend, and the highest price as well as the average price at which the stock was sold during the year. Such officer, after being duly sworn or affirmed, must also estimate and appraise the capital stock of said company at its actual value in cash on the first day of May, after deducting therefrom the assessed value of all real and personal estate upon which the corporation pays tax and the value of the shares of stock legally held and owned by such company in other corporations incorporated in this State and paying tax on its capital stock in this State. Every such corporation may deduct from the total amount of its capital stock, surplus, and undivided profits the total amount of its actual investment in such bonds of the State, of the United States, of the Federal Farm Loan Bank, and of the Joint-stock Land Bank, as have been held as a continuing investment by such corporation for a period of not less than three months prior to the day on which such report is required to be made. If the State Department is not satisfied with the appraisement and valuation made and returned, it may make a valuation based upon the facts contained in the report, or upon any other information in its possession, and may settle an account on the valuation so made for taxes, penalties, and interest due the State thereon; and if the corporation is dissatisfied with the settlement thus made, it may appeal to the Superior Court in term, and thence to the Supreme Court. Public Laws 1921, ch. 38, sec. 43. In making such assessment, the Department of Revenue shall first ascertain the true cash value of the entire property owned by the corporation, taking the aggregate value of all the shares of capital stock in case the shares have a market value, or in case they have none, taking the actual value of the same or of the capital of the corporation, however it may be divided, in case no shares of stock have been issued. If the property is mortgaged, its true cash value shall be ascertained by adding to the market value of the aggregate shares of stock, or to the value of the capital stock, if there are no shares, the aggregate amount of the outstanding mortgage or mortgages. The result so obtained shall be treated as the true cash value of the property of the corporation. Section 57. If any of its property is locally assessed, the amount of the local assessment is to be deducted from the cash value finally ascertained, and as a part of the total amount of the taxes there must be estimated also the tax on the franchise of the company. Section 82. The Commissioner of Revenue

finds the actual market value of the capital stock, to the end that if the corporation has not made return to the list-taker of its real and personal property at a total value as great as the total value of its capital stock (or of the "investments" in its shares of stock), the deficiency may be certified to the register of deeds of the proper county, and the amount of such deficiency added to the listed value of its real and personal property under the name of "corporate excess."

It is argued that there is a distinction between common and preferred stock, and that the latter is a debt of the corporation, and should be treated as a bond. To this we do not agree, so far as the question of taxation is concerned. Both classes of stocks are "investments" in the capital stock of the corporation. The investor in the common stock elects to hazard his investment against the company's failure to earn dividends and against its liability to liquidation. Preferred stock is no less an investment, the investor therein assuming a similar hazard on condition that he be given a prior lien on the earnings and property of the company. As an equitable balance against the prior lien given the preferred stockholders the holders of common stock are usually entrusted with the management of the business. The holders of both kinds of stocks are creditors of the corporation in the sense that the corporation owes them a return on their investment, but neither occupies toward the corporation the relation of a bondholder. The distinction is this: The corporation is required by statute to make return to the Commissioner of Revenue of all its shares of stock, common and preferred alike, to be assessed and valued at the actual value of such shares, so that no investment in the capital stock of such corporation may escape taxation. The corporation also pays a franchise tax based upon its preferred as well as its common stock. The relation between a corporation and the holders of its bonds is the complete relation of debtor and creditor. Bonds issued by a corporation are not in any sense a part of its capital stock; they are not reported by it or assessed against it as a part of its capital stock; and, therefore, the holders of such bonds are required to list them for taxation.

When the existing system of taxing corporate property is considered, it is not difficult to perceive that care has been taken to insure the taxation of investments in the stocks of corporations by dealing primarily with the companies and not with the shareholders. This, in fact, is the system which generally prevails. The North Carolina Corporation Code is authority for the statement that a large majority of the states (enumerating forty-four) have adopted a policy similar to or identical with that pursued in our own legislation (p. 501). However that may be, the oft-repeated enactment of a statute which was intended to prevent double taxation has evidently met the approval of the State. We are

dealing with the statute and the Constitution as they are, and not as they would be if otherwise written. Changes in them must be wrought as provided by the law—by the people or by their representatives in the law-making department, or by both; but in any event the Legislature is responsible to the electorate and not to the courts.

In our opinion, the statute which provides that individual stockholders in any corporation or company paying a tax on its capital stock shall not be required to pay any tax on said stock, or list the same, is not in conflict with Article V, section 3, of the Constitution of North Carolina.

The plaintiff's action must be dismissed.

Action dismissed.

WALKER and HOKE, JJ., concurring.

STACY, J., concurring: I concur fully in all that is said in the clear and able opinion of *Associate Justice Adams,* speaking for the Court. But, in view of the wide range of discussion which the case has taken, I deem it not amiss to add the following:

Article V, section 3, of the State Constitution provides: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money."

It will be observed that this provision does not require the Legislature to levy a tax on investments in bonds, stocks, etc., *in the hands of the individual holders thereof,* nor is there any provision in the Constitution requiring that such investments shall be taxed twice. Section 40 of the Machinery Act of 1921 specifies what shall be enumerated on the tax list of each individual taxpayer; and item 21 of said section is as follows: "Money, investments, stocks and bonds, and shares of stock in incorporated companies which are not taxed through the corporation itself." Note the words, "which are not taxed through the corporation itself." The purpose of this language was to exempt from taxation in the hands of individual shareholders certificates of stock in corporations, where the State had already exercised the right to tax such stock through the corporation itself, or "at its source," as it is sometimes called. Manifestly, so far as the constitutional mandate is concerned, it is immaterial whether the Legislature impose a uniform tax on such investments in the hands of the individual shareholders or levy and collect such tax through the corporation itself. The method to be employed is one involving a question of state-craft, to be determined by the Legislature, and not for the courts to decide. Our functions are judicial, and we have no power to levy assessments or to devise a scheme of taxation. *Fert. Co. v. McFall,* 128 Tenn., 645.

A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value, except that derived from the company issuing it; and its legal status is in the nature of a chose in action. The value of all the property owned by a corporation, of whatever kind, including its franchise, is the true and fair measure of the value of all its stock. When it is said that a person owns a certain number of shares of stock, it is meant that such person has a right to participate in the profits of the corporation, and in its property on dissolution, after payment of its debts, in the proportion that the number of his shares bears to the whole capital stock. Clark on Corporations, ch. 10; *R. R. v. Comrs.*, 87 N. C., 426; *Redmond v. Comrs.*, 87 N. C., 122.

That the stock of a corporation has no intrinsic value separate and apart from the property of the corporation is clearly shown from what is said in *Gibbons v. Mahon*, 136 U. S., 549, and *Towne v. Eisner*, 245 U. S., 418, relative to a stock dividend:

"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each shareholder remains the same. The only change is in the evidence, which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones. In short, the corporation is no poorer and the stockholder is no richer than they were before." See, also, *Logan County v. U. S.*, 169 U. S., 255.

But more directly to the point at issue is the language of *Chief Justice Chase* in *Van Allen v. The Assessors*, 70 U. S., 598:

"It is true that the shareholder has no right to the possession of any part of the corporate property while the corporation exists and its affairs are honestly managed. He has committed his interest, for a time, to the possession and control of the corporation of which he is a member, and he has only a member's voice in the management of it.

"So a man who has leased a farm has no right to possession or control during the lease; but who denies his property in the farm? And if a dozen owners join in the lease, has not each one an interest in the property to the extent of one-twelfth? (And if, under the law or by agreement, the lessee be required to pay the tax on the farm, who would contend that the owner should pay it again?)

"So, if for the time the property of the shareholder is placed beyond his direct control and converted into property of the association, how

can that circumstance affect the intrinsic character of his shares as shares of the whole corporate property? How can a man's shares of any property be the subject of valuation at all if not with reference to the amount and productiveness of the property of which they are a part? What value can they have except that given them by that amount and that productiveness? A certificate of title to a share is not a share. It is evidence of the shareholder's interest. His interest may be transferred by the transfer of the certificate; but it is not the certificate that is valued when the worth of the share is estimated either by the speculator in the market or by the tax assessor. It is the property which it represents that is valued by the speculator often with reference to speculation only, but by the public officer, always, if he does his duty, by the real worth of the property, all things considered."

Undoubtedly the State, in creating a corporation, may provide for the taxation locally of all its shares of stock, whether owned by residents or nonresidents; and this, by virtue of the authority of the chartering state to determine the basis of organization and the liability of all of its shareholders. *Corry v. Baltimore,* 196 U. S., 466; *Hannis Dist. Co. v. Baltimore,* 216 U. S., 285. Under this principle, North Carolina levies a tax upon all the issued and outstanding capital stock of domestic corporations, regardless of where the holders of said stock may reside. Revenue Act, sec. 82. Such shares are, therefore, exempt from taxation in the hands of resident stockholders, because the corporation itself pays the tax. If the stock were not taxed in this way, the State would lose all the revenue derived from the tax paid by the corporation on shares held by nonresidents, for it is only through the corporation that such shares may be taxed at all. *Comrs. v. Tobacco Co.,* 116 N. C., 441. "In case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation." *Nat. Bank v. Commonwealth,* 76 U. S., 361.

The "capital stock" of a corporation, strictly speaking, is the amount in money or property subscribed and paid in, or secured to be paid in, by the shareholders, and always remains the same unless changed by proper legal authority. *Burrall v. Railroad Co.,* 75 N. Y., 211. The phrase in its technical sense, is not used to indicate the value of the property of the corporation, and takes no account of profits or losses. *S. v. Morristown Fire Assn.,* 23 N. J. L., 195. The surplus of a corporation is no part of its capital stock. *Farrington v. Tenn.,* 95 U. S., 687. The "capital" of a corporation, on the other hand, is a broader term, and includes all the funds, securities, credits, and property of every kind and description whatsoever belonging to the corporation. "The word 'capital' is unambiguous. It signifies the actual estate, whether in money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the

sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses." *Comstock, C. J.*, in *People v. Commissioners of Taxes, etc.*, 23 N. Y., 219. In revenue statutes, as is the case with us, the words "capital stock," as applied to corporations, are often used interchangeably with the word "capital," and both are frequently used to express the same thing, to wit, the entire property and assets of the corporation. *Christensen v. Eno,* 106 N. Y., 97.

It is of no avail to say that capital stock and shares of stock are separate and distinct pieces of property, and therefore taxable, one in the name of the corporation and the other in the hands of the individual shareholders, when, as a matter of fact, the State taxes both (in the sense they are spoken of as different pieces of property) through the corporation itself. *Farrington v. Tenn., supra; Bank v. Tenn.,* 161 U. S., 146. Our statutes provide that every item or element of worth tending to impart value to the shares of stock of a corporation shall be reported to the taxing authorities of the State for purposes of assessment and taxation. Therefore, by whatever name it may be called, every "investment in stocks" is taxed at least one time in North Carolina, and this is all that the Constitution requires. In those cases where the courts have drawn a distinction between the capital stock of the corporation and the shares of stock in the hands of the individual holders thereof, the term "capital stock" was employed in a different sense from that in which it is used in the statutes now before us. See opinion of *Mr. Justice Nelson* in *Van Allen v. The Assessors,* 70 U. S., 573, and *Bradley v. The People,* 71 U. S., 459; *Nat. Bank v. Commonwealth,* 76 U. S., 359; 7 R. C. L., 195; Clark on Corp., ch. 10. Under our revenue laws, the shares of stock themselves, and all of them, are required to be listed for taxation by the corporation and not otherwise. *Trust Co. v. Lumberton,* 179 N. C., 411.

Congress has expressly provided that shares of stock in national banks, wherever held, shall be taxable in the State, and only in the State, where the bank is located; thus recognizing the propriety and really suggesting the wisdom of taxing shares of stock in a corporation only at its home office or through the company issuing the same. U. S. Revised Statutes, sec. 5219 (Comp. St., sec. 9784); *Merchants Nat. Bank v. Richmond,* 256 U. S., 635; *Home Savings Bank v. Des Moines,* 205 U. S., 503; *Nat. Bank v. Owensboro,* 173 U. S., 664; *Aberdeen Bank v. Chehalis County,* 166 U. S., 440; *Mercantile Bank v. New York,* 121 U. S., 138; *Tenn. v. Whitworth,* 117 U. S., 129; *Evansville Bank v. Britton,* 105 U. S., 322; *Nat. Bank v. Commonwealth,* 76 U. S., 353.

This arrangement, which has been followed by the General Assembly of North Carolina from time immemorial, does no violence to the letter

or to the spirit of the constitutional provision above recited, but is, in fact, in conformity with it. The Legislature has never thought it necessary to tax shares of stock in domestic corporations twice in order to comply with this provision of the Constitution.

In a case from Ohio, with a constitutional provision exactly similar to the one in the North Carolina Constitution, and under a statute of that state, exempting shares of stock in domestic corporations from taxation in the hands of individual shareholders, when the same was paid by the corporation itself, the Supreme Court of the United States recognized and treated with approval the principle and arrangement there adopted. See *Sturges v. Carter,* 114 U. S., 511, and *Jones v. Davis,* 35 Ohio St., 474. As stated above, the constitutional provision was identical with ours, and the exemption in the Ohio statute was as follows: "No person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company." See, also, opinion of *Mr. Justice Wayne* in *Gordon v. Appeal Tax Court,* 3 Howard, 133.

In addition to Ohio, the following states have adopted policies of taxation, in regard to corporate stock, either similar to or identical with the legislation in this State, though it is conceded that their constitutional requirements may be different, to wit: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and District of Columbia. In short, so far as I have been able to ascertain, no state in the American Union has adopted and carried into actual practice the policy advocated by the plaintiff in this suit. Indeed, the adoption of such a system by our Legislature, in my judgment, would be exceedingly unwise and fraught with incalculable harm to the State, for justice would be a stranger to such a system.

Our domestic corporations are fully taxed. They pay a franchise tax, also an *ad valorem* tax on all their real, personal, and tangible property in accordance with the Constitution, and then they list all the shares of their capital stock for the owners thereof, and pay the taxes thereon for the shareholders at a valuation fixed by the State's taxing officers. Thus, all the property of North Carolina corporations, including all the shares of stock, whether owned by citizens of North Carolina or nonresidents, contribute to the support of our State Government and its subdivisions.

The fallacy of the plaintiff's argument lies in the fact that it is based on a false premise. He assumes that shares of stock in domestic corpo-

rations are not taxed at all under our present revenue laws, when, as a matter of fact, just the reverse is true. Because the Legislature has adopted one policy, and he thinks another should be pursued, falls far short of proving his case. This establishes no more than a difference of opinion between him and the law-making body of the State. His views have been expressed in the legislative halls, but they have met with disapproval there. Then, why should they be considered all-controlling here, when it is not within our province or power to say which method should be followed?

"Within constitutional limits, the power of the Legislature in matters of taxation is supreme, and its action cannot be revised or annulled by the judicial department. Nor can the courts be authorized or required by statute to levy and collect taxes, as that is a legislative function, and not judicial." Black on Const. Law (3 ed.), p. 93.

Those who criticise our revenue laws would have the Legislature to double the tax on the corporate holdings of progressive North Carolinians who have invested their money in all kinds of industrial and commercial enterprises within the State; and this, it should be remembered, in face of the fact that only residents would pay such tax, for nonresident holders of stock in domestic corporations would be exempt from its payment. No state can levy a tax, except through the corporation itself, on shares of stock in the hands of nonresidents of the taxing state, for such property is beyond its jurisdiction. *Metropolitan L. Ins. Co. v. New Orleans,* 205 U. S., 395.

The principle of taxation here sought to be established is in vogue nowhere in this country. Then why should it be adopted in North Carolina? Ordinarily, under modern conditions, capital will coöperate to achieve large and beneficial results only in corporate form; and, if it is to be taxed twice in the same jurisdiction, it will flee from the borders of the State and seek investment under fairer and more favorable laws.

The constant agitation of this matter can serve no good purpose; and, while the case might be allowed to go off on a question of procedure, it is probably not amiss for us to say that, in our opinion, the policy heretofore established by the Legislature, and now in vogue in this State, is entirely permissible and is in full compliance with the constitutional requirement above recited, and that the sections of the Revenue and Machinery Acts here called in question are valid.

WALKER and HOKE, JJ., concurring.

CLARK, C. J., *Not concurring in the dismissal of the action:* The Constitution of North Carolina, Art. V, sec. 3, provides: "Laws shall be passed *taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money.*"

The statute of which the plaintiff complains on behalf of himself and other taxpayers appears near the end in a very long section, to wit, sec. 4, ch. 34, Laws 1921, and is as follows: *"Individual stockholders* in any corporation, joint-stock association, limited partnership, or company paying a tax on its capital stock *shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations in this State, upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same."*

"Investments in stocks" are made by those who buy them, or otherwise acquire them, and not by the corporations who sell them. The owners of the stock possess them absolutely, have a right to devise, sell, or otherwise dispose of them. The corporation which has sold the stock has received the purchase price therefor, and has parted with and has no control over the stock of the purchaser to whom it has sold. The corporation is no wise liable for the debts of the stockholder and the stockholder is no wise liable for the debts of the corporation. The two are entirely separate and distinct. The owner has acquired this stock as he would acquire livestock and the seller has sold it and received the purchase price just as the seller of livestock or any other property.

Compare the clear language of the Constitution and the statute. It would be impossible to conceive of any more direct and palpable conflict with the Constitution, which requires that "investments in stocks" shall be taxed like all other property, "according to its true value in money," than this statute, which *exempts* "investments in stocks" from all taxation. It does not require one to be a lawyer, but simply the capacity to read the English language to see the absolute conflict between this statute exempting these immense accumulations of capital invested in stocks and bonds and the Constitution, which requires without equivocation that they shall be taxed.

Indeed, in the very same chapter, Laws 1921, ch. 34, sec. 6 (7), it is recognized that all stocks are the property of the owner and not the property of the corporation, for it is provided that as to the inheritance taxes, the State Tax Commission shall "determine the amount of inheritance tax due the State of North Carolina on the transfer of any such bonds or stocks; it shall determine the value of such bonds or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due, or to become due, and shall make prompt return to the State Treasury of all such taxes collected." In this section the whole subject of bonds and shares of stock of any decedent holder is treated, and it is provided that such stocks and bonds are liable to the payment of the inheritance tax prior to any other creditor. It regulates the transfer of such stocks and bonds as

the property of the decedent to provide against fraud upon the State in the nonpayment of the tax thereon as the property of the owner. Did these stocks become the property of the stockholder and taxable only by his death? Stocks and bonds are liable for the debts of the owner, and are not liable for the debts of the corporation; if they are liable for inheritance taxes on the death of the owner, they are liable for the annual taxes for the support of the Government. The fanciful theory that investments in stocks shall be exempt from taxation is contradicted by the very chapter in which it is contained.

Not only every office-holder, but every voter takes an oath to support and maintain the Constitution of the State. Such an open, not to say defiant, contradiction of this provision of the Constitution by the statute entitled the plaintiff, and all others of like mind, to place their complaint before the courts that it may be declared whether such exemption is valid or not. The great railroads are now maintaining in the courts a complaint that they are taxed in violation of the Constitution. Surely the plaintiff and those who concur with him have a right to place before the judicial tribunals of the State a like complaint that by this statute they have been overtaxed to threefold or more the former tax rate, and that this is caused by the exemption of this vast amount of the "canned wealth" of the State, the money invested in stocks and bonds, which by this statute has been exempted from paying their fair share, or any share, of the burdens of carrying on the Government.

The total valuation of all the real and personal property for the year 1921 filed in the State Auditor's office is in round numbers $3,119 millions. The estimate of the total valuation of stocks and bonds which are exempted from taxation is not returned to the Auditor's office, but we know from the official records of the U. S. Government that the corporations in this State, which are in number about 6,000, return as the valuation of their stock to the Federal Government on 4,300 of these corporations $932,000,000 for the past year. This is a matter of which we can take judicial notice. As the statute requires no corporations having less than $5,000 of stocks to make this return, and as the return omits not only all stocks in corporations under $5,000, but there is no return made to the Government on the stocks held in this State issued by corporations outside of North Carolina, it is probably an under-estimate to say that all the untaxed stocks in this State will aggregate over fifteen hundred millions, or in round numbers, nearly one-half of the amount of property listed for taxation. We know that the taxation on the listed property in most of our cities averages $2.50 per $100. Putting the rate of taxation, State, county, and town, at the low average of $1 per $100, it is very clear that the owners of stocks in the State are illegally exempted annually from the payment of $15,000,000 of taxes. That

is to say, that they should pay that much if there was conformity with the Constitution, which requires that "Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and all real and personal property, according to its true value in money."

This amount, which should be paid by the owners of stocks in corporations, is paid for them by adding it to the taxation of those who are not wealthy enough to have idle capital to invest in stocks.

It follows, therefore, that if all property were taxed as the Constitution requires, *"uniformly, including investments in stocks and bonds,"* the rate of taxation from the realty, livestock, and other personal property, and others not wealthy enough to invest in stocks, would be reduced at least one-third. This would be accomplished simply by the owners of the bonds and stocks paying taxes thereon at the same rate as the owners of other property. They would not pay $15,000,000, for the total of taxpaying property being increased the rate would be decidedly lower.

In this estimate omission has been made of the fact that the Constitution requires that bonds should be taxed, and while we have no data, such as returns of stocks which the Federal Government gives us, we know from high authority that throughout the country there is altogether fifty billions invested in bonds which are exempted from taxation. One-half of this fifty billions is stated to be the bonds of the Federal and State Government, which are exempted from taxation upon the ground that to some extent, at least, their exemption from taxation is a collection of taxes at the source by the lower rate of interest. However, it may be as to the alleged financial reasons for exempting National and State bonds, there is no such ground for the exemption of the stocks or bonds of railroads, banks, cotton mills, water-power companies, tobacco companies, or any other corporations. They pay, and should pay, on their property, but in doing so there is no reason why those to whom they sell their stocks, and whose money they have received in exchange, should be exempt from taxation on the stocks and bonds of these corporations on which the owners receive dividends and interest, and not infrequently nontaxable stock dividends doubling and trebling their *"tax-free"* holdings.

The Constitution forbids expressly the exemption of stocks and bonds, but it is clearly violated. There is no more reason that the owners of the stocks which the corporations have sold to those who own them should be exempted from taxation than that their bonds or the indebtedness by individuals should be exempt from taxation. A certificate of stock in a corporation is simply an indebtedness on which the seller agrees to pay dividends in lieu of interest. On common stock, the rate

of the dividend is not fixed; on preferred stock there is a fixed rate, and stock differs in no wise from bonds except that the owner of the stock in most companies is allowed to share in the election of officers, which is at most mostly an illusory privilege, as all corporations are governed by those who arrange to control the majority of the stock.

The provision that *"all investments in bonds and stocks"* shall be taxed by the same *uniform* rate as all other property was put into the Constitution as a guarantee that those not able to purchase stocks and bonds should not be over-taxed by the exemption of owners of stocks and bonds, who are, of all people, most able to pay taxes, but whose influence might procure exemption from taxation, as it has done, notwithstanding the constitutional guarantee against it.

There is no question that has come up to this Court which is more entitled to a fair and full consideration. If the railroads are entitled to have considered their claim for over-taxation, surely the masses of the people, those who, not owning exempted property, are paying the taxes which should be paid by the property illegally exempted, have the right to have their complaint considered and the Constitution enforced by holding invalid and illegal any tax levy that taxes them and exempts so large a body of idle wealth, the taxes on which are paid by those who do not have money to invest in such exempted property.

Not only are the stocks of corporations of this State exempted, but the same chapter which levies the revenue, Laws 1921, ch. 34, sec. 3, provides that not only are individual stockholders in corporations in this State exempted from payment of taxes thereon, but the statute, Laws 1921, ch. 34, sec. 4, provides: "Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, or if such corporation has tangible assets within this State assessed for taxation at a value not exceeding the par value of the total stock owned by citizens of this State, and the said corporation pays franchise tax on its entire issue and outstanding capital stock at the same rate as paid by domestic corporations."

It is to be noted that as to the franchise tax which is levied on corporations for the privilege of doing business and which is analogous to license tax paid by lawyers, merchants, and all others for carrying on business, the franchise tax has been usually one-twenty-fifth of 1 per cent, and never over one-tenth of 1 per cent, which produces an insignificant amount. There is no reason, as this Court has often held, to grant an exemption to stockholders on this ground.

It may be further noted that while there is an illusory provision that where the capital stock is more than the aggregate value of the property

of a corporation there shall be levied a tax on the excess of capital stock. Under this head there was assessed for taxation last year only the petty sum of 17 millions of capital stock, and the total taxes paid by individuals on stocks in this State was $25,000 on a true valuation of over $1,500,000,000, as above estimated. The taxes which should have been paid by the owners of this vast body of "tax free" stocks was paid by those not able to invest in stocks and bonds.

It can be readily seen that upon a fair estimate of the stocks and bonds and other property illegally exempted from taxation there is approximately at least one-third in "tax-free" stocks, and adding "tax-free" bonds, more than one-half in value of the property in this State which pays no taxes whatever, though the Constitution requires expressly that this exempted property shall be taxed uniformly with other property. This exemption is of the property owned by the wealthiest section of the people with the result that it more than doubles the taxes upon the farmers and other real estate owners and the laborers and merchants and all others unable to spare surplus money to be invested in exempted stocks and bonds.

From the adoption of the Constitution in 1868 down to 1887—20 years—this constitutional provision that stocks and bonds should be taxed uniformly with other property according to its true value was observed. In 1887 two great railroads of this State were entirely exempt on all their property, which exemption was later declared illegal in 1892, and set aside by this Court in the well known case of *R. R. v. Allsbrook,* 110 N. C., 137. Though in that case, as in this, it was claimed that they had enjoyed such exemption for so long a time that they were protected in its continued enjoyment, the Court held that there was no statute of limitations that would protect an illegal exemption by lapse of time. This opinion of the Court, written by the same hand that writes this, was carried to the United States Supreme Court and was affirmed in *R. R. v. Allsbrook,* 146 U. S., 279. There was in their case an express agreement claimed to have been made by the State in their charter for such exemption. This Court held that the Legislature had no power to grant such exemption. In their case, also, there was not, as in this instance, an express provision to the contrary in the Constitution which forbade the exemption of the owners of stocks from taxation.

The corporations not foreseeing in 1887 that the State would enforce the taxation of their properties, and by the aid of other corporations, secured in addition to some extent the exemption from taxation of the stocks sold by them to investors. This enhanced the selling price of their stocks by making them much more desirable to investors. The great increase in the number of corporations, railroads, cotton mills, tobacco companies, and for other purposes lent force to the movement to

make all stocks more saleable by making them exempt from taxation. The *thin edge* of the wedge exempting any stocks from taxation introduced in 1887 was gradually made broader, until by the act of 1919 it was made to exempt the stocks of all corporations chartered in this State, or wherever two-thirds of its property, though chartered in other states, was taxed in this State. The result has been that though there is now one and a half billions of stocks owned in North Carolina, as above estimated, only $25,000 in taxes on stocks was last year paid into the State Treasury. On this billion and a half dollars in stocks, if taxed like other property, there should have been paid fifteen millions of dollars.

Uniform taxation would not have placed, however, 15 million dollars taxation on this property, because by uniform taxation on all property alike the rate would have been largely reduced to all, to the immense relief of farmers and other owners of real estate, and all others who were unable to invest their money in "tax-free stocks and bonds." The taxation of property equally is the simplest justice which the plaintiffs and all other citizens are entitled to demand, and the failure to observe it is in direct violation of the obligation of every citizen to maintain and support a Constitution which guarantees equality and uniformity in the taxation of property.

In reply to the above, the owners of these vast quantities of "tax-free" securities contend that to tax their stocks is double taxation. There is *no requirement in the Constitution forbidding double taxation.* The opinion-in-chief in this case admits this, and it has often been held, *S. v. Wheeler,* 141 N. C., 775; *Comrs. v. Tobacco Co.,* 116 N. C., 448. But there is a requirement forbidding the exemption of stocks and bonds. Connor and Cheshire on Cons., 263 (1), 267, 277, citing cases.

But it is not true, either as a matter of fact or of law, that because the corporation pays tax on its property that it will be double taxation to tax the stocks and bonds which they have sold to other people, which have become the property of other people, and for which the corporations have received full value.

This matter has been often before this Court and before the Supreme Court of the United States, and *in every case,* without exception, it has been held in both courts that to tax the property of a corporation and to tax the purchasers of its stocks and bonds is not double taxation. Every court in states whose Constitution, like ours, requires uniform taxation of property, has also held that to tax the stocks and bonds of corporations is not double taxation. It is not "double taxation" to tax the shares in the hands of the shareholders when taxes have been laid upon the tangible property and capital stock of the corporation itself. This plea is denied by all the courts, and is unfounded in fact and in justice.

All courts hold that the tangible property and capital stock and franchises of a corporation are taxable as its property; that a corporation is a distinct entity from the individual shareholder, and that the payment of taxation by the corporation can furnish no claim for the exemption of the stock in the hands of the stockholder.

It is estimated, and probably justly, that more than half the wealth in the United States is either owned by corporations or is invested in their bonds and stocks. The latter is idle capital, whose owners do nothing for the public welfare, but simply live on that which comes to them without effort as coupon clippers or dividend drawers. Mr. McAdoo, late Secretary of the United States Treasury, has said, that indeed they "should pay a far higher rate of taxation than any other class in the community, since they do less for the public welfare."

The propaganda for their total exemption from taxation has been so widespread and persistent, and the end sought is so unjust and dangerous to the foundations of society, that it will not be amiss to set out at some length what the courts have all said as to the wholly unfounded hypothesis that to tax shares in the hands of shareholders is "double taxation," and therefore unconstitutional.

The courts all hold that the taxation of stocks in the hands of the owner is *not* "double taxation," simply because the corporation itself is taxed, and even if it were, it would not be unconstitutional.

In *Pullen v. Corporation Commission,* 152 N. C., 553, *Manning, J.,* for the Court said: "It is likewise well settled by the language of our State Constitution, by many decisions of this Court and of the Supreme Court of the United States, and is now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a *separate and distinct* species of property from the property, whether real, personal, or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted."

Brown, J., in the same case, concurring, says, at p. 562: "I agree, also, that it is well settled that the shares of stock in any corporation, when owned by individuals, are *separate and distinct property* from the assets of the corporation and *may be taxed as such.*"

In the same case *Hoke, J.,* 152 N. C., at p. 582, says, quoting from *Bank v. Tennessee,* 161 U. S., 146: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may *both be taxed,* and it is *not double taxation. Van Allen v. Assessors,* 70 U. S. (3 Wall), 573; *People v. Comrs.,* 71 U. S. (3 Wall), 244, cited in *Farrington v. Tenn.,* 95 U. S., 687. This statement has been reiterated

many times in various decisions by this Court, and is not now disputed by any one."

A later case, *Brown v. Jackson,* 179 N. C., 363-371 (1920), cites and approves the above cases.

The above decisions of this State and of the United States Supreme Court are uniform, and without variation or shadow of turning, to the effect that the shares of stock in the hands of the stockholders are separate and distinct from the tangible property, the franchises and capital stock of the corporation, and that it is *not double taxation* to tax the shares in the hands of the stockholders and also to tax the franchises, capital stock, and other property of the corporation. These decisions should be the end of the controversy.

But there are many decisions in other courts to precisely the same effect.

In our own Court are many other cases. In *Comrs. v. Tobacco Co.,* 116 N. C., 446, this Court held, in accordance with the decision rendered by *Chief Justice Smith* in *Belo v. Comrs.,* 82 N. C., 415; 33 Am. Rep., 668, and by *Ashe, J.,* in *Worth v. R. R.,* 89 N. C., 305, and indeed, in accordance with all legal authorities and text-books, as follows: "As to corporations, by all the authorities, it is in the power of the Legislature to lay the following taxes, two or more of them in its discretion at the same time: (1) To tax the franchise (including in this the power to tax also the corporate dividend); (2) the capital stock; (3) the real and personal property of the corporation. This tax is *imperative and not discretionary* under the *ad valorem* feature of the Constitution. (4) The shares of stock in the *hands of the stockholder.* This is *also imperative and not discretionary.*" This last, of course, is due by the owner thereof, the stockholder.

It is further said in the same case, on the identical point presented here, as follows: "The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed *ad valorem* like other 'property belonging to the holder, independently of the taxation upon the corporation, its franchises,' " etc.

This case has been cited with approval: *Comrs. v. S. S. Co.,* 128 N. C., 559; *Lacy v. Packing Co.,* 134 N. C., 571; *Land Co. v. Smith,* 151 N. C., 72; *Pullen v. Corporation Commission,* 152 N. C., 554; 58 L. R. A., 590, 594, 601, note; 60 L. R. A., 367, note.

The corporations are further discriminated in favor of by the provision at bottom of page 148, Laws 1921, that if they hold stock in other corporations (paying the small "excess capital" tax) they shall not pay taxes upon the money invested in such other corporations. When the American Tobacco Company was dissolved it appeared that that com-

pany held controlling stock in 65 subordinate companies as tributaries or aliases, under which to do their style of business.

There is also a provision in the Laws of 1921, p. 148, not far from the bottom, that corporations paying this tax on the small part of the capital known as "excess capital stock" (and amounting in the whole State to almost nothing), "shall not be required to pay tax on the mortgages, bonds, other securities and credits owned by them"—though every one else must do so.

Then there is a further provision, which secures safety even from public criticism, that the Public Treasurer and the State Tax Commission shall not *allow the tax returns of the corporations to be examined,* Laws 1921, top of p. 251, and prescribes a penalty of $1,000, one year's imprisonment, and dismissal from office for any one giving information. This enables them *to do anything and deny everything!*

The banks, which formerly were taxed in the manner provided in Revisal, 5267 and 5268, have now "received theirs," as can be found by reference to Laws 1921, p. 248. Thus everybody who could foresee the coming and necessary increase of taxation has "gotten under shelter" except only those who create the wealth of the State, or who by their own efforts, manual or mental, earn the incomes which they receive.

To this may be added that while the constitutional amendment of 1920 provides that "incomes from property already taxed may be taxed," by recent legislation (Laws 1921, ch. 34, sec. 306 (5), page 210): "Dividends from stock in any corporation, the income of which shall have been assessed and the tax or such income paid by the corporation" shall not be taxed! That is, not only the money invested in "stock" by individuals and others (amounting in this State probably to fifteen hundred million dollars) is absolutely exempted from taxation in defiance of the constitutional provision, Article V, section 3, that "all stocks" and other personal property shall be taxed, but it is now further provided that the *income* or dividends received by the stockholders, and which is paid into their pockets from such stock is exempt from taxation in spite of the recent amendment that "incomes derived from property taxed" (even if the stock had been the property of the corporation) shall be taxed. And it is further provided by a more recent act, Special Session 1921, p. 152, that banking corporations may deduct from taxation 5 per cent of their surplus and undivided profits, besides, also, the total amount of the surplus and undivided profits invested in State or United States bonds, or the bonds of the Federal Farm Loan Banks and Joint-stock Land Banks.

In the very recent case of *Brown v. Jackson,* 179 N. C., 363, it was held that the stock of the Atlantic Coast Line Railroad Company was taxable in the hands of the shareholders, and is not exempt from taxa-

tion like other stocks. This seems to have had very small enforcement, or there is much less of this stock owned in the State than is generally supposed, for as it appears from the State Auditor's report, the entire sum derived from taxes on stocks of all kinds in this State last year is reported as $25,000.

In *Belo v. Comrs.*, 82 N. C., 415, *Chief Justice Smith* held that a tax upon the shares of stock *in the hands of stockholders* was *imperative and not discretionary,* in addition to the tax upon the real and personal property of the corporation, which was also *imperative and not discretionary.* That decision stands unquestioned in our Reports, and has been reiterated and approved by *Ashe, J.,* in *Worth v. R. R.,* 89 N. C., 305, and in every case since.

It is further said in *Comrs. v. Tobacco Co.,* 116 N. C., 446, on the identical point presented here, as follows: "Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. *Buie v. Comrs.,* 79 N. C., 267. But under that method many shares failed to be listed for taxation. Besides, the shares of nonresident owners, except those of national banks, escaped taxation in this State under the ruling in *R. R. v. Comrs.,* 91 N. C., 454. To remedy this, the provision was passed which, in sec. 14, ch. 296, Laws 1893 (which has been substantially reënacted at every session of the Legislature since), requires the list of shares to be given in by the proper officer of the corporation, which shall pay the same in behalf of the shareholders. This *does not affect the liability of the shares to tax as the property of the shareholders,* but is simply for the convenience of the State in collecting the tax. The effect is merely to change the *situs* of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in *Wiley v. Comrs.,* 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks." *But it should be noted that this is now changed to a total exemption of the owner of stock from all taxation thereon.*

That opinion further said: "The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and under the Constitution must be taxed *ad valorem* like other 'property belonging to the holder, independently of the taxation upon the corporation, its franchises, etc.'

To the same effect are the decisions throughout the country, which can be found grouped in the elaborate notes to *State Board v. Coggin* (Ill.), 58 L. R. A., 513-618, which cite the above case at pp. 590, 594, 601. On p. 594 it quotes from *Chief Justice Waite,* in *Tenn. v. Whit-*

worth, 117 U. S., 129, as follows: "In corporations four elements of taxable value are sometimes found: (1) franchises; (2) capital stock *in the hands of the corporation;* (3) corporate property; and (4) shares of the capital stock *in the hands of the individual stockholders.*"

The Constitution of this State, Article V, section 3, specifies the only property which may be exempted from taxation, and in it there is no authority to the Legislature to exempt the *owners* of the 'stocks' and 'bonds' of any corporation from payment of taxes upon the true value thereof because the corporation has paid taxes (as it rightly should do) upon its own property, nor for any other reason. In that same article, section 5, there is authority to exempt "wearing apparel, arms for muster, household and kitchen furniture, and mechanical and agricultural implements of mechanics and farmers, libraries, and scientific instruments, or any other personal property, to a value *not exceeding* $300." But the State has felt so poor that every farmer and mechanic for more than 50 years has been required to pay taxes on his clothing for his family, his household and kitchen furniture, his blacksmith's and farming tools and plows "above $25," until, the matter being called to the attention of the Legislature (see concurring opinion in this Court, *Wagstaff v. Highway Commission,* 177 N. C., at bottom of page 360), this exemption was raised to $300 for the first time by the Legislature of 1919.

Those who labor and toil have been required to pay taxes on everything above $25—on their pots and pans, the washing tub of the washerwoman, the farmer on his plows, the blacksmith on his tools, and every one on everything above $25. The Tax Commission now contends that the Legislature, contrary to the equality of taxation, required alike by the Constitution and by justice, had power to exempt, and has exempted, the investment of fifteen hundred millions of the best property in the State, the stock of its most prosperous corporations, from paying any share of the burden of maintaining the Government under which they live, and thus made it nontaxable, though this Court and the United States Supreme Court have held that the property of the corporation itself could not be exempted from taxation by the act of the Legislature. *R. R. v. Allsbrook,* 110 N. C., 137, affirmed on writ of error, 146 U. S., 279.

It is a maxim of the law, as well as of political economy, that the "power to tax is the power to destroy," and there is no power more deadly to the prosperity of a people than to increase taxation on those of small means, and who by their labor and their efforts earn a bare living, while wholly exempting stocks issued and sold by the wealthy and powerful corporations, the just share of taxation on the purchasers of which must thus be paid by the class that is less wealthy and influential.

The owner of a note for money loaned a neighbor is taxed, while the borrower is taxed also on the land mortgaged to secure the loan. They are not corporations, endowed with special privileges.

The decisions from the U. S. Supreme Court are uniform, like our decisions, on this point. In *Van Allen v. Assessors,* 70 U. S. (3 Wall.), 573, 583, and 584, it is said: "The tax on shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with corporate property as absolutely as a private individual can deal with his own, . . . the interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of his capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a *distinct, independent interest* or property, held by the shareholder like any other property that may belong to him." This is quoted verbatim and approved. *People v. Comrs.,* 71 U. S., at p. 258, the Court saying, "And we add, of course, is *subject to like taxation.*"

And in *Tennessee v. Whitworth,* 117 U. S., 129, at p. 136, *Mr. Chief Justice Waite,* in delivering the opinion of the Court, says: "In corporations four elements of taxable value are sometimes found. First, the franchise; second, the capital stock *in the hands of the corporation;* third, the corporate property; and fourth, *the shares of capital stock in the hands of* the individual stockholders."

In *Bank v. Tennessee,* 161 U. S., 146, the Court says: "The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders may both be taxed, and it is *not double taxation,*" citing *Van Allen v. Assessors,* 70 U. S. (3 Wall.), 573; *People v. Comrs.,* 71 U. S. (3 Wall.), 244, already cited in *Farrington v. Tennessee,* 95 U. S., 687.

In *New Orleans v. Houston,* 205 U. S., 395, *Mr. Justice Matthews* said, speaking for the Court: "It is well settled by the decisions of this Court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are *distinct property interests,* and, where that is the legislative intent clearly expressed, that both may be taxed," as in the Constitution of North Carolina. This doctrine is fully recognized in *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S., 194, and in many other cases. There are sound reasons for it in public policy.

In a more recent case, *Hawley v. Malden,* 232 U. S., 1 (October, 1913), the Court says: "The property of shareholders in their respective

shares is distinct from the corporate property, franchises, and capital stock of the corporation itself, and *may be separately taxed.*" It also quotes with approval *Corry v. Baltimore,* 196 U. S., 496, that "A state has the undoubted right in creating corporations, to provide for the taxation in that State of all their shares, *whether owned by residents or nonresidents.*"

These uniform decisions by the U. S. Supreme Court and by our own Court—for there is no decision to the contrary—are sufficient, but we may add the following to the same purport from those States, whose Constitution, like ours, require *uniformity* and *equality* in the taxation of property.

Alabama: In *Bank v. Hewitt,* 112 Alabama, 553, it is said: "The question has been fully considered and settled that the ownership of land by a corporation is entirely separate from the ownership by shareholders of stock in the corporation. The former is realty, the latter is personalty under all circumstances. The corporation acting through the power conferred by its charter, the shareholder disposes of his shares as he does of any other property he may own. *The property of each is subject to taxation, without regard to the other.* The one may become insolvent, while the other is entirely solvent. A private corporation, like an individual, may invest its money in nontaxable property. When it does so, the property remains subject to taxation. Desty on Taxation, 330; *ibid.,* 371; *Maguire v. Board of Revenue,* 71 Ala., 401; *Van Allen v. The Assessors,* 70 U. S. (3 Wall.), 583. Many authorities might be cited to the proposition."

Georgia: In 125 Georgia, 595 (1906), it is said: "It would be more than idle to contend in this day that one who owns shares of stock in a corporation is not the owner of property. It is true the value of the property depends largely, if not entirely, upon a fiction of the law. But every holder of a share of stock in any corporation is a property owner. Shares of stock are bought and sold. They are bequeathed to legatees and descend to heirs. The Legislature may have even the right under our Constitution to declare that the situs for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a situs for taxation in this State. The General Assembly has so declared, and residents in this State *who own this class of property must bear the same burden of taxation as is required of owners of other kinds of property.*"

Illinois: In *Bank v. Kinsella,* 201 Illinois, 31 (1903), the Court says: "The taxing of tangible property to the corporation and of the shares of stock to the holders thereof is *not double taxation,*" quoting from *Banking Co. v. Parks,* 88 Illinois, 173, as follows: "This Court has repeatedly held that the tangible property of a corporation and the

shares of stock are separate and distinct kinds of property *under different ownership;* the first named being the property of the corporation, and the last named is the property of the individual stockholders, both of which, under the provisions of the revenue law, being subject to taxation." It also quotes *Porter v. R. R.,* 76 Illinois, 561, and subsequent cases, and the U. S. Supreme Court, in *Minot v. R. R.,* 18 Wall., 206, and *Taylor v. Secor,* 69 U. S. (2 Otto), 575, and other cases, as follows: "These cases hold that such taxation is *neither double nor unconstitutional;* that the property of different ownerships must be taxed by the municipalities from which they derive their powers and franchises." It further quotes, in *Trust Co. v. Lander,* as follows: "A state has a power to tax both the capital and shares of a corporation, unless prohibited by its Constitution, and to do so would not be double taxation." And further quotes several authorities that "The capital stock of a corporation and the shares into which such shares are divided and held by individual shareholders are two *distinct pieces of property.* The capital stock and the shares of stock in the hands of shareholders may both be taxed, and it is *not double taxation.*" Among the many cases cited for this proposition is *Van Allen v. Assessors,* 70 U. S., 573.

Indiana: In *Building Co. v. Board,* 30 Indiana App., 13, it is said that the assessment of taxes upon the company for money loaned arising from interest and premium does not amount to double taxation on the grounds that the stockholders are assessed on their shares since their shares are assessable against the stockholders, citing, on p. 21, several cases from the Indiana Supreme Court.

Iowa: In *Judy v. Beckwith,* 137 Iowa (1908), 30, the Court says: "A shareholder and the corporation are two distinct persons, their rights and interests with relations to the property and business are distinct and separable. The corporation is the sole owner of such property, while the shares of the capital stock simply entitles the holder to demand his just proportion of the dividends, and when the corporation is dissolved, to also demand his like proportion of the remnant of assets." Then, after citing authorities that the owner of the stock can bring an action to recover them, and that on his death it is distributed to his heirs, the Court adds: "Such shares being personalty, representing valuable rights personal to the owner, no good reason can be assigned why they should not be governed by the usual rule, which makes such property taxable at the owner's domicile. With but very little discord in the cases, save as objection has been occasionally made in academic discussions, such taxation is upheld by all the courts," citing numerous authorities from many states. It is further said (p. 35): *"Capital stock and shares of capital stock represent different property rights, one belonging to the corporation and the other to the shareholders, and both*

may be taxed without violation of any established principle of law," citing a long list of cases from several states, among others, *Belo v. Comrs.,* 82 N. C., 415, and *Shelby Co. v. Bank,* 161 U. S., 149.

In *Head v. Board,* 170 Iowa, 306 (1915), the Court held, citing U. S. authorities, *Bank v. Des Moines,* 205 U. S., 516, particularly, that "Shares in corporations are property entirely distinct and independent from the property of the corporation. *The tax on an individual in respect to his shares in the corporation is not regarded as a tax as upon the corporation itself."*

Kansas: In *Bank v. Moon,* Kansas (1918), the Court held: "The *distinction between* the class of property known as *shares of stock* and the class of property owned by the corporation called *capital stock,* and sometimes called capital, has always been recognized and enforced by the Supreme Court of the United States. Its decisions are authoritative because of the legislative purpose to conform the tax law to the requirements of the Federal law. A *specious argument* frequently advanced is that the shares of stock represent the capital stock, which in turn represents the property of the corporation, so that a tax return of shares by the stockholders, or the corporation for them, and a return of capital stock or property by the corporation, accomplish the same end, but by different methods. The fallacy of this argument is exposed by the decision in *People v. Comrs.,* 71 U. S. (4 Wall.), 244." The Court then quotes from the several cases from the U. S. Supreme Court above set out.

Kentucky: In *Franklin Co. v. Bank,* 87 Kentucky, 382, it is said: "The capital stock of a bank and the shares of capital are distinct things, and *both may be taxed.* So, also, the franchise, the surplus earnings, and the real estate are things distinct from the capital stock, and from each other, and the State may tax the bank under each of these heads without imposing double taxation." The Court says: "It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the appellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank, and the means of conducting its operations. The corporation cannot increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee, first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership. But he cannot control or withdraw a dollar of the principal; that must remain as the basis of

the corporation's business operation. The shareholder is entitled only to share in the profits. So, the capital stock and the shares of the capital stock are distinct things, and *both may be taxed.* So, also, the franchise—the right of the corporation to exercise its powers in the prosecution of its business as a distinct right from its capital stock—may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, but only its earnings, which are not a part of its capital stock, may be taxed. Angell and Ames on Corporations, secs. 556, 557; *Bradley v. People* (4 Wall.), 459; *National Bank v. Commonwealth* (9 Wall.), 353."

Massachusetts: In *Hawley v. Malden,* 204 Mass., 104, the Court held, quoting *New Orleans v. Houston,* 119 U. S., 277, and other U. S. decisions: "It is well settled by the decisions of this Court that the property of the shareholders and the property of corporations in its capital stock, are distinct property interests, and where that legislative intent is clearly expressed *both may be taxed,"* adding as citations *Transient Co. v. Kentucky,* 199 U. S., 194, and many other cases, and adding: "There are sound reasons for it in public policy." This case itself was affirmed on writ of error by U. S. Supreme Court, 232 U. S., 1.

In *Loring v. Beverly,* 222 Mass. (1916), 332, it is said, citing the above case: "Shares of stock are property distinct in kind from the capital, franchise or other property of a corporation. Taxation upon one or all of these elements of property of the corporation does not prevent taxation upon the shares of stock as the property of the owner at his domicile."

New Jersey: In *State v. Branin,* 23 N. J. L., 484, the Court held: "The stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders if authorized by the Legislature." In that State the Constitution does not require, as here, the equal and uniform taxation of all property, including "investments in bonds and stocks."

Ohio: In *Bradley v. Bauder,* 36 Ohio State, 35, the Court says: "The argument is that the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares in the capital stock, when owned by individuals, only represent proportions in the ownership of such property, and hence, to tax the shares is another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed by another State, violates the rule or principle of equality established by the Constitution. This argument, however plausible it seems, has *never met with favor* from the courts. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the

same jurisdiction. Here *the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its situs, so far as shares of stock are capable of one, is in a different State.*"

Tennessee: In *State v. Bank,* 95 Tennessee, 221, the Court "reaffirms that *taxation of capital stock to the corporation and of the shares of stock to its stockholders is not double taxation.* Capital stock and shares of stock are separate and distinct property interests and form separate and distinct subjects for taxation," citing numerous cases. The capital of a corporation, whatever invested in, and the individual shares of stock, are *distinct species of property. Farrington v. Tennessee,* 95 U. S., 679. The owner of a share of stock owns no part of the capital of the company. *Watson v. Spratley,* 10 Exch., 256. The corporation is its sole owner, holding the same, it is true, in trust, for the purpose for which the corporation was created, and upon its winding up, for the benefit of creditors and shareholders. The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate, from time to time, in the net profits of the business, and upon the dissolution of the corporation to a proportion of the assets after the payment of the corporate debts. It is personal property, which, upon the death of the owner, goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and, in so doing, works no change or modification in the title to the corporate property."

Virginia: In *Commonwealth v. Charlottesville,* 90 Virginia, 190, the Court quotes with approval and reaffirms the proposition laid down in *Bank v. Richmond,* 79 Virginia, 113, as follows: "The capital stock and the shares of capital stock are *distinct things,* the former belonging to the corporation and the latter to individuals. Both may be taxed, and it is not *double taxation.*" At that time the Constitution of Virginia, like ours, required uniformity in taxation, but at their Convention in 1900 that provision was struck out. In this State it has simply been ignored.

That Court, citing cases, added: "The two are very different things. The capital or capital stock belongs to the corporation; the shares to individuals, and being different property interests, and consequently distinct subjects of taxation, the better opinion is that taxing both is *not double taxation.* Burroughs, Taxation, 170; *Bank v. Richmond,* 79 Va., 113; *Farrington v. Tennessee,* 95 U. S., 679."

Washington: In *Bank v. Pierce Co.,* 20 Wash., 683, the Court holds, citing *Van Allen v. Assessors,* and other U. S. decisions, that *"the tax on the shares is not a tax on the capital of a bank.* The corporation is legal owner of all the property of the bank, real and personal; and

within the powers conferred upon it by the charter, and for the purpose for which it was created can deal with the corporate property as absolutely as a private individual can deal with his own."

SUMMARY

It appears clearly from the above authorities that it is held uniformly always and everywhere—*ubique, semper et eadem*—that the stock in the hands of shareholders is his individual property, and that the capital stock, franchises, and tangible property of the corporation are its property, that there is a distinct ownership by the two parties of a separate and distinct species of property, and that the taxation of one does not exempt the property of the other from taxation. The cases say the opposite contention is "specious."

It also appears that in all cases where the Constitution, as in this State, requires that all property, real and personal, shall be taxed, it is unconstitutional to exempt the shares of the stockholders from taxation upon the ground that the property of the corporation, whether capital stock, franchises, or tangible property, is taxed.

There are some states in which the requirement of the Constitution of North Carolina and of some other states that there shall be "uniform taxation of all property," and that "all moneys, investments in bonds, stocks, etc., shall be taxed uniformly" does not appear. In those states it is held to be discretionary what property shall be taxed. But, in all others, the shares in the hands of the stockholders are required to be taxed, and to refrain from doing so is a clear evasion of an imperative constitutional duty, which was imposed for the protection of those who might not have idle money to invest in stocks and other securities.

But the defendants claim that the Court is without authority to issue a *mandamus* to the Corporation Commission to levy the tax. Every citizen is entitled to have the Court pass upon his claim that the taxes imposed by any statute, or even which is likely to be imposed, shall be declared illegal by the courts if contrary to the constitutional protection. This is constantly done when injunctions are sought against issuance of bonds, and formerly, when there was a provision requiring equation between the taxes on the poll and taxes on the property, this Court repeatedly held statutes laying taxation without observing this equation to be invalid.

This prohibition of the exemption of investments in stocks and bonds is in section 3 of Article V. Section 1 of that same article required, until recently amended, that there should be an equation in the statute levying taxes between the tax on property and the tax on polls, and as to that it has been repeatedly held that when that requirement was not observed the statute levying the tax issue was void. *R. R. v. Comrs.,*

148 N. C., 220; *French v. Comrs.*, 74 N. C., 692; *Trull v. Comrs.*, 72 N. C., 388; *Mauney v. Comrs.*, 71 N. C., 486. In *Board of Education v. Comrs.*, 137 N. C., 310, and in *Jones v. Comrs.*, 107 N. C., 248, it was held that the observance of this equation was absolutely necessary to the validity of all revenue or taxing laws, providing for the ordinary and necessary expenses of the Government, and that an act levying a tax, or making, repairing, or keeping up the public roads of a county exempting polls from taxation was unconstitutional. *S. v. Godwin*, 123 N. C., 697. And there are many others holding that the non-observance of this requirement in section 1 renders the taxing law invalid *in toto*. This provision in section 3 of the same article must, therefore, be void if the requirement that all property, including "investment in stocks and bonds," shall be taxed equally and uniformly is disregarded.

Indeed, in *R. R. v. Comrs.*, 148 N. C., 220, it was held by *Connor, J.* (now the distinguished judge of the Federal Court in Eastern North Carolina), speaking for a unanimous Court, three of whom (*Judges Walker, Hoke,* and the writer) are still on this bench, that a *mandamus* could issue to compel the commissioners to place the omitted items necessary to comply with the equation of taxation upon the tax list. This case has been repeatedly cited and approved since by this Court. See the numerous cases cited thereto in the Anno. Ed. Among other cases citing and approving that case was the opinion in the same volume, *Perry v. Comrs.*, 148 N. C., 521, by *Hoke, J.*, also speaking for a unanimous Court. The cases holding that the revenue act was void if it disregarded section 1 of this Article V of the Constitution, and holding that a *mandamus* could issue were to enforce this provision in order to lighten the tax on property by observing the requirement to levy a tax upon the polls.

In this case, the plaintiffs are seeking under section 3 of the same article to require the lightening of the burdens upon the property of nonstockholders by placing upon the tax list (or holding void an act which does not do so) an immensely greater relief by taxing investments in stocks as required by section 3 of the same article. If, as the above cases hold, it was invalid to omit the levy of a poll tax because this made somewhat heavier the tax on property, for a stronger reason it is necessary to require fifteen hundred millions of money invested (whatever the sum is, it is very large) in the best property of the State to be placed on the tax list, that this *equality* and *uniformity* in taxation of all property may be observed, which the Constitution requires.

For a stronger reason, when the taxes laid upon that large portion of our people who own no stocks in corporations is greatly increased, being probably double or more than it should be by reason of the fact that the investments by the wealthy of their funds in so-called "tax-free stocks"

have exempted them from all the burdens of the Government, the Court should declare the illegality of such exemption. The mere formality, even if it were erroneous, that the complainant taxpayers here ask for relief by *mandamus* cannot vitiate the right of the plaintiffs to have a proper judgment, declaring the statute invalid, as has been so often done in other instances.

It has been over and over again held by this Court that the form of the prayer of relief is immaterial; and, indeed, if there were no prayer at all for relief it would not be a defect, but "the party can obtain any relief to which the facts alleged entitled him." *McCullock v. R. R.*, 146 N. C., 316, and some 50 cases since, many of which are cited in C. S., 506 (3), and many others, with which all lawyers are familiar.

The complaint which is made in this proceeding is based upon the soundest principles of justice, and upon the clear and unmistakable language of the Constitution, which *requires* that "investments in stocks and bonds" shall be taxed uniformly with other property, and it is not denied, and cannot be denied, that a vast sum, if not fully a billion and a half, of money is invested in stocks, owned by the influential classes, and is absolutely exempt from all taxation, and thereby the taxation of all others is probably doubled. These latter are those who pay double taxation, for they not only pay taxes on their own property, assessed often at a high figure, but they pay the taxes which ought to be paid by the owners of "investments in stocks and bonds," as is explicitly required by the Constitution.

This provision of the Constitution is relied upon by the plaintiffs as a shield against the continuance of this discrimination, and this action is brought in accordance with numberless precedents adjudging invalid statutes authorizing issuance of bonds, and which invalidated statutes levying taxation in disregard of the equation between the property and the poll tax, and in divers other cases. A statute which exempts so large a part of the property of the State from all taxation with the result of doubly taxing those who do not own stocks in corporations, the plaintiffs claim, should therefore be declared illegal.

The plaintiffs claim that the illegally exempted stocks should pay fifteen million dollars city, county, and State taxes annually. It may be more or less than that sum. An exact knowledge of the amount cannot be ascertained until this exempted property is placed upon the tax list, like real estate and other property, as the Constitution plainly requires. Until then, only an estimate can be made, for the statute above quoted makes it punishable, with penalty of $1,000, a year's imprisonment, and dismissal from office to give information on the subject from the corporation reports. Laws 1921, ch. 34, sec. 805 (2), p. 222. The corporations offering for sale "tax-free" securities are well protected.

It is quite certain that less than 3 per cent of the people of this State are "stockholders." Yet they have this immense aggregation of property exempted from taxation, and the taxes which they should pay thereon are collected out of the other 97 per cent of the population, who are unable to secure any exemption of their property.

The plaintiffs have asked for a *mandamus* against the Tax Commission and the Tax Commissioner to place this omitted property upon the tax list. The U. S. District and Circuit Courts of Appeal and the Supreme Court of the United States have held that a *mandamus* will lie at the instance of a private creditor to force tax assessors to put property on their books, increase their assessed value, and do such other things as may be necessary to bring the property upon the tax list that taxes may be collected thereon to pay judgments of the courts or bonded indebtedness, notwithstanding, as in the well known case of Carteret County of this State, there may be express legislation forbidding the tax assessors to do so.

If the courts are sufficiently jealous of the rights of private creditors and bondholders to issue a *mandamus* against the officials to collect a debt, how much more jealous should the courts be when the rights of all the people are involved. A leading case upon this subject is *Falls City Construction Co. v. Jimmerson,* 222 Fed., 489; L. R. A. (1918 B), 1102, which holds that a *mandamus* lies at the instance of a judgment creditor of a county whose judgment cannot be collected (because of a permitted tax rate upon the assessed valuation of the property of the county which did not produce sufficient revenue) to compel the tax officials to raise the assessment to the full value of the property as required by the Constitution, although by so doing the taxes throughout the State will not be equal and uniform, as required by the Constitution, because the property in other counties was assessed below its true value.

The legislative enactment relied upon in this case to exempt so immense a mass of property as the money invested throughout the State in stocks, which are exempted from *all* taxation, is in direct violation of the express provision of the highest law, which is the Constitution of the State.

In *Hicks v. Cleveland,* 106 Fed., 462, decided in this Federal Circuit, *Judges Goff, Simonton,* and *Waddell* sitting, held that a *mandamus* would issue to compel the listing of property to pay interest on railroad bonds in South Carolina, *Judge Simonton* saying, for the Court: "The defense proceeds upon the ground that the Legislature of South Carolina has forbidden its officers to levy and collect the tax to pay this, and claims of the same character—has in effect made it a misdemeanor for them to do so—and that hence a *mandamus* under these circumstances will not lie," but the Court held that the *mandamus* did lie, and that the act of the South Carolina Legislature was unconstitutional.

We have seen that *mandamus* lies to enforce the constitutional provision requiring the listing of all property for taxation, even though the Legislature has sought to exempt it. This has been held in cases where individual creditors only were plaintiffs, and were seeking to enforce collection of their claims.

In *United Brethren v. Comrs.*, 115 N. C., 490, it is said: "The general rule is liability to taxation, and that all property shall contribute its share to the support of the Government which protects it. Exemption from taxation is exceptional. It needs no citation from reiterated precedents that such exceptions should be strictly construed, and if we have any doubts (which we have not), they should be resolved in favor of liability to taxation."

In that case, it was said that the fundamental principle of our Constitution is that all property shall be taxed uniformly except that which is either expressly exempted by the Constitution itself or as to which the power of exemption by the Legislature is left discretionary within the limits prescribed by the Constitution, citing *Redmond v. Comrs.*, 106 N. C., 122.

This case has been cited with approval by *Hoke, J.*, in *Davis v. Salisbury*, 161 N. C., 56, and in *Southern Assembly v. Palmer*, 166 N. C., 75, and other cases; and the doctrine has been reaffirmed at this term in *Trustees v. Avery County*, 184 N. C., 469.

The present case is much stronger, for here not only no exemption is granted or discretionary authority to exempt, but there is an express requirement that investments in stocks and bonds *shall* be taxed.

Since this case was argued here, the President of the United States, yielding to an urgent and Union-wide demand, has urged upon Congress the adoption of an amendment forbidding the issuance of "tax-free" securities, and both Houses of Congress are already engaged in considering a bill to that effect. The steady accumulation of vast masses of wealth by corporations and individuals is a menace to our institutions. It has been largely caused by the exemption of their investments from taxation, thereby doubling the taxation upon all others. In response to an unmistakable public demand, the XVI Amendment was adopted, which required the levy of a heavily graduated income tax to put some restriction upon such vast accumulations, but this has been largely nullified by the device which special interests have secured in both national and state legislation of making it heavily penal for any officer to give information as to the returns on income. In this State it has also been greatly restricted by the recent constitutional amendment limiting the income tax to 6 per cent. In addition, the accumulation of great estates in corporations and in individual hands has been most strongly fostered by disregarding the constitutional provision now before us which forbids the exemption from taxation of "investments in stocks and bonds."

These vast accumulations are seeking investment, and also public favor, now by legislation fostering loans to farmers and others upon mortgages. The result of this will be that many farmers and others will become mortgagors, and therefore tenants at will upon the property they now own, and gradually we must become largely a nation of peasants and laborers. What is needed is not this semi-charity, ostentatiously doled out, but simple justice by enforcing the constitutional provision requiring the taxation of "investments in stocks and bonds" *equally* and *uniformly* with other property, real and personal, "at their true value in money." This will insure a reduction in the rate of taxation upon those who do not possess idle capital to invest in "tax-free" securities, and a heavily graduated income tax may prevent the accumulation, as now, in a few years of sums, which in ordinary and just course of business would require hundreds of thousands of years to accumulate.

The provision of our Constitution prohibiting the issuance of "tax-free" securities should be strictly enforced, both because required by the Constitution and by a wise and just regard for those who produce the wealth of the State, and as a political necessity for the security of our free institutions.

When the United States Supreme Court set aside the income tax law, *Judge Brown,* one of the dissenting judges, stated that if that decision stood this country would "sink into a despotism of sordid wealth," and the other dissenting judges were as outspoken and emphatic. The people of this country stood with the dissenting judges and wrote into the Constitution XVI Amendment under which we have now not only an income tax, but one that (until lately) was graduated to run as high as 68 per cent. Without this, the prophecy of the dissenting judges would not only have become true, but it would have been impossible to carry on the late war, or, indeed, the Government, with its greatly increased expenditures.

There is in this State, beyond all question, a vast amount of double taxation, which is caused entirely by the fact that a vast sum, probably fifteen hundred millions, invested in stocks, besides bonds are entirely exempted from all taxation with the result that the nonstockholding masses are taxed double and even treble their former taxation to make up the taxes which the Constitution requires shall be paid by uniform taxation on all property, including "investments in stocks and bonds."

The result of this vast exemption is that all fluid wealth flows naturally to these illegally "tax-free" investments. Only in the last few days one of the corporations in this State has declared a 500 per cent stock dividend; that is $600 to every owner of stock for $100 invested, and each owner has thus $600 for every $100 put in the property, all of which is tax-free.

Another corporation, in the same manner, has recently added six millions of stock dividends to its four million, giving the owners of the stock ten million dollars of exemptions and dividends instead of four millions. Another in the last few years has increased its capital stock from a few millions to 100 millions, and the owners of the 100 millions all are exempt. These are merely a few instances of what is going on around us. Who will invest money in farms, or lands, or houses, or other investments when the same money invested in stocks grows thus marvelously, and not only the original investment, but all of this marvelous increase is also "tax-free"—the entire burden of the State, county, and city governments being thrown entirely upon the nonstockholding masses. The growing demands of the State, county, and city governments for all purposes must be met, and with a steady growth in the bonded indebtedness of each (the principal being already nearly 100 millions, as well as the interest on which, must be met), taxation is falling with terrific force upon property subject to taxation by reason of the exemption in direct conflict with the Constitution of the most profitable investments in the State.

As to the plea that the statute of limitations is a protection of this illegal exemption because it has been acquiesced in more or less by legislation, it must be said that this legislation has been held illegal by every decision of the Court of this State and of the United States, and of all the other states whose Constitution, like ours, requires equal and uniform taxation of all property, except such as is exempted or authorized to be exempted by the Constitution itself. The fact that the validity of this particular statute has not until now been presented to the court, in its present shape, makes it all the more necessary to hold it invalid. That there is no statute of limitations in favor of unconstitutional legislation was held in *R. R. v. Allsbrook,* 110 N. C., 137, where the Court set aside the exemption which had been granted to two great railroad companies by the Legislature after a lapse of nearly half a century. And in *Mial v. Ellington,* 134 N. C., 131, which overruled *Hoke v. Henderson,* 15 N. C., 1, after it had been affirmed 60 times, and after a lapse of 73 years.

The question whether the courts can hold any act of the Legislature unconstitutional has been debated, but if any case should require that it be done the plaintiffs are presenting it now. So many statutes have been held unconstitutional by this Court without it being deemed a reflection upon the legislative department, surely the remedy should not be denied in a matter which affects vitally the rights of every taxpayer, even the humblest.

If the people of this State, with the facts before them, are content to continue this legislative exemption of fully one-third of the property

of the State (and that third steadily increasing) from all taxation in the hands of less than 3 per cent of its people while taxing the other 97 per cent, three, four, and five times as high as formerly, it is for them to say so. No one can complain if with the facts made known, and with full knowledge of the constitutional provision requiring equality and uniformity in the taxing of all property, and of the former uniform decisions of this Court, as above set out, a majority of the people so wish. This should be a Government of the people, and if they so will, they can permit the continuance of this exemption and consequent great inequality in taxation; but in my humble judgment it should be declared by this Court unconstitutional in accordance with all previous decisions. This provision against exemption of all wealth invested in corporation stocks from bearing any part of the burdens of Government—State, county, and municipal—was put in the Constitution for the protection of the masses of the people against the power of growing and enormous aggregations of wealth in the hands of the few.

Whether the provision in the Constitution forbidding the *exemption* of investments in stocks and bonds is in conflict with legislation which *exempts* all investments in stocks in corporations; and whether the decisions of the courts of this State and of the United States, and others above mentioned, have held such legislation illegal or not is *not a matter of argument, but simply a question of reading the decisions themselves and the constitutional provision, as above set forth.*

In setting forth the decisions themselves holding uniformly such exemption to be in conflict with the express letter of the Constitution, as well as its spirit—and contrary to the eternal justice of "equal rights to all and special privileges to none"—and my deep conviction that this Court should declare these exemptions invalid, I have simply done my duty as it has been given me to see that duty.

T. V. GORDON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 20 December, 1922.)

Employer and Employee—Master and Servant—Carriers of Freight—Railroads—Negligence—Federal Employers' Liability Act—Automatic Couplings—Federal Safe Appliance Act—Contributory Negligence—Assumption of Risks—Instructions.

The plaintiff was employed in interstate commerce as head brakeman by the defendant railroad company with the duty to set all through switches and to couple and uncouple cars, and while performing this duty he was struck and injured while cutting off a car coupled to the train

with an improper automatic coupler used in violation of the Federal statute known as the "Safety Appliance Act," by his striking a car that had been placed on the "house track" under his supervision, with conflicting evidence as to whether this car had been placed in the "clear," and the conductor so informed: *Held*, in an action brought under the Federal Employers' Liability Act, the refusal of a requested instruction by the defendant that the injury would be due to the plaintiff's contributory negligence if it was caused by the close proximity of the car on the house track under the circumstances was not erroneous; and an instruction of the court that the defendant would be answerable if the violation of the Federal statute contributed to the injury was proper, both upon the issues of contributory negligence and assumption of risks.

APPEAL by defendant from *Devin, J.*, at June Term, 1922, of WAKE.

This action was brought under the Federal Employers' Liability Act or an injury suffered by the plaintiff while in the defendant's employ. The plaintiff was head brakeman on one of the defendant's freight trains at the time of his injury. He thus describes the duties of his employment: "The nature of the service that I was performing for the Norfolk Southern while acting as head brakeman was to set all through switches and to couple and uncouple cars, and that was the duty I was performing in the Charlotte yard on this 7 June. . . . I did not have anything to do with the application of the brakes on that car. That was no part of my duties. The rear brakeman is the man that does that."

As grounds for recovery, the plaintiff alleged in substance that he was injured by the negligent, unlawful, and wrongful conduct of the defendant in that:

(*a*) The car that he was attempting to uncouple was being hauled and used in violation of the Safety Appliance Act in that it would not uncouple without the necessity of the plaintiff going between the cars of the train and using his hands to remove the pin.

(*b*) The coupler was old, worn, defective, and insufficient, and would not uncouple in the usual way, and required the plaintiff to assume a position on the stirrup of the car to lift the pin.

(*c*) The defendant ordered the plaintiff to uncouple said defective car.

(*d*) Its failure to furnish a reasonably safe place to work and reasonably safe appliances.

(*e*) It failed to bring the car to a stop when he notified the defendant of the defective condition.

(*f*) It allowed a free car to run upon an adjacent track in close and dangerous proximity to the track on which the plaintiff was engaged in the performance of his duty.

(*g*) It failed to notify the plaintiff of the defective condition of its coupler and the close proximity of said car upon the adjacent track.

(*h*) It failed to properly apply and maintain brakes upon said car located on said adjacent track.

(*i*) It failed to maintain its car at a safe distance from said track.

The defendant denied its own negligence; pleaded contributory negligence on the part of the plaintiff; that he had assumed the risk; and that a violation of the Federal Safety Appliance Act did not contribute to the plaintiff's injury. The jury found on all four of these issues in favor of the plaintiff, and assessed his damages. From the verdict and judgment thereon the defendant appealed.

Douglass & Douglass and Pou, Bailey & Pou for plaintiff.
R. N. Simms for defendant.

CLARK, C. J. The case was tried with ability on both sides in the court below, and the contentions were clearly presented in the argument here. There were numerous exceptions, but there are two only that we think require discussion by us. The defendant's brief, in presenting his exceptions for refusing to give prayers requested, said: "Certainly the instruction covered by the 45th exception should have been given, 'If the jury shall find from the evidence, and by the greater weight thereof, that the car which the plaintiff cut off, and stated to the Conductor Jones, was in the clear on the team track, did not move from the place where it was located, when plaintiff so cut it off and so declared it in the clear between that time and the time when the plaintiff struck said car, then the jury should answer the first issue "No."'"

He also contended, under exception 47, that it was error to refuse the following prayer: "If the jury shall find from the evidence that the plaintiff placed the car in the house track and left the same in such close proximity to the team track that in riding the car into the team track the plaintiff was struck and injured, then this injury would be due to the plaintiff's own negligence, and the jury should answer the first issue 'No.'"

We think that the court not only gave said instruction in substance, but was more favorable to the defendant than his prayer. He charged: "If the jury shall find from the evidence that the plaintiff was brakeman in charge of the placing of cars, and was directed to place one car in the house track, and after this car had been placed the conductor inquired of the plaintiff if the car was in the clear of the team track, and the plaintiff thereupon investigated and reported such car clear, and then the plaintiff, while attempting to place a car in the team track was struck by the car formerly placed by him in the house track because the same was not clear, or for any other reason not due to the negligence of the defendant, then the defendant would not be liable for the injury that

the plaintiff sustained, and the jury would answer the first issue 'No.'" This instruction went beyond the prayer, for it not only exempted the defendant from liability if the plaintiff had been negligent in the matter referred to, but it also exempted the defendant if the plaintiff was struck by the other car on account of "any other reason not due to the negligence of the defendant."

The defendant also excepted because the court after having instructed the jury by reading from the 176 N. C. Reports said: "The fourth issue is addressed to this question whether or not the defendant, the railroad company, violated the Federal statute known as the Safety Appliance Act; and if it did violate that law, then whether that violation contributed to the plaintiff's injury. These are the questions raised in that issue. Whether it violated the law about using a car without proper couplers, automatic, those that would couple automatically by impact and those that would couple without a person having to go between the cars to do so. If you find by the greater weight of the evidence that the defendant violated the law, and that violation of the law contributed to the plaintiff's injury, then you would answer that issue 'Yes.' Otherwise, 'No.'" And the defendant excepted. But we think it is an almost *verbatim* quotation from the Federal Employers' Liability Act, which provides, in section 2: "No such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees *contributed* to the injury or death of such employee." Section 4: "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees *contributed* to the injury or death of such employee."

Upon consideration of the whole case, and of the exceptions, we find No error.

EUGENE IRVIN AND R. S. MONTGOMERY, AS ADMINISTRATORS WITH THE WILL ANNEXED OF THE ESTATE OF H. C. HARRIS, DECEASED, v. WILLIAM C. HARRIS ET AL.

(Filed 20 December, 1922.)

Limitation of Actions—Deceased Persons—Executors and Administrators—Creditors—Estates.

C. S., 412, extending the time within which an action that has survived may be brought against representatives of deceased persons to one year after the issuance of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person, and that it is not necessary to bring an action upon a claim against the estate

to prevent the bar which has been admitted by the personal representative, until after his final settlement, is an enabling statute, intending to enlarge to that extent the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. In this case the question of the custom of partners in making sealed and unsealed obligations is referred to the case of *Supply Co. v. Windley*, 176 N. C., 18.

THIS is a petition to rehear the case reported in 182 N. C., 653. From ROCKINGHAM.

J. I. Scales, J. M. Sharp, H. W. Cobb, Jr., Fentress & Jerome, and Manly, Hendren & Womble for petitioners.

P. T. Stiers, W. R. Dalton, Thomas C. Hoyle, F. P. Hobgood, Jr., and Humphreys & Gwynn contra.

ADAMS, J. The question presented for decision in the petition for a rehearing involves the construction of the following statute: "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement." C. S., 412.

On behalf of the creditors it is insisted that the legal effect of this provision is to suspend the statute of limitations as to their several claims during the period that intervened between the death of the debtor and the qualification of his personal representative, and that such intervening period should not be considered in computing the statutory bar.

We cannot concur in this conclusion, although apparently it finds support in some of the decisions. "When the statute of limitations has once begun to run, nothing stops it, but the Code does not stop when the cause of action is one which must be brought by or against a personal representative. . . . If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that

time and within one year after the issuing of letters testamentary or of administration." *Winslow v. Benton,* 130 N. C., 58. The extension of one year after the issuing of letters testamentary or of administration is not a disabling, but an enabling statute, intended to enlarge to that extent the time within which the action may be brought.

This is the purport of the reported case, but the defendants contend that by the application of this principle certain claims should be disallowed in addition to those excluded in the former opinion. While it is not our purpose to conclude any claimant in case of a possible error or mistake, if the dates and claims are correctly stated (as we understand them to be), in "Appendix No. 1" following the defendants' brief filed with their petition, it would seem that all the claims therein set out are barred and should be disallowed, in addition to those excluded on the former appeal.

We have considered the argument submitted by the counsel for Mrs. Chandler (Lizzie Sellers, exception 2), concerning the alleged custom of Robert Harris & Brother to issue both sealed and unsealed instruments, but we find nothing in the record to warrant us in holding that the principles announced in *Supply Co. v. Windley,* 176 N. C., 18, and other similar cases, do not apply.

When the case on appeal was argued, the record was not sufficiently definite to enable us to determine whether certain claims were barred, and a writ of *certiorari* was issued to the clerk of the Superior Court of Rockingham County in order to obtain more definite information. Upon consideration of the record as it now appears, we think the petition should be allowed.

Petition to rehear allowed.

K. C. MORRIS ET AL. v. THE BOARD OF COMMISSIONERS OF HENDERSON COUNTY ET AL.

(Filed 20 December, 1922.)

Appeal and Error—Injunction—Actions—Suits—Causes of Action Ceasing—Dismissal—Costs—Highways—Roads and Highways.

Where it appears, on appeal from an order of the Superior Court judge enjoining a board of county commissioners from wasting and misapplying certain proceeds from the sale of bonds issued for highway purposes, that on account of the change in the personnel of the board the proceedings have become unnecessary, the action will be dismissed. On this appeal the cost is taxed equally between the plaintiffs and defendants. *Semble,* the judge was without authority to direct the application of the funds, but that good cause was shown for continuing the injunction to the final hearing.

MORRIS *v.* COMBS.

APPEAL by defendants from a judgment continuing an injunction to the hearing, rendered by *Ferguson, J.*, at chambers in Waynesville, 25 September, 1922.

Pless, Winborne & Pless for plaintiff.
Shipman & Arledge and Carter, Shuford & Hartshorn for defendant.

ADAMS, J. The plaintiffs are citizens and taxpayers of Henderson County, and the defendants are the board of county commissioners, W. P. Bane, chairman, G. B. Hill, and John T. Staton, members of said board, the board of road trustees, W. P. Bane, chairman, F. A. Bly, and W. W. Wilfong, members of said board, and the Citizens National Bank, treasurer of Henderson County. Prior to April, 1921, the county commissioners and the road trustees decided to reconstruct and surface the road extending from the Buncombe County line to the Greenville County line, and in May bonds amounting to $590,000 were sold for the purpose of building and reconstructing the public roads and bridges of the county. The plaintiffs alleged that the commissioners and trustees announced that any part of the fund remaining after accomplishing these purposes was to be spent by the road trustees upon other highways, and that in consequence of this announcement the plaintiffs and other citizens executed notes in the aggregate sum of $23,000 to make up the deficiency between the price paid for the bonds by the two banks and the price the bonds could be resold for, with the understanding that the proceeds derived from the sale of the bonds should be used first for constructing and hard-surfacing the road from the Buncombe line to Hendersonville, and thence to the Greenville line. The object of the action is to restrain the defendants from using the fund for any purpose other than the construction of this State highway until completed. The plaintiffs alleged incompetency, waste, and the wrongful use of a part of the fund, and sought by means of an injunction to prevent the alleged misapplication of the balance. The defendants answered, denying the charges made against the defendants, and alleged that they had in all respects lived up to their agreement, and had been defeated in their purpose by the refusal of coöperation on the part of the State Highway Commission. On 25 September, Judge Ferguson continued to the hearing the temporary restraining order theretofore issued, and directed that $60,000 of the fund be turned over by the defendants to the State Highway Commission, to be used in the improvement of the road between Hendersonville and Tuxedo, etc., and that $200,000 be held by the county authorities, to be used only in the construction of a hard-surface road between Bat Cove and Hendersonville, and enjoined the use of these funds for any other purpose.

In their brief the attorneys for the plaintiffs say that the object of the suit was to restrain the defendants from wasting the fund referred to, and that as the official conduct of the defendants was directed by one of their number, who is now out of office, they will not resist a modification of the order from which the appeal was taken.

While we think that his Honor was without authority to direct the application of the fund, and that such direction should have been omitted from the order, still there was good cause for continuing the injunction to the final hearing. But since it is admitted that the principal defendant is out of office, and that further prosecution of the suit would serve no useful purpose, the action is dismissed. The cost will be equally divided between the plaintiffs and the defendants.

Action dismissed.

W. E. GARLAND v. LINVILLE IMPROVEMENT COMPANY ET AL.

(Filed 20 December, 1922.)

1. Appeal and Error—Several Causes of Action—Fragmentary Appeals.

An appeal is not fragmentary where the complaint alleges four distinctive causes of action and the breach of each, and there is no exception raised as to the judgment on two of them, but from the judgment on the other two the plaintiff has appealed, assigning error in the exclusion of his evidence by the trial judge on the two to which his exceptions have been duly taken and prosecuted. *Cement Co. v. Phillips*, 182 N. C., 437, cited and distinguished.

2. Same—Issues—Objections and Exceptions.

Where there are several causes of action alleged, and the plaintiff has duly excepted to the exclusion of all evidence on one or more of them, his failure to except to the judge's refusal to submit issues relating thereto or to except to an issue as to damages which in the court's discretion may have been submitted as to each of the separate causes alleged, is not necessary to his appeal thereon, and his enforcing the judgment by execution under the judgment on the issues decided in his favor will not estop him.

3. Contracts—Writing—Statute of Frauds—Incomplete Contracts—Evidence—Parol Evidence—Appeal and Error.

When a contract, not required by the statute of frauds to be in writing, is partly in writing and partly oral, parol evidence of the oral part is competent when not contradictory of the written part; and in an action for breach of contract in preventing the plaintiff from cutting and logging certain of defendant's timber for him, requiring the loading upon cars, it is competent for the plaintiff to show that defendant agreed by parol to furnish them, when the writing does not specify the one who had obligated himself thereto, and the exclusion of this evidence by the judge constitutes reversible error.

4. Compromise and Settlement—Statutes—Distinctive Items of Damages —Receipts.

Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, one for the loss he has sustained in preparing to fulfill his part of the contract, and the other for the loss of profits he would have received except for the defendant's breach, the plaintiff's agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, under the provisions of our statute relating to compromises, C. S., 895, or by a receipt he has given therefor, when it appears that the settlement had been made in contemplation of the first item alone, without reference to the second, the subject of the action.

APPEAL by plaintiff from *McElroy, J.*, at July Term, 1922, of AVERY.

This is an action for the recovery of damages for breach of a contract for cutting and logging a certain boundary of timber, the description of which tract is set out in the record. Verdict for the plaintiff for $300. Appeal by plaintiff.

Charles Hughes, W. C. Newland, S. J. Ervin, and S. J. Ervin, Jr., for plaintiff.

J. W. Ragland and F. A. Linney for defendant.

CLARK, C. J. This is an action for the recovery of damages by reason of a breach of contract on the part of the defendants.

There are four separate and distinct contracts alleged in the complaint, and four separate and distinct breaches of these contracts are alleged.

The lower court permitted the second and third contracts, and the breaches of these second and third contracts, to be considered by the jury, and allowed the jury to assess the damages sustained by reason thereof. No exception to the ruling of the court, nor to the verdict of the jury, are taken, or assigned, so far as the trial on the second and third contracts, or the second and third causes of action are concerned. The judgment as to them stands, for there is no exception in the record relating to them, no motion for a new trial as to them, and the motion for a new trial expressly excepts them, and is confined to the first and fourth causes of action for damages. So the appeal is restricted to the rulings of the court on the trial of the first and fourth causes of action.

The defendants moved to dismiss upon the ground that this is a fragmentary appeal, the plaintiff having obtained judgment for $300, collected the same, and appealed. This appeal is by the plaintiff for failure to recover on the first and fourth causes of action. If the appeal had been by the defendant, or by the plaintiff from a verdict on one or more causes of action, an appeal would not lie until the other matters were tried, but this is not like the case of *Cement Co. v. Phillips,* 182

N. C., 437, where a counterclaim was pleaded, but on verdict against defendant on two causes of action, the cause was retained for the trial on the third cause of action, for the trial was not completed until the disposition of the case by final judgment. But here the plaintiff having recovered judgment upon the issue submitted as to the second and third causes of action, it is no estoppel on appeal that he collected that part of the judgment, though the defendants could have objected if they had a counterclaim pending—which is not the case. The trial was complete, judgment being entered for the plaintiff on two causes of action and against him on the other two, since the judge ruled out the evidence which sustained the plaintiffs action as to those causes of action. As the plaintiff was satisfied with the verdict on the issue submitted as to the second and third causes of action, unless he appealed now on the other two causes of action, he never could have errors as to them reviewed. If the plaintiff had been appealing from the judgment as to the second and third causes of action, leaving the other matters untried, it would have been a fragmentary appeal, but the plaintiff was not only satisfied with that, but has collected that sum, and the only matters not disposed of are the rulings of the court as to the first and fourth causes of action, as to which the plaintiff's evidence was excluded, and he must have appealed now or not at all as to those causes of action.

Ordinarily, when there is more than one cause of action, the failure to except for not submitting issues is conclusive, but the evidence offered by the plaintiff in support of the first and fourth causes of action having been excluded by the court, and exceptions duly entered, there was no ground upon which to submit issues as to them. The plaintiff having excepted in apt time to exclusion of this evidence, is entitled to have it reviewed.

This, therefore, is not the case of a fragmentary appeal, but where a party having succeeded on two causes of action, and is satisfied therewith, is appealing to secure a review of his exceptions for excluding his evidence as to the other two causes of action, which he could not present for review unless he had taken this appeal. Certainly his obtaining judgment and payment on the second and third causes of action, from which defendants did not appeal, was not an estoppel when, as held at this term, the payment of a judgment against him will not be an estoppel on his appealing. *Bank v. Miller, post,* 593.

Cement Co. v. Phillips, supra, is conclusive that a fragmentary appeal will not lie where, as in that case, judgment was rendered for the plaintiff upon the first and second causes of action and retained as to the third cause of action, and the defendant sought to appeal against the judgment in favor of the plaintiff, leaving the third cause of action still undetermined. Here there was final judgment in favor of the plain-

tiff as to the subject-matter of the issues passed on, and the defendant is not appealing. The appeal of the plaintiff is as to the alleged errors in excluding testimony to prove the other two causes of action which could be presented only by an appeal at this time. The authorities cited in *Cement Co. v. Phillips, supra,* are numerous, and give the reasons therefor, which are conclusive, but they do not apply to the facts in this case.

The plaintiff had to appeal now or never, and the fact that he did not appeal from the judgment on the issue tried, and collected the same, is no estoppel as to this appeal for excluding evidence as to the other causes of action.

The court submitted the following issue: "What amount, if any, is the plaintiff entitled to recover of the defendants?" In the discretion of the court, this issue could have covered all four causes of action, and it was not absolutely necessary that the plaintiff should except thereto. The jury answered the issue $300. Judgment was entered accordingly, and the plaintiff did not appeal, but, as already stated, execution was issued thereon and the $300 was paid.

But the plaintiff did except to the ruling of the court excluding certain testimony as to other matters, which therefore did not get to the jury, and those exceptions could not be presented except by this appeal. The defendant's motion to dismiss the plaintiff's appeal must, therefore, be disallowed.

The first assignment of error was to the court excluding parol evidence that at the time the written contract was entered into between the parties the defendants contracted and agreed to furnish the cars upon which plaintiff was to load the logs, and that the defendants were to furnish at least three cars per day. It is true that "contemporaneous parol evidence is not admissible to contradict, vary, or alter the terms of a written contract," but it has been always well settled that "when a contract is not required to be in writing, it is admissible to show by parol testimony that in fact the contract was partly in writing and partly oral, and to prove the oral part." *Nissen v. Mining Co.,* 104 N. C., 310, and cases there cited. Also, see citations to that case in 2 Anno. Ed. As said in the *Nissen case, supra,* "This is not varying, altering, or contradicting the written instrument, but merely showing further the entire contract that was made."

In this case it was error for the lower court to decline to permit the plaintiff to show by parol testimony the collateral or additional contract as to who was to furnish the cars, so that they might be loaded, and that the defendant verbally contracted to furnish at least 3 railroad cars every day when the written contract was silent as to who should furnish the cars, or how many cars every day were to be furnished. The only reference to the cars in the written contract was the scale of

prices to be paid the plaintiff for cutting, hauling, and loading the cars, *i. e.*, "$6 per M. feet for logs delivered on railroad cars, and $6.50 per M. feet will be paid for poplar and cucumber loaded on cars. Poplar to be loaded separately." It was error to exclude parol evidence as to this matter, which was not in contradiction nor a variation of the written contract.

As to the fourth cause of action, the allegation in paragraphs 7 and 8 of the complaint that the plaintiff and defendant agreed that if the plaintiff would construct roads, build his camp, and move his equipment and log the timber standing and growing on certain boundaries of land to mill yards Nos. 4 and 5, and saw the timber, they would pay him $8 per M. feet for all logs cut and hauled by him to these yards, and afford him steady employment until 1 January, 1921; and that acting in compliance with the terms of this part of the contract, plaintiff, at large expense, purchased supplies for teams and hands, built roads, and moved his equipment and logging outfit to said boundary, and there built camps, stables, shacks, roads, etc., and began to cut and haul logs to said mill sites, and that after plaintiff had done all this preparatory work, and had cut and hauled only sixty thousand feet of logs, that the defendants, in violation of the terms of said contract, ceased operations, closed down their mill, and discharged the plaintiff early in November, 1920, by reason whereof plaintiff alleges that he sustained damages in loss of profits he would have made in November and December had he been permitted to continue his operations.

The plaintiff alleges that the actual cost of the above preparatory work was about $200, and when the defendants breached their contract and discharged the plaintiff they paid him $200, the estimated cost of doing this preparatory work, and the plaintiff thereupon executed the receipt which appears in the record, and covers only such work.

The lower court held that the acceptance of this $200 estopped the plaintiff from recovery of damages on account of the alleged loss of profits during the months of November and December.

The authorities that where the writing does not contain all the terms of the contract, when it is not required to be in writing, the oral part of the contract may be shown by parol evidence are numerous, many of them being cited above, and it was therefore error in the court to exclude such testimony.

As the logs were not the property of the plaintiff, and he had no authority to manufacture, ship, or sell them when they were loaded, it was a matter of evidence in the silence of the written contract upon whom was the duty of furnishing the cars. The plaintiff was entitled to show this fact just as in *Doubleday v. Ice Co.*, 122 N. C., 675, it was admissible to show upon whom rested the duty of keeping the cold

storage in proper condition for the safety of the stored grapes, or to show the time for the delivery of ice. *Johnston v. McRary,* 50 N. C., 369.

As to the fourth cause of action, it is true the acceptance of a lesser sum in full payment of a larger sum is valid under our statute, C. S., 895, but the payment of one account is not the settlement of another, and the receipt does not state that it was in full settlement, as in *Thomas v. Gwyn,* 131 N. C., 460, and makes no reference to the plaintiff's claim for the damages sustained by reason of breach of contract causing the loss of profits for the months of November and December, by reason of the plaintiff's premature dismissal and the cessation of work.

The evidence as to these matters should have been submitted to the jury, who alone were competent to find whether or not there was these additional matters set out in an oral contract, and if so, whether there was a breach thereof, and the amount of damages, if any, which the plaintiff was entitled to recover on that account. There should be, therefore, a new trial on the first and fourth causes of action. There was no appeal by either party as to the second and third causes of action, which have been settled.

Error.

MRS. CAROLINE WOOD MILLER v. G. P. SCOTT.

(Filed 20 December, 1922.)

Wills—Devise—Estates—Remainders—Intent.

A devise to testator's wife of all of his personal and real property, to use as she may see proper for the balance of her life, and should there be any at her death, it was the testator's "preference" that it should go to a charitable institution, giving indication, or otherwise some institution his wife would designate: *Held,* the wife acquired only a life estate in the lands included in the devise to her, and could not convey a fee-simple title to a purchaser. *Herring v. Williams,* 158 N. C., 1, cited and approved.

APPEAL by plaintiff from *Long, J.,* at September Term, 1922, of IREDELL.

Civil action, heard on case agreed. The action is to recover the purchase price of a lot situate in said county, which plaintiff, devisee under the will of D. A. Miller, has contracted to sell to defendant at the price of $600. Defendant, admitting the contract, resists payment on the ground that plaintiff could not convey a good title. There was judgment for plaintiff, and defendant excepted and appealed.

John A. Scott, Jr., for plaintiff.
Dorman Thompson for defendant.

HOKE, J. The title offered is dependent on the proper construction of the last will and testament of D. A. Miller, deceased, and the terms of the will and the facts considered pertinent are set forth in the case agreed as follows:

"1. That on 11 November, 1913, D. A. Miller of Iredell County, North Carolina, died leaving a last will and testament, which was duly probated and is recorded in the office of the clerk of the Superior Court of Iredell County in Will Book No. 7, page 506, a copy of which will is as follows:

" 'In the name of God, Amen.

" 'Knowing full well the shortness of life and the certainty of death, I, therefore, make the following disposition of what few worldly goods I have: I, D. A. Miller, this day, being of sound mind, and in excellent good health, and after I have been put away in a decent manner, funeral expenses and all debts paid, if any, do bequeath to my beloved wife, Caroline Wood Miller all my personalty and realty consisting of money, notes, bonds, houses and lots in and out of the city of Statesville, one-half interest in tobacco business, all machinery and personal property whatsoever it be, to have and to hold and to use as she may see proper the balance of her life, and should there be any left at her death, I would prefer it to go to a charitable institution, say Invalid's fund, or otherwise some institution my wife would designate or prefer.

" 'With my hand and seal, this 27 December, 1898.

'D. A. MILLER. [SEAL.]

" '27 December, 1898.

" 'Witness:

" 'P. S.—Furthermore, what life insurance I have is for the express use of my wife to have and to hold for her benefit.

'D. A. MILLER.'

"2. That said will was a holograph will written by the testator himself, and was proved as such, there being no witness. That said D. A. Miller was not a man accustomed to drawing such instruments, or familiar with legal technicalities. That said will was executed 15 years before testator's death and 12 years prior to his illness. That plaintiff was duly appointed administratrix with will annexed, and has made settlement of all debts except certain amounts due her for money advanced personally to pay the debts.

"3. That Mrs. Caroline Wood Miller is the same person referred to in the will. That at the time of the testator's death in November, 1913,

she and he lived together at Statesville, North Carolina, and that the said D. A. Miller had no lineal heirs, his father and mother were dead, and he had no children, no brothers nor sisters, no child of a deceased brother or sister, but his nearest relative was a first cousin who resided outside of Iredell County. That testator was paralyzed about three years prior to his death, and for three years next preceding his death was an invalid, confined to his home and required constant care and attention both day and night. That during this period Caroline Wood Miller, his wife, not only nursed him and looked after his physical welfare, but necessarily was entrusted with the management of his business affairs, and during said period she advanced her own individual money to meet expenses, and borrowed money in her own name to carry testator's debts. That as a result of her constant watchfulness and care of her sick husband, Mrs. Miller suffered a near physical breakdown after his death. That plaintiff has for a number of years found it necessary to work in order to supplement the income from the property left by her husband to such an extent that she may have a comfortable support, and is now engaged in educational work."

Upon these facts, the case, in our opinion, comes clearly within the decision of this Court in *Herring v. Williams,* 158 N. C., 1, to the effect that under the will of her husband, plaintiff takes only a life estate in the property, and is not, therefore, in a position to convey a valid title to defendant. In the case referred to the proper rule of interpretation is stated as follows: "Giving effect to the intent of the testator from the language employed by him in the will: *Held,* a devise and bequest to A. of real and personal property 'to have and to hold during her natural life,' and at her death 'the said property, or so much thereof as may be in her possession at the time of her death, is to go to B., her heirs and assigns forever,' gave A. only a life estate in the lands, with remainder to B. in fee."

On the facts presented, we regard the case as decisive, and in deference thereto the judgment must be reversed.

Reversed.

JOSEPH INMAN RICHARDSON v. E. H. JENNINGS.

(Filed 20 December, 1922.)

Easements—Deeds and Conveyances—Covenants—Breach—Lakes—Boating and Fishing—Servient Tenement—Dominant Tenement—Actions.

A deed to a lot of land, included in a large tract thereof developed into a summer resort, whereon a large lake had been made by damming a stream flowing through it, that has a covenant running with the land giving the owner upon its banks, and his successors in title, the right of boating, fishing, bathing, etc., creates an easement in favor of the grantee and his successors in title, constituting the said property of the grantor the servient and that of the grantee the dominant tenement in reference to the rights and privileges described and specified in the instrument; and in the absence of an express agreement in the instrument, the owner of the servient tenement is not bound to maintain such easement or keep it in repair; and where the dam has been later swept away by an unusual and unprecedented rainfall in this vicinity, no cause of action lies in favor of the grantee in the deed to compel the grantor to rebuild the dam, or to recover damages for being deprived of the benefits he had acquired under the covenants in the deed.

APPEAL by plaintiff from *Calvert, J.,* at the July Term, 1922, of TRANSYLVANIA.

At close of plaintiff's evidence, on motion, there was judgment dismissing the action as in case of nonsuit under C. S., 567, and plaintiff excepted and appealed.

Martin, Rollins & Wright for plaintiff.
Merrimon, Adams & Johnston for defendant.

HOKE, J. From the facts in evidence it appears that heretofore the Toxaway Company, predecessor in title of defendant, owning an extensive body of land in this vicinity, built thereon and operated a large hotel, and in addition, and as an accessory to this improvement, constructed a dam nearby, across Toxaway River, the same being 60 feet high, 400 feet from bank to bank, and 200 feet thick at the bottom and 12 to 15 feet wide at the top, sloping on both sides, built of earth and resting on a rock foundation. That the artificial lake thus formed had a shore line of some thirteen miles, with a driveway around the greater portion, the road being also across the top of the dam, which had been in existence for several years. That in 1912, the defendant having acquired the title of the Toxaway Company, sold and conveyed to Hugh Richardson a lot containing four acres abutting on the shore line of said lake for a distance of 884 feet. That on or about the same time defendant sold and conveyed to other persons lots of similar kind abutting on said lake, and all of these deeds contained certain restrictive covenants

on the part of the respective grantees as to the extent and character of the improvements that could be placed on the same, and including a stipulation that these covenants should attach to and run with the land, giving to the grantors or any of the adjacent owners a right of action in case of breach. And each and all of them having covenants purporting to bind the defendant grantor in these deeds, these latter being in terms as follows:

"And the said parties of the first part, for themselves, their heirs and assigns, agree and covenant that the said party of the second part, his heirs and assigns, shall have the right and privilege of enjoying the use of the waters of Lake Toxaway for the purpose of boating, fishing, and swimming, and may also take water from said lake for domestic purposes, provided that all fishing in said lake shall be governed by the laws of the State and such rules and regulations as may be prescribed by the said party of the first part, their heirs and assigns, for the protection and propagation of the fish in said lake, and it is further provided that the maximum catch of fish shall not be restricted to less than five fish per day.

And said party of the second part, his heirs and assigns, shall have the right to build and maintain a pier along the shore line of said lot which said pier shall not project more than twenty-five feet into the waters of said lake, and may also build and maintain a boat house along the shore line of said lot, which said boat house shall not project more than thirty-five feet into said Lake.

And it is further mutually agreed and understood that the said parties of the first part, their heirs and assigns, shall have the full right and power to raise the main level of the waters of Lake Toxaway, not to exceed eighteen inches, vertically above its present level, and shall also have the right to lower said water level not to exceed twelve inches vertically, below said main level of said lake, said raising or lowering of the water level is for the purpose of utilizing the water power which may be derived from said lake."

That said Hugh Richardson, observing the restrictive stipulations of his deed, made extensive improvements on the property bought by him, at a cost approximating $20,000, and occupied same as his summer home until 1916, using and enjoying the stipulated easements and privileges of the lake as contained in his deed, and on 31 May, 1916, he sold and conveyed the lot and improvements to present plaintiff, the *habendum* in part being: "To have and to hold the above described lot, and every part and parcel thereof, with the appurtenances thereunto belonging, including all right, title, easements, privileges and estate in the use of the waters of Lake Toxaway, as set out in the deed from defendant, and subject to the restrictive stipulations in this last mentioned deed."

That in August, 1916, during the floods of that season, caused by unusual and unprecendented rainfall in this vicinity, the said dam across Toxaway River was washed away and destroyed, and defendant has thus far failed and refused to rebuild same, to plaintiff's great damage. The grievances alleged and the resultant injuries being stated in the complaint as follows: "That the plaintiff has at various and divers times requested said defendant to rebuild said dam, and to restore said lake, which the defendant has failed, neglected, and refused to do. That said plaintiff, by reason of the covenants, agreements, and conditions mentioned in said deed of conveyance, and by reason of the advantages, pleasures, and benefits offered by the existence of said lake, spent large sums of money in the development and improvement, and in beautifying said property; that by reason of the carelessness, negligence, and indifference of the defendant in his failure to keep and maintain said lake, which were fully set forth in said deed of conveyance, and is now denied and deprived of the privileges, rights, and easements in said lake, which were fully set forth in said deed of conveyance, and is deprived of the right of boating and crossing said lake, and using the same as a convenient means of access to her property, and of bathing, fishing, and swimming therein, and is also deprived of the use of the waters of said lake for domestic purposes, and the benefits and enhancement to the value of said property fronting immediately on and adjacent to said lake."

And judgment is thereupon prayed that defendant be required to restore said dam, and that plaintiff have all other and further relief to which she may be entitled. On this, a sufficient statement to a proper apprehension of the questions chiefly presented, we must approve of his Honor's ruling in directing a nonsuit.

In our opinion it is the force and effect of this deed from defendant to Hugh Richardson to create an easement in defendant's property in favor of the grantee and his successors in title, constituting said property the servient, and that of the grantee the dominant tenement in reference to the rights and privileges as described and specified in the instrument. This being true, it is the rule very generally accepted that unless by virtue of express agreement, the owner of the servient tenement, here the defendant, is not bound to maintain such easement or keep same in repair. *City of Bellevue v. Daley*, 14 Idaho, 545; *Oney v. West Buena Vista Land Co.*, 104 Va., 580; *Bartlett v. Peasely*, 20 N. H., 547; *Huntington v. Absher*, 96 N. Y., 604; Jones on Easements, sec. 822; 14 Cyc., 1209; 9 R. C. L., title Easements, sec. 57. In this last citation the position is stated as follows: "The owner of land which is subject to an easement requiring the maintenance of means for its enjoyment is not bound unless by virtue of some agreement to keep

such means in repair or to be at any expense to maintain them in proper condition."

The principle is fully recognized with us, as shown in *Lamb v. Lamb*, 177 N. C., 150, where it is said to be "undoubtedly the general rule that in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists, and is used and enjoyed for the benefit of the dominant estate alone."

Under these and other authorities of like kind, defendant not being bound to maintain this dam or be at any expense concerning it, cannot be required to replace it when washed away and destroyed by unusual and unprecedented floods. *Rector v. Power Co.*, 180 N. C., 622. No more can he be held liable for any omissive neglect in respect to it.

We must, therefore, as stated, uphold his Honor's decision that on the facts presented no cause of action has been shown, and the judgment of nonsuit is

Affirmed.

ROBERT W. McKINNEY v. T. T. ADAMS AND J. B. ADAMS, TRADING AS T. T. ADAMS COMPANY.

(Filed 20 December, 1922.)

1. Employer and Employee—Master and Servant—Safe Appliances—Duty of Master—Ordinary Tools—Reasonable Care of Selection—Negligence.

The principle requiring an employer, in the exercise of reasonable care, to furnish to his employees a safe place to work, and provide them with implements, tools, and appliances suitable to the work in which they are engaged, applies to simple or ordinary tools where the defect is readily observed, and of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and the employer should have known of the defect, or discovered it under the duty of inspection ordinarily incumbent upon him in tools of this character, and the injury complained of occurred without having afforded the employee an opportunity of remedying the defect.

2. Same—Evidence—Nonsuit—Questions for Jury—Trials.

The plaintiff, an employee of the defendant, was furnished by the defendant's foreman, to trim limbs from logs, in the course of his employment, an axe with a split handle that made "a limber, switchy handle," with which one could not strike true, the foreman telling the plaintiff during his work to be careful, that the axe was sharp, and he might cut his foot, which a little later he did, without having an opportunity to remedy the defect, and caused substantial damage, the subject of the action, the axe having glanced from a small dead snag on a limb he was trimming by reason of the limber handle: *Held*, sufficient evidence of actionable negligence, and defendant's motion as of nonsuit was properly overruled.

APPEAL by defendant from *Calvert, J.*, at July Term, 1922, of McDOWELL.

There were allegations with evidence on part of plaintiff tending to show that on 22 September, 1919, plaintiff was employed for defendant company by one James Boyd, vice principal and foreman of said company, and sent into the woods on the Blue Ridge Mountains to nose and knot logs and drive grabs into said logs and load the teams, etc., in the woods, some distance from defendant's camp. That for purposes of doing the work, said foreman himself gave defendant an axe with a defective handle. Speaking to the condition of said axe, as in connection with the work, plaintiff testified: "We had to nose and trim the logs so they would not drag on the ground, trimmed off the front end. To do this I was required to use an axe, and the one I was given to work with was a good axe only it had a defective handle. The handle was bursted from the eye of the axe, to the best of my knowledge, 12 inches up the handle, about one-third of the handle being gone. It looked like the split part had been trimmed out with a knife or axe, and that made it a limber, switchy handle, and when you struck with it it did not strike true." Witness further said that Boyd, about five o'clock in the afternoon, came out and sharpened the axe, telling witness to be careful, that the axe was sharp and he might cut his foot. That a little later, as plaintiff was knotting a log, the axe glanced from a small dead snag on a limb overhead and by reason of having this limber handle it was deflected and struck plaintiff's foot, inflicting a painful and permanent injury. There was other supporting evidence as to the defective condition of the axe handle and the severity of the injury. There was no evidence offered by defendant.

On issues raised by the pleadings, the jury rendered the following verdict:

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

"2. Did plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

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

"4. What damage, if any, has plaintiff sustained, as alleged in the complaint? Answer: '$1,000.'"

Judgment for plaintiff. Appeal by defendant, assigning for error chiefly the refusal to allow his motion for nonsuit.

Hudgins, Watson & Washburn for plaintiff.

Pless, Winborne & Pless for defendant.

HOKE, J. In *Thompson v. Oil Co.*, 177 N. C., 279-282, the Court, in the opinion, speaking to the question chiefly presented, said: "It is the

accepted principle in this State that an employer of labor, in the exercise of reasonable care, is required to furnish his employees a safe place to work and provide them with implements, tools, and appliances suitable for the work in which they are engaged. *Kiger v. Scales Co.,* 162 N. C., 133; *Mincey v. R. R.,* 161 N. C., 467; *Reid v. Rees,* 155 N. C., 231; *Hicks v. Mfg. Co.,* 138 N. C., 319. And it has been repeatedly held that the position may be recognized in the case of simple, ordinary tools, where the defect 'is of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and it is further shown that the employer knew of such defect or should have found it out under the duty of inspection ordinarily incumbent upon him in tools of that kind,' etc. *King v. R. R.,* 174 N. C., 39; *Rogerson v. Hontz,* 174 N. C., 27; *Wright v. Thompson,* 171 N. C., 88; *Reid v. Rees,* 155 N. C., 231; *Mercer v. R. R.,* 154 N. C., 399."

And in further illustration of the principles pertinent, in *Rodgerson v. Hontz, supra,* a recovery was allowed for injuries caused by a defective cant-hook, negligently furnished an employee for use in loading and unloading heavy logs, being loaded on a train car, and speaking to the obligation of an employer of labor, in reference to simple tools, the Court stated the approved position as follows: "That an employer was not relieved of all obligation and responsibility in reference to such tools; and further, that when there was negligence in supplying tools of that character, or keeping them in order, and the defect was of a kind that reasonably imported menace of substantial physical injury, and the same was known to the employer, or if it should have been ascertained by him under the rules of inspection applicable to such cases, and having due regard to the nature of the defect and the use to which it was being put and all the attendant circumstances, liability might attach."

In this statement it appears as an essential element of liability "that in case of ordinary every-day tools the defect complained of must be one that imports menace of substantial injury." And accordingly, in *Morris v. R. R.,* 171 N. C., 533, recovery was denied when a hammer used in driving railroad spikes into cross-ties had worn slick and an employee having taken an unusual and awkward position with one foot on a pile of dirt, the hammer slipped from the head of a spike, whereby he was jerked down and injured. The Court being of opinion that in the ordinary use of such a tool, no such injury could have been reasonably expected, and therefore the injury should be properly classed as an accident.

Again, in reference to these tools, it held that an employer of labor is not held to same careful inspection as in more complicated and

threatening implements, and may ordinarily rely upon the employee to discover defects observable in their use, and at times to correct them himself. And applying the principle in *Winborne v. Cooperage Co.*, 178 N. C., 88, where an employee sent to take down some old box cars some miles out on a logging road, and there found an old axe, which he in part used in the work, the axe being ill-fitted, or not having been used in some time, flew off the handle and the employee was injured, held that there was no breach of duty shown, the defect being in that the employee should have discovered for himself and remedied it. But in our opinion neither of the limitations on liability suggested in these cases may avail the defendant on the facts of this record, where the axe, with this open and observable defect, a limber, switchy handle, is personally given to the employee by defendant's foreman and vice principal, and he is sent off into the woods to trim logs, and with no opportunity to fix it. There is here no question of proper inspection. The foreman must have known it, nor to one who has ever tried it can there be any doubt as to the menace of substantial injury.

In our opinion the facts establish a clear breach of duty, causing the injury, and the motion for nonsuit was properly overruled.

No error.

MARGARET A. LEE AND HUSBAND v. TOWN OF WAYNESVILLE.

(Filed 20 December, 1922.)

1. Municipal Corporations—Cities and Towns—Condemnation—Eminent Domain—Streets and Sidewalks—Discretionary Powers—Courts.

The courts will not interfere with the statutory discretionary powers given to the governing authorities of an incorporated town to take lands from adjoining owners in widening its streets for the public welfare, unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion. C. S., 2791, 2792.

2. Same—Appeal and Error—Findings of Facts.

Where it appears that the governing authorities of a town have taken plaintiff's adjoining lands to widen a street intersecting with other streets so as to lessen the danger to traffic thereon, and it is made to appear by affidavits and otherwise that doing so was a reasonable exercise of the discretion vested in them, the findings of the trial judge, upon opposing affidavits, that such course was unnecessary to a certain extent, and reducing the width of the land which should be appropriated for the purpose, is not binding on the Supreme Court on appeal, the question being, primarily, whether the administrative authorities of the town have so grossly and manifestly abused the exercise of their discretionary powers as to render their action ineffectual, which does not appear upon the facts of the instant case.

3. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Condemnation—Eminent Domain—Estoppel.

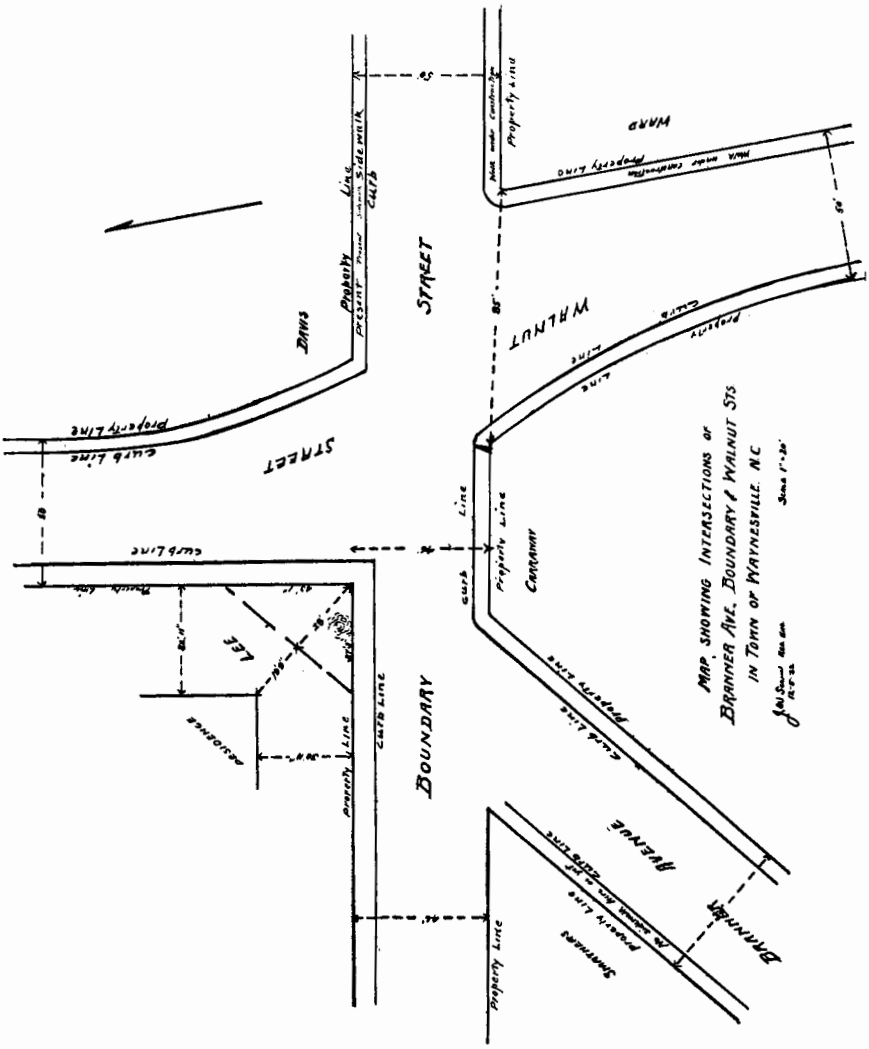
The governing authorities of a town are not estopped to condemn land for the widening or improving of its streets by reason of an owner having put extensive improvements on his land a long time prior to the time it was condemned for that purpose, the power of condemnation, in cases of this character, being a continuing one to be exercised when and to the extent that the public good may require it.

APPEAL by defendant from *Ferguson, J.*, at chambers in Waynesville, 25 August, 1922, from HAYWOOD.

Civil action, heard on return to a preliminary restraining order. On the hearing there were facts tending to show that the board of aldermen of the town of Waynesville, acting under statutory authority, had properly resolved upon and were proceeding to carry out a plan of improvement in straightening, widening, and opening the streets of said town; and in pursuance of their plans proposed to cut off from plaintiff's lot a corner of same to the extent in all of 28 feet where it projected an acute angle towards the intersection of three or more of the prominent streets of the town. The conditions presented being as shown in the plat of the official engineer, submitted and used at the hearing and hereto annexed.

Plaintiffs thereupon instituted the present suit to restrain the board of aldermen from appropriating the portion of plaintiffs' lot as proposed, and a preliminary restraining order having been issued, his Honor, as stated, heard and considered the matter and entered judgment in terms as follows: "This is a motion to continue restraining order heretofore granted to the hearing. After hearing the pleadings and evidence offered, and the argument of counsel, I find the following facts from the evidence:

"That heretofore, some thirty years ago, the town of Waynesville laid off and established streets, Boundary Street and Walnut Street connecting. The plaintiffs purchased property on the corner of Boundary and Walnut streets, and at great expense built a home, planted out shade trees, and otherwise improved his yard and premises, and the streets have remained in that condition from that time up to the present. The defendants, the mayor and board of aldermen of the town of Waynesville, have undertaken to improve the said town by widening, straightening, and hard-surfacing the principal streets of the town, and with that view had a survey made by an engineer, and in making the survey of Boundary Street and Walnut Street, the town proposes to run through the plaintiff's yard, taking at the widest point 21½ feet, and reserving the right to still take further ground for the purpose of putting down the sidewalk.


MAP SHOWING INTERSECTIONS OF
BRANNER AVE., BOUNDARY & WALNUT STS
IN TOWN OF WAYNESVILLE, N.C.
WARD
WALNUT STREET
BOUNDARY
LEE
BRANNER AVENUE
Property Line
Curb Line
Sidewalk
Driveway

"Upon the evidence offered and duly considered, it appears that it will be necessary to take off a small portion of the corner of the plaintiff's lot, but that it is not necessary to take as much as the defendant claims to have a right to do, and as it has been surveyed. That to do so would not add any additional security to the traveler on the streets, or any of them, and would virtually destroy the plaintiff's property as a home, by running through his yard, cutting down his shade trees, and doing such irreparable and unreasonable damage to the plaintiff's property and to his home that the same would be unreasonable, unjust, and oppressive to the plaintiff.

"Therefore, it is adjudged that the restraining order heretofore issued be modified so as to permit the defendant to run a line parallel with the one already surveyed, at the deepest point, not to be more than 15 feet from the corner of the plaintiff's lot, and to remove such obstructions as may be in the way in building said streets and finishing the same as contemplated by the defendant, and the defendant is perpetually restrained from entering any further on the plaintiff's premises either for the purpose of streets or sidewalks. The question of damages is not passed on."

Defendant excepted, and appealed.

John M. Queen and Alley & Alley for plaintiffs.
Morgan & Ward and W. R. Francis for defendants.

HOKE, J. From a consideration of the legislation applicable, it appears that the board of aldermen are possessed of ample authority to enter into the proposed improvements of straightening and widening the streets, and to condemn the property required for the purpose on payment of reasonable and just compensation. Private Laws 1885, ch. 127, sec. 16; Public-Local Laws, Extra Session 1921, ch. 28, sec. 3; C. S., 2791-2792; *Jeffress v. Greenville,* 154 N. C., 490; *Waynesville v. Satterthwait,* 136 N. C., 226. This being true, it is the accepted principle, declared and upheld in numerous decisions with us, that courts may not interfere in a given case with the exercise of discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion. *Newton v. School Committee,* 158 N. C., 186-188, citing *Jeffress v. Greenville,* 154 N. C., 490; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Ward v. Comrs.,* 146 N. C., 534; *Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 392; *Brodnax v. Groom,* 64 N. C., 244. And there may be added the cases of *Dula v. School Trustees,* 177 N. C., 426-431; *Crotts v. Winston-Salem,* 170 N. C., 24; *Durham v. Rigsbee,* 141 N. C., 128. In *Rosenthal*

v. Goldsboro, supra, the Court, quoting from and interpreting the case of *Tate v. Greensboro,* 114 N. C., 392, stated the position referred to as follows:

"The law gives to municipal corporations an almost absolute discretion in the maintenance of their streets, since wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid.

"The charter of the city of Greensboro and the several laws of the State (The Code, ch. 62, vol. 2) gives to the municipal authorities of that city wide discretion in the control and improvement of its streets, and if damage results to an abutting property owner by reason of acts done by it neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum absque injuria.*

"The courts will not interfere with the exercise of a discretion reposed in the municipal authorities of a city as to when and to what extent its streets shall be improved, except in cases of fraud and oppression constituting manifest abuse of such discretion.

"In order to show how far the principle was applied in that decision, it appeared that the city authorities, having concluded that the trees, from their shade and placing, tended to prevent the proper maintenance of the streets in reference to the public benefit and convenience, ordered their removal, and on the hearing the judge found: 'That the trees did not obstruct the passage of persons on the sidewalk; that the public convenience did not require their destruction; that the mud hole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting down the trees.' And on the facts, *Burwell, J.,* in his well considered opinion, thus stated the question presented: 'This phase of the case presents for our consideration this question: Can the courts review the exercise by the city of Greensboro of its power to repair and improve its streets and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city, which the municipal authorities honestly believe were injurious and obstructive to the public, were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?'

"And in reference thereto, among other things, said: 'Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets, considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. Illustrative of this is the provision of The Code, 3803, that the

commissioners of towns "shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best." We think that under its charter and under the general laws of the State (The Code, ch. 62, vol. 2) the city of Greensboro was clothed with such discretion in the control and improvement of its streets, and if damage comes to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith in the careful exercise of that discretion, it is *damnum obseque injuria. Smith v. Washington,* 20 How., 136; *Brush v. City of Carbondale,* 78 Ill., 74; *Pontiac v. Carter,* 32 Mich., 164.'"

It is the recognized rule of procedure in appeals of this character that the Court is not concluded by the finding of facts made by the trial judge. *Hyatt v. DeHart,* 140 N. C., 270, and on consideration of the entire evidence, and in view of the principle sustained by the authorities above cited, we are of opinion that the judgment of his Honor cannot be sustained. While the plaintiff and several other witnesses submitted affidavits to the effect that in their opinion the appropriation of plaintiff's property, to the extent proposed, will cause them irreparable damage, and is not at all required by the public good, and will practically destroy their property as a residence, there are affidavits from several of the board of aldermen and the city engineer to the effect that on learning that there would be objection made to the condemnation as proposed, they caused a resurvey to be made; that they also made personal examination of the locality, and passed the resolution with the consultation and advice of numerous citizens and taxpayers, on being convinced that the cutting off of the acute angle of plaintiff's yard was necessary to the convenience and safety of the public using the streets and sidewalks in that locality. These resolutions and findings are supported by the affidavits of several citizens, that the proposed change is desirable, and even necessary; and there are, too, facts in evidence permitting the inference that the damage to the property will not be so extensive as plaintiffs now think and contend. Here is sharp divergence of opinion certainly, but nothing to justify a conclusion that there has been gross abuse of discretion on the part of defendants to the manifest oppression of plaintiffs. This view is also confirmed by a perusal of the official map put in evidence showing the sharp projection of plaintiffs' lot into the present course of three important and much frequented streets, where, even in the opinion of the trial court, there should be a further condemnation of fifteen feet of this angle. The objection to the judicial modification of defendant's resolution, however, is that the question is primarily and exclusively submitted to the municipal government, and his Honor has no power whatever in the premises unless and until manifest abuse and oppression are first established. Nor is there any ques-

tion of estoppel presented by reason of the fact that the streets were laid off as they now exist before plaintiffs ever built and improved the property. The better opinion being that the power of condemnation, in cases of this character, is a continuing one to be exercised when and to the extent that the public good may require. *Power Co. v. Wissler,* 160 N. C., 269; Elliott on Roads and Streets (3 ed.), sec. 260.

On the record and the facts as thus far presented, we are of opinion that no right to a restraining order has been shown, and the judgment of the trial court must be set aside.

Reversed.

J. M. EDGERTON AND WIFE, SALLIE EDGERTON, v. W. V. TAYLOR, DALLAS TAYLOR, A. F. MOYE, SAM BRIDGERS, JOHN R. CRAWFORD, D. H. DIXON, H. L. BIZZELL, J. B. NEWSOME, AND W. P. ROSE.

(Filed 20 December, 1922.)

1. Contracts — Executory Contracts — Interpretation — Interdependent Parts.

Where all of the parts of an entire contract are interdependent, so that one part cannot be broken without breaching the whole, a breach by one party of a material part will discharge the whole at the option of the other party; and, as a general rule, when one party is unable to perform such executory contract, and the promises are interdependent, and made in consideration of each other, he is not entitled to performance by the other, or where he positively refuses to perform his contract in an essential particular he cannot recover of the other for nonperformance.

2. Same—Breach—Liability.

Where a party obligates himself to the performance of his contract dependent upon an act to be performed by the other party, the doing of such act is a condition precedent, and generally without inquiry by the courts whether the doing of such act is beneficial to the one to whom the promise has been made, and the performance of the consideration also in such case, becomes a condition precedent; and where one promise forms the whole consideration for the other, the promises are not independent of one another, and the failure of one party to perform on his part will exonerate the other from liability to perform.

3. Same—Conditions Precedent—Conditions Concurrent—Actions.

One party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof; or, if the stipulations are concurrent, his readiness and ability to perform them.

4. Same—Principal and Surety.

The surety on a bond given by some of the parties defendant for the faithful performance of a contract on their part is only bound upon the

failure or refusal of his principal to comply with the terms which the written instrument has imposed on him, and the surety's liability is generally to be considered as *strictissimi juris.*

5. Contracts—Rights of Parties.

Parties must be permitted to make their own contracts in their own way, and they will be valid and binding upon them except where not contrary to good morals, or for some other reason, deemed sufficient, they are not sanctioned by the law, or are declared invalid and unenforceable in the interest of public policy.

6. Contracts — Conditions Precedent—Breach—Sales—Suppressing Bidding—Principal and Surety—Damages.

The defendants, contractees, in a contract to convey land, for the purpose of meeting their payment of the consideration, platted the same into several lots contemplating an auction sale at a certain date, when the plaintiff objected; and at his request the defendants executed their bond, with sureties, for the payment of the balance of the purchase price at the time specified in the contract of sale, upon condition that the plaintiff should withdraw his objections to the sale of the land at auction by defendants, and not interfere therewith. The plaintiff's action being against the defendants and their sureties for specific performance of the contract, and for damages, etc., and there being evidence in defendants' behalf tending to show that the plaintiff had violated the conditions to be performed on his part, by appearing at the sale and suppressing the bidding thereat, in consequence of which there were no purchasers: *Held,* as to the sureties, the condition that the plaintiff should not so interfere was a condition precedent to any obligation on the part of defendant sureties; and as to the defendant principals, they were entitled to have the jury consider whether or not, under the evidence, they were entitled to be compensated for any loss they may have sustained, caused by the plaintiff's conduct at the sale, which was prejudicial to them.

7. Same—New Trials—Pleadings—Amendments to Pleadings—Issues.

It was further held under the evidence in this case that the issues submitted by the judge were insufficient to determine the rights of the parties upon the facts and principles of law involved, and a new trial is ordered upon all the issues with suggestion that the parties replead, if so advised and permitted by the trial court, and that issues be so framed as to more clearly present the controversy to the jury.

APPEAL by defendants from *Calvert, J.,* at May Term, 1922, of WAYNE.

This was a civil action, wherein the plaintiffs were seeking to enforce specific performance of a contract for the purchase of certain real property in the city of Goldsboro, and for damages for breach of contract for the purchase of certain personal property executed by the defendants, W. V. Taylor and Dallas Taylor to the plaintiffs, and for the recovery against the remaining defendants of judgment for $59,000 under a bond executed by said defendants for the faithful performance by the defendants W. V. Taylor and Dallas Taylor of the contract of purchase.

On 6 March, 1920, the plaintiffs and the defendants W. V. Taylor and Dallas Taylor entered into a written contract wherein the plaintiffs agreed to sell and said defendants agreed to buy certain real property in the city of Goldsboro, known as "Edgerton Stables," at and for the sum of $60,000, of which $1,000 was paid in cash and a bond for $5,000 executed and delivered to the plaintiffs by said defendants for the faithful performance of the contract on their part; the deed was to be delivered by plaintiffs on 15 October, 1920, and the remainder of the purchase money was to be paid on that day.

Some time thereafter the defendants W. V. Taylor and Dallas Taylor sold the defendant A. F. Moye an interest in their contract. A month or so thereafter the said defendants decided to advertise a sale of said property in separate portions at public auction, said sale to be made on terms and deeds to be made to the respective purchasers on 15 October, 1920, the day on which said plaintiffs agreed to deliver to said defendants a deed for said property free and clear of incumbrances.

When the plaintiff learned of this proposed auction sale of said property he objected thereto, and refused to let surveyors go on the property to get the dimensions thereof for the purpose of platting the same for such proposed sale, and refused to let any notices or advertisements of said sale be placed upon said property. At this time an auction sale of said property in lots or portions had been advertised to be held on 25 May, 1920. On 22 May, 1920, for the purpose of removing any objections the plaintiffs had to an auction sale of the property, and for the purpose of guaranteeing the performance of the contract of purchase by defendants, if said plaintiffs would not interfere with the auction sale thereof, defendants caused to be executed and delivered to plaintiffs a further bond signed by the defendants W. V. Taylor, A. F. Moye, Sam Bridgers, John R. Crawford, D. H. Dixon, H. L. Bizzell, J. B. Newsome, and W. P. Rose, in the sum of $59,000, the exact amount of the remainder of the purchase price for the property.

These defendants, other than W. V. Taylor and Dallas Taylor and A. F. Moye, had no interest whatever in the property or in any of the proceeds that might be derived from a sale thereof. The sole consideration for this bond, as alleged and admitted, was to remove any objections the plaintiffs might have to an auction sale of the property, and to cause plaintiffs to permit the auction sale to proceed without interference on his part. Plaintiffs accepted the bond for this purpose and on this consideration.

It is contended by the defendants, and they assert that the jury has found, that the consideration of this last mentioned bond has failed, for that it did not remove any and all objections on the part of the plaintiffs to an auction sale of said property, and that the plaintiffs, after the

bond was given and accepted by them, as aforesaid, did wrongfully interfere with the auction sale of the property, as alleged in the answer. They contend that notwithstanding this finding of fact by the jury, the court erroneously rendered judgment for the plaintiffs against all of the defendants for the full penalty of the bond.

It is further alleged and contended that the consideration for the second bond having failed, the only judgment that can be rendered against any of the defendants, if any, is against the defendants W. V. Taylor and Dallas Taylor, in the sum of $5,000, stipulated in the first contract and bond attached to the complaint.

The following verdict was returned by the jury in response to the issues submitted by the court:

"1. Were the plaintiffs J. M. Edgerton and wife ready, able, and willing, on 15 October, 1920, to convey the land to the defendants W. V. Taylor and Dallas Taylor, and to deliver to them the personal property, as required by the terms of the contract. Answer: 'Yes.'

"2. Have the defendants W. V. Taylor and Dallas Taylor failed and refused to comply with their contract to purchase said lands and said personal property, as alleged in the complaint? Answer: 'Yes.'

"3. What damages, if any, are the plaintiffs J. M. Edgerton and wife entitled to recover from the defendants on account of the failure of the defendants W. V. Taylor and Dallas Taylor to take over and pay for the real estate? Answer: '$59,000.'

"4. What damages, if any, are the plaintiffs entitled to recover of the defendants on account of the failure of the defendants W. V. Taylor and Dallas Taylor to take over and pay for personal property? Answer: 'None.'

"5. Did the plaintiff J. M. Edgerton wrongfully interfere with the auction sale of the property, as alleged in the answer? Answer: 'Yes.'

"6. If the plaintiff J. M. Edgerton wrongfully interfered with the auction sale, did such interference prevent the sale of said property, as alleged in the answer? Answer: 'No.'

"7. If so, what damages are the defendants entitled to recover from the plaintiff J. M. Edgerton by reason of such wrongful interference? Answer: 'None.'"

Judgment was rendered against the defendants for $59,000, with interest from 29 May, 1922, and other relief demanded, and the costs.

W. S. O'B. Robinson, E. M. Land, Teague & Dees, and Dickinson & Freeman for plaintiffs.

Langston, Allen & Taylor, J. F. Thompson, W. A. Finch, William R. Allen, and D. H. Bland for defendants.

WALKER, J., after stating the case: This case was not tried in the court below upon the correct theory, and the issues submitted to the jury did not embrace fully all the matters really in controversy. These issues were objected to by the defendants and other issues tendered by them, which were rejected by the court, and defendants duly excepted.

The court submitted, as will appear above, among others, the following issues to the jury:

"5. Did the plaintiff J. M. Edgerton wrongfully interfere with the auction sale of the property, as alleged in the answer?"

The court then charged the jury upon that issue as follows: "If the jury should find by the greater weight of the evidence that after the execution of the bond for $59,000, J. M. Edgerton, by word or act, said or did anything to stifle the sale or bid, the court charges you that the consideration of the bond would have failed, and it would be your duty to answer the fifth issue 'Yes.'"

The defendants complain that notwithstanding the instruction of the court upon the fifth issue, and the affirmative response of the jury thereto, the court has rendered judgment against the defendants for the full amount of the bond, viz.: $59,000, contrary to the instruction of the court that if the jury found that J. M. Edgerton "said or did anything to stifle the sale or bid, the consideration of the bond would have failed." In other words, that, as the jury found, by the answer to the fifth issue that J. M. Edgerton had stifled the sale or bid, the consideration of the bond for $59,000 had failed, and it would follow therefrom that plaintiff could not recover on the bond, or, at least, could not recover as much as $59,000.

Then, again, the court refused to submit an issue as to the damages, if any, sustained by the defendants or the principals in the bond for $59,000, in consequence of the wrongful interference by J. M. Edgerton with the auction sale of the property. It does not follow that because the sale was not wholly prevented by the unlawful and wrongful interference of J. M. Edgerton with the same, that defendants, or some of them, were not damaged thereby, or that by reason of the wrongful conduct of J. M. Edgerton he may not be barred altogether of any remedy or right of action on the bond against those who executed the same, as sureties, or who guaranteed the payment of the debt to Edgerton, upon condition, which was precedent, that he should not interfere with the sale. It is not in this condition of the guaranty or undertaking of some of the defendants as sureties that they will pay the debt or be responsible for any default of their principals, if Edgerton did not prevent the sale, but only if he did not interfere with it, and would agree, as a part of the condition, that all objections to it had been removed; and, therefore, the sureties, or guarantors, are entitled to

stand upon the exact terms of their contract or undertaking, and if Edgerton failed to comply with it strictly, to be discharged or exonerated from all liability. Some of the defendants, who claim to be merely sureties or guarantors, insist that, when the facts of the case are fully disclosed and shown, by the evidence and under proper issues to be submitted to the jury, it will appear that their true position is but that of guarantors or sureties who have assumed responsibility for the payment of the debt only upon a condition precedent which has not been literally or even substantially performed, but has been openly and essentially violated by Edgerton, and that by reason thereof, the latter has forfeited all right to proceed against them in the event of their principals' default. They further contend that the only consideration for their agreement to answer for the wrong or default of their principals was the reciprocal promise of Edgerton that he would not interfere with the sale and withdraw all objections to it, and that this he failed to do. That he did interfere with the sale, as admitted by him, and found by the jury at the last trial; and further, that he, by doing so, and by other wrongful and illegal conduct, stifled competition and chilled the biddings, and caused great damage to the defendants, both the principals and the sureties, and thereby released the latter from all liability to him. It is expressly alleged that J. M. Edgerton announced at the sale, or caused to be proclaimed, that whoever bought the property would not get a good title. The auctioneer employed to sell the property talked with J. M. Edgerton, and requested him to bid on the property, but Edgerton replied to him that "there was no use bidding on the property, that we couldn't give title." One witness at the last trial, Thomas Burton, detailed his conversation with Edgerton at the sale, and testified as follows: "I saw Mr. J. M. Edgerton at the sale and asked who he was. I asked him to bid on the property, and he told me there was no use bidding on the property, that we couldn't give title, and I made the remark to him that I guessed we could, we didn't usually sell property unless we knew what we were doing, and he said we couldn't give title. He was standing at the large entrance door, and there were quite a number present. I do not know that I can recall the names of any of them. Mr. Hardy was standing there, and the young man we had advertising for us. In consequence of the remark made by Mr. Edgerton, I turned and asked who he was, and they told me it was Mr. Edgerton, and I got back on the wagon and made the announcement that if any one in the audience was afraid of the title they could make their first cash payment and we would place the first payment in any bank in the city until they were satisfied that the title was good. I didn't see any chance of selling the property when the owner was knocking the sale. When I spoke to Mr. Taylor, I was within ten feet

of Mr. Edgerton. I spoke wide open so any one in the world could hear it, and it was after speaking to Mr. Taylor that I made the announcement from the wagon. The crowd began dwindling away, and we couldn't hold them after making that announcement." This witness further stated that in consequence of what had occurred there was no sale, and that there were 1,000 or 1,500 people at the sale.

It is further alleged by the defendants that the conduct of the plaintiff J. M. Edgerton, as alleged, caused those intending to bid on said property to desist from executing their intention, and particularly two bidders, who had made bona fide bids aggregating $65,000, to withdraw said bids, said withdrawals being caused wholly and solely by a statement of the plaintiff J. M. Edgerton that a lawsuit would arise out of any purchase by any bidder at said sale. That in consequence of the wrongful conduct of the plaintiff J. M. Edgerton, as above alleged, the performance of the contract on the part of the defendants W. V. Taylor and A. F. Moye was made impossible, and the defendants are advised, informed, believe, and allege that such conduct was a breach of contract by the plaintiff. There was ample allegation and proof in the case of the suppression by J. M. Edgerton of biddings at the sale and of active and energetic efforts by him to discourage those present for the purpose of bidding for the property, and cause them to desist from said purpose by disparaging and flyblowing the title, which was offered to those desiring to purchase the property.

It would be difficult, if not undesirable, at this time and in the present situation of the case, with the issues not, in their nature, fully determinative, or decisive of the rights of the parties, and of the real questions involved, to state with any degree of precision the principles of law applicable to the case, as it may hereafter be developed, but the following may have important bearing when the case is correctly presented upon the true and essential issues, leaving their proper application to the different phases and aspects of the controversy as they may hereafter appear at the next trial. We therefore state them here:

If the contract is entire in the sense that each and all of its parts are interdependent, so that one part cannot be violated without violating the whole, a breach by one party of a material part will discharge the whole at the option of the other party. 6 R. C. L., Contracts, paragraphs 311 and 324, also 310. And again, as a general rule, it is settled that where one party is unable to perform his part of the contract he cannot be entitled to the performance of the contract by the other party. Moreover, a party positively refusing to perform his contract cannot sue the other for nonperformance, where the promises are interdependent, or *if one is the consideration for the other, and the contract is wholly executory.* 6 R. C. L., Contracts, paragraph 324.

Where the performance of an agreement depends upon an act to be done by plaintiff, the doing of such act is a condition precedent, and the Court will not (always nor generally) inquire whether the doing of it is beneficial to defendant. So, whenever the entire consideration of the demand claimed is stipulated to be performed at or previous to the performance of the demand, the performance of the consideration becomes a condition precedent. 13 C. J., Contracts, paragraph 698.

The general rule is that promises, each of which forms the whole consideration for the other, will not be held to be independent of one another; and a failure of one party to perform on his part will exonerate the other from liability to perform. Clark on Contracts, 656; 13 C. J., Contracts, paragraph 540. Likewise, the party from whom the performance is due cannot (generally) assert that performance would be of no benefit to the other party. 13 C. J., Contracts, paragraph 706; also 13 C. J., Contracts, paragraph 735.

The decisions of our State seem to be in accord with these principles. *Niblett v. Herring,* 49 N. C., 262; *Wooten v. Walters,* 110 N. C., 254. One party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them. *Ducker v. Cochrane,* 92 N. C., 597, cited and approved in *McCurry v. Purgason,* 170 N. C., 468; *Tussey v. Owen,* 139 N. C., 457.

This Court said, by *Hoke, J.,* in *McCracken v. R. R.,* 168 N. C., 62, at p. 67: "It is true that our Court has frequently expressed its approval of the principle that, in ordinary business contracts, in which the consideration has wholly or in part passed, conditions subsequent which look to the forfeiture of rights and covenants for liquidated damages, which are in their effect but penalties, will be construed with some strictness, and, in the exercise of its equitable powers, that it will, at times, relieve against forfeiture in the one case and will adjust the conflicting interests in disregard of the penalty in the other. But the principle does not obtain in the case of conditions precedent where strict performance may be insisted on," citing *Corinthian Lodge v. Smith,* 147 N. C., 244; 1 Pomeroy Eq. Jurisdiction (3 ed.), sec. 455. And in illustration of the principle controlling with reference to a condition precedent, the Court further said in that case: "Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract, and the subscriber may be discharged from liability by a failure to comply with the condition." 1 Elliott R. R., secs. 116-117. Where a town agreed to issue its bonds on "performance of certain conditions by a railroad company—as that

it should construct its road from a certain point to a certain other point within a given time—if the company does not perform the condition within the time, it cannot, though prevented by floods, compel the issue of the bonds, though it afterwards completes the line. 1 Wood R. R., sec. 119, citing *R. R. v. Thompson,* 24 Kan., 170. A subscription, 'providing that the town of F. be made a point, and said road be put under contract in one year from 1 September, 1853': *Held,* putting the road under contract was a condition precedent to the right of the company to recover, though the road was finished and running by 1 September, 1858; *Judge Dillon* saying, the letting to contract as stipulated might have hastened completion. *R. R. v. Boestler,* 15 Iowa, 555. In the present contract the parties have not only made the express stipulation that if the road is not completed to a certain point in three years, the bonds will be surrendered and destroyed, and that all rights and equities under the contract shall cease, but have added yet another with regard to time, that the bonds shall not be delivered unless and until the railroad shall construct its lines as above set forth, and has in operation over said line, within three years, trains for the transportation of passengers and freight." And in *Ducker v. Cochrane,* 92 N. C., 597, cited with emphatic approval in *Corinthian Lodge v. Smith, supra,* the Court held: "That one party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them." And the Court in that case further says: "This principle has been recognized and applied by us in many well considered cases. *Tussey v. Owen,* 139 N. C., 457; *Jones v. Mial,* 79 N. C., 164, modified, but not on this point, in 82 N. C., 252; *Niblett v. Herring,* 49 N. C., 262; *Grandy v. McCleese,* 47 N. C., 142. And it is also well established that when the stipulations imposed by such a contract on the complaining party are in the nature of conditions precedent, a strict compliance may be insisted on. *Mizell v. Burnett,* 49 N. C., 249; *Norrington v. Wright,* 115 U. S., 188; *Oakley v. Morton,* 11 N. Y., 25; *Pickering v. Greenwood,* 114 Mass., 479."

And more especially as bearing upon the particular questions in this case, attention is directed to the fact that the bond in question is a surety bond, the nature or character of which is explained in 20 R. C. L., at p. 946, under the title "Principal and Surety," paragraphs 2 and 3. Since from an early date the liability of a surety has been considered as *strictissimi juris,* it is a general rule, where the surety enters into the contract of suretyship upon condition and in consideration of something to be first done by the creditor, that if the latter omits to perform the condition the surety is not liable. 21 R. C. L., 962, "Principal and

Surety," paragraph 16; *Lawrence v. Walmsley,* 104 R. C. L., 799; see note, 22 Ann. Cas., 415. Sureties are favored by the law. Their obligations are ordinarily assumed without pecuniary compensation, and are not to be extended by implication or construction. They have a right, as we have said, to stand on the terms of their contract, and having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed, and it has been said to be insufficient that the surety may sustain no injury by a change in the contract, or that it may even be for his benefit. 21 R. C. L., 975, "Principal and Surety," paragraph 28, and see especially note 11, p. 976.

In *Jeffries v. Lamb,* 73 Ind., 202, a creditor whose indebtedness was secured by a chattel mortgage took from his debtor a note signed by a surety. The creditor at the time promised the surety to cancel the chattel mortgage so as to enable the surety to secure a mortgage on the chattel from the debtor as security to him. The creditor failing to do this, it was held that the surety was not liable, the Court saying: "These facts show, we think, an entire failure of the consideration of the note in suit as between the appellant as payee of the note and the sureties therein."

In *Fay v. Jenks,* 93 Mich., the Court held that "If the creditor violated the agreement for the exclusive agency as per contract, the sureties were not liable, irrespective of the extent to which the agreement was violated and the resulting injury to the corporation." The court pointed out in that case that the defense was not on the ground of a partial failure of consideration, but upon the ground that the creditor violated the condition upon which the surety signed, and which was the sole consideration of his suretyship.

In *Jones v. Kerr,* 30 Ga., the Court said: "We understand the law to be this: If a creditor neglects to perform, or performs defectively, any of the conditions either expressed or implied which are incumbent upon him, or any of the terms which, collectively, form the consideration of the surety's contract or the contract to which the surety acceded, the surety is discharged, or rather, his liability never attached."

In *Capps v. Smith,* 4 Ill., 177, the Court said: "The rule is well settled that where the undertakings of the parties to a contract are mutual, one in consideration of the other, they are to be regarded as dependent contracts, which neither party can enforce without averring and proving a performance." *Coughran v. Bigelow,* 164 U. S., at p. 301, and especially on p. 310. See, also, *Gamble v. Cuneo,* 47 N. Y. Suppl., at p. 548, where the Court said: "The rule that a contract of a surety is *strictissimi juris* is not a rule of construction, but a rule as to the application of the contract after its meaning has been ascer-

tained." See, further, *Day v. Dox,* 24 Amer. Dec., 137; *Gayton v. Dey,* 178 Fed., 249 (101 C. C. A., 609); *Hunt v. Livermore,* 5 Pick. (Mass.), 101; *Chapman v. Clements,* 56 Southwestern, 646 (last paragraph of opinion); *Gardner v. Edwards,* 119 N. C., 566.

It is well understood in the law that parties must be permitted to make their own contracts in their own way, and they will be valid and binding upon them except where not contrary to good morals, or for some other reason, deemed sufficient, they are not sanctioned by the law, or are declared invalid and unenforceable in the interest of public policy.

The plaintiff has made a contract, in this instance, that he would refrain from doing anything that would interfere with the making of this sale, or obstruct the same, and has agreed that he would withdraw all objections to it, and the defendants, some of whom are sureties, or guarantors, for the performance of their part of the contract, have agreed, in consideration of plaintiff's promise, as set forth, and upon condition that he fully and faithfully performs the same, that they will become bound to him for the faithful performance of their part of the contract. But it appears that the promise of the one was the only consideration for the promise of the other, or to state it differently, the promise of J. M. Edgerton, and the fulfillment of it, was necessarily a condition precedent to any obligation on the part of the defendants, or, at least, such of them as were to be sureties or guarantors, that they should become bound to Edgerton in the manner specified in the contract. But we are of the opinion that the case was not so tried throughout as to decide the dominant question in it, nor yet to determine it with respect to other important matters involved in the controversy, one of these questions being the amount of damages to which the defendants, or any of them, are entitled to recover if plaintiffs have violated the contract on their part, and the actual prevention of the sale by the plaintiffs is not essential to their recovery of such damages, because if plaintiffs have impaired the right of the defendants to have a sale free from objection, and, of course, without interference by them and free from any act or conduct of theirs which was calculated to impede the sale by depressing or chilling the biddings, by disparaging the title to the property, or by other means or conduct, and to the extent that defendants' rights were impaired in such manner, it would seem that they are entitled to be compensated for any loss they sustained.

It may be that it would conduce to a more intelligent and a clearer perception of the controlling or determinative issues if the parties should replead and state their respective sides of the controversy more precisely, under the order of the Court, and that thereupon other issues be framed and submitted to the jury, but the case can proceed without this being done, if the parties are so advised, what we have said in this

regard being merely suggestive, and not as any compulsory direction by us, but as something left entirely to the discretion of counsel, and to be done with the approval of the presiding judge.

We order a new trial as to all the issues, as this will best attain the end in view, and will the more certainly conserve, if not advance, the rights and interests of the several parties.

We need not consider the other exceptions, though this does not mean that they are not well taken, but that it would not be timely to refer to them more minutely than we have already done, as we deem it best to reserve all other questions until the facts are more fully and clearly presented to us than they are in this record.

There must be another trial for the purposes we have indicated, and it will be so certified.

New trial.

MARY STRUNKS, ADMINISTRATRIX OF JOHN M. STRUNKS, v. JOHN B. PAYNE, DIRECTOR GENERAL OF RAILROADS, AND SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1922.)

1. Railroads—Employer and Employee—Master and Servant—Negligence —Sufficient Help—Evidence—Questions for Jury—Trials.

In an action to recover damages for the negligent killing of plaintiff's intestate by the defendant railroad company, there was evidence tending to show that the intestate, in the course of his employment, had applied the brakes on two cars that had been "shunted" onto a sidetrack from the defendant's freight train, and that then the defendant's train "shunted" another car onto this track that came in contact with those to which the plaintiff had applied the brakes, connecting the automatic couplings so that the three cars, instead of remaining stationary, began to run back down grade; that the intestate got back upon the car and used a "brake stick" as a lever, which was fixed within the spokes of the brake wheel, for additional power, and upon the breaking of this "brake stick," the intestate was thrown between the cars to his injury and resultant death, there being no other employee than the intestate to act as brakeman under the circumstances: *Held*, sufficient evidence upon which the jury could find that the service required for stopping the cars under the circumstances was more than the intestate could singly perform with reasonable safety; that defendant had negligently failed in its duty to furnish him sufficient help, and that this negligence was the proximate cause of the intestate's death.

2. Same—Assumption of Risks.

A brakeman on a freight train assumes the risks of his employment that are incident thereto and obvious, but not such as are caused by the negligence of the railroad company, or its employees, for whose acts it is liable, under such circumstances that the employee may not reasonably anticipate in time to avoid the result of an injury thereby caused, the rule

not applying that the servant assumes the risk by remaining in the service after he knows it, or it is obvious, and he appreciates the danger arising from it.

3. Same—Rules of Employer.

A rule of a railroad company that its employees shall not use a "brake stick" intended to be inserted between the spokes of the brake wheels for stopping its freight cars will not alone bar the recovery of such employee in his action to recover damages for the alleged negligence of the defendant railroad company when the rule has not been enforced, but habitually disregarded, if the use of the "brake stick" was reasonably required under the circumstances.

4. Same—Defects—Instructions.

Under the evidence in this case, *it is held*, that the defendant railroad company could not reasonably object to a charge of the court instructing the jury that, where an employee knows of a defect that has caused the injury complained of, and appreciates the risk and the danger attributable to it, and continues in the employment without objection, or obtaining from his employer, or representative, an assurance that the defect would be remedied, the employee assumes the risk, even though it arises out of his employer's breach of duty, as the instruction is in its favor, if erroneous.

5. Damages—Statutes—Federal Employers' Liability Act—Compensation—Negligence—Wrongful Death—Present Value—Railroads.

The measure of damages under the Federal Employer's Liability Act for the negligent killing of plaintiff's intestate, an employee of the defendant railroad company, is for "compensation" to the legal dependents, to be computed at the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance, according to the circumstances, for the earning power of money.

6. Appeal and Error—Objections and Exceptions—Instructions—Exceptions — Damages — Present Value—Negligence — Wrongful Death—Federal Statutes—Federal Employers' Liability Act.

A charge of the court upon the measure of damages to be given to the legal dependents of an employee negligently killed by the defendant railroad company under the provisions of the Federal Employers' Liability Act, that omits from the jury's consideration the present value of the future benefits that the legal dependents had been deprived of by the death, permits a recovery beyond that allowed by the statute, and an exception thereto presents the error on appeal without the necessity of a special request confining the recovery within the proper limits, there being but one legal principle involved and erroneously stated, which makes the error positive or affirmative, it being a failure to state the applicable principle correctly, and not a mere omission to charge as to some special or particular phase of the case.

7. Courts—Practice—Federal Courts—State Courts.

Semble, the Federal courts follow the rules of practice in the state courts holding an exception to the charge is sufficient on appeal, without a request for instruction, when the charge is of itself an erroneous statement of the measure of damages to be awarded by the jury for a wrongful death, in this case the negligent killing by a railroad company of its employee.

8. Appeal and Error—New Trials as to One Issue—Damages.

There being no error upon the issues of negligence, etc., committed by the trial court in an action against a railroad company for the alleged negligent killing of plaintiff's intestate, but only upon the issue as to the measure of damages, a new trial upon that issue alone is ordered on this appeal.

APPEAL by defendants from *Long, J.*, at March Term, 1922, of GUILFORD.

This is an action by plaintiff, as administratrix of her husband, to recover damages for his death caused by the alleged negligence of the defendant Southern Railway Company. It was admitted that he was killed 9 November, 1920; that the plaintiff is the widow and administratrix of the testator, and that he also left surviving him three minor children. The jury found upon the issues submitted that the plaintiff's intestate was killed by the negligence of the defendant railway company, as alleged in the complaint; that he did not assume the risk of being injured, and assessed the damages to the widow at $10,000; to his infant daughter, Margaret, 7 years of age, at $6,000; to his infant son, Marvin, 5 years of age, at $7,000, and to his infant son, Howard, 2 years of age, at $7,000. Judgment accordingly.

It appeared in the evidence that on the morning of 9 November, 1920, the intestate was a member of a train crew of the defendant's railroad in charge of L. M. Carr, conductor, who took out from Greensboro a train of freight cars, 28 or 29 in number, to a point on the belt line of the defendant, serving several manufacturing establishments, known as the Finishing Mill, where said cars were switched, classified, and distributed. There are several tracks branching off from this belt line and used for this purpose. One of these is known as the pass track, near a public highway, and is the one on which intestate was killed.

When this train of cars reached a point on the belt line near the said pass track the engine was pushing them in a general easterly direction. One car was put upon the main or belt line. Then two gondola cars together, loaded with sand, and each weighing 65 to 75 tons, were kicked or shunted some distance up on the steep grade of the pass track; Strunks, in the performance of his duty as brakeman, set the brakes on these two cars when they ceased rolling up the grade on the pass track; then a box car of lime (weighing 35 tons) was kicked or shunted up the grade of the pass track with sufficient force and violence to strike one of the gondola cars, and coupled with it automatically. The effect of this impact was to jostle the two gondola cars and to start all three cars rolling down the grade.

This created an unexpected emergency. When the cars began to roll down, Strunks was on the ground, where it was his duty to be, and it was his duty to stop the cars. In order to do this he had to go on top

of the car to get to the brakes. He ran up the ladder of the box car and applied the brakes on that car, using the brake stick; there was nobody there to help him and nobody on the two gondolas. Strunks was the only brakeman on the cars. In order to stop the cars with only one brake, he would have to apply enough pressure on this brake to stop all three of them, and the brake stick broke, which it seems caused his fall to the ground and his subsequent death.

The box car of lime was kicked up the grade with more force and violence than was perhaps intended, and, not being under the control of any one and with no brakeman on it, this was doubtless the initial cause of the tragedy which followed.

When the three cars began to roll down the grade Strunks was on the ground, near where, on the opposite side, was the conductor Carr. Strunks ran up the ladder of the box car and applied the brakes to that. These brakes were on the end of the box car which was next to the gondola cars. He fell from this place, between the box car and the first gondola. The truck of the gondola which followed the box car passed over him. Witness Carr heard Strunks apply the brakes, heard a sound as if something had broken, then saw Strunks' feet, saw him when he struck the ground. He fell on the side opposite to the witness.

The defendant in his answer states that Strunks was using the brake stick at the time that the stick broke, which caused him to become unbalanced and to fall from the car, being thrown under the car and killed. It was in evidence that a brake stick is like a pick handle, reduced to a suitable length, to be used as a lever, which, when inserted in the brake wheel (which is made like the steering wheel of an automobile) enables the brakeman to apply a greater degree of pressure than would otherwise be possible. It was in evidence that the defendant had a rule forbidding the use of brake sticks, but, nevertheless, that they were in universal use, and had been for at least 16 years; that there is much work required of brakemen which cannot be done without the use of brake sticks. The conductor in charge of the train knew that Strunks was using a brake stick, and another brakeman testified that he was familiar with and had worked on this particular grade; that he used a stick there, and that to control the cars on this grade it was necessary to use a brake stick.

The conductor, Carr, testified that he did not inspect the brakes, but there was nothing to indicate that the brakes were in bad condition up to the time they started to roll back, that is, when they were struck by the box car and jostled or jarred. Strunks had applied the brakes on these cars, and if in good condition they would have held under the impact.

There was verdict and judgment thereon against the defendant, from which it appealed.

S. B. Adams and R. C. Strudwick for plaintiff.
Wilson & Frazier for defendants.

WALKER, J., after stating the case: It appears that there was sufficient evidence in the case to warrant the jury in finding that the task of Strunks on this occasion was beyond his power to perform alone with reasonable safety; that the defendant had failed in its duty to furnish sufficient help. If so, this was actionable negligence, provided such failure was the proximate cause of the death. *Pigford v. R. R.*, 160 N. C., 93. That case also holds that the doctrine of the assumption of risk relates to the servant's knowledge of the ordinary risks incident to his employment, and which he is presumed to know—but that extraordinary risks created by the master's negligence, if he knows of them, will not defeat a recovery unless the danger to which he is exposed is so obvious and imminent that the servant cannot help seeing and understanding it fully, and he fails under the circumstances to exercise that degree of care for his own safety which is incumbent upon the ordinarily prudent man.

The defendant was negligent in kicking or shunting these cars up the steep incline of the pass track without any one in position to control their movements—the cars being shunted and not under control, violently struck the two cars already on the pass track and started all three of them rolling down the grade. This was the initial cause of this occurrence, and was negligence. *Moore v. R. R.*, 179 N. C., 641.

Notwithstanding the defendant had a rule forbidding the use of brake sticks by brakemen, it was in evidence that this rule had been disregarded for more than 16 years, and that all brakemen had for many years habitually used brake sticks, to the knowledge of defendant; that defendant constantly required brakemen to do work which could not be done without their use, and that on this particular grade, in doing the work required of Strunks, the use of a brake stick was necessary. Under these circumstances the existence of the rule cannot exculpate the defendant. *Biles v. R. R.*, 143 N. C., 79.

The defendant insists that it was error to refuse to nonsuit, or to instruct the jury that if they believed the evidence to answer the first issue "No"; and further, that it was error for the court to refuse the prayer for an instruction, viz.: "If the jury believed the evidence they should find that the plaintiff's intestate assumed the risk incident to his employment." We do not think that upon this evidence the court committed any error in these respects.

The court charged the jury: "When the employee knows of the defect and appreciates the risk and danger attributable to it, then if he continues in the employment without objection or without obtaining from the employer, or his representative, an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of

the master's breach of duty." We do not see how the defendant can complain of this instruction.

This case was brought under the Federal Employers' Liability Act, and the rule of the Federal Court and not of the State court controls as to the assessment of damages.

Upon the other question, as to the assessment of damages under what is termed the "present value" rule, it is unnecessary for us to say very much, as the proper rule, and the one, therefore, that we should follow, was stated by the Supreme Court of the United States in the comparatively recent case of *Chesapeake & Ohio R. Co. v. Kelley,* 241 U. S., 485 (*S. c.,* 60 L. Ed., p. 1117); and *Same Railroad Co. v. Gainey,* 241 U. S., 494 (*S. c.,* 60 L. Ed., p. 1124), as follows: "The present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance, according to the circumstances, for the earning power of money, is the proper measure of recovery in an action against an interstate railway carrier under the Employers' Liability Act of 22 April, 1908 (35 Stat. at L., 65, ch. 149), as amended by the act of 5 April, 1910 (36 Stat. at L., 291, ch. 143; Comp. Stat. 1913, sec. 8662), for the benefit of the widow and dependent children of an employee killed while engaged in interstate commerce."

The charge of the court in this case is contrary to the rule as there declared by the highest Federal Court, and proper exception was taken thereto in this case.

If a judge attempts to state the rule of law applicable to the case, he should state it fully, and not omit any essential part of it. The omission of any material part is a fatal error, and it is an affirmative or positive error. The "present value" of the future benefits which his widow and children would have derived by a continuance of the life of the person in question would seem clearly to be an essential part of the rule of the statute as to the damages which may be recovered, and not the sum total of the benefits as they may accrue in the future, because the amount of the latter are to be paid now. The rule of damages, as charged by the court, did not follow the Federal statute, as the latter provides only for "compensation," while the rule as given to the jury by the court would more than "compensate" the beneficiaries, as they would receive all at once, or *in solido,* and not as the benefits severally accrue in the future, which would necessarily be more than the statute contemplated should be paid to them, as the sum total of all the benefits, if received as they may accrue hereafter, would plainly be less than the payment of all of them immediately without any abatement, or discount so as to reduce them to the present value of the said future benefits. Manifestly the Congress intended only the present worth of the accruing benefits by the use of the language in the statute. Any other construction would result in giving the beneficiaries more than the fair and reasonable compensation provided for in the Federal statute, for without being

kept within the proper limit, the jury could, at least, give them more than the present worth or value of the accruing benefits, being unrestrained, and more than likely they would do so, and given ample opportunity and free range for favoring the beneficiaries beyond their legal deserts, it is more than probable that they did so. But apart from this consideration, it is plain that the statute intended to limit the jury to a fair and reasonable compensation, to be estimated by them in view of the fact that the whole amount or aggregate of the several benefits will be paid presently, and not the several amounts successively as they may accrue. No special request for an instruction was required by the law, or by well recognized procedure, in order to entitle the defendant to such an instruction, as that is undoubtedly an essential and material part of the rule prescribed by the statute, and the judge should have charged it voluntarily and without being urged to do so by a special prayer.

In the *Kelly case, supra,* the Court said "that, where future payments are to be anticipated and capitalized in a verdict, *the plaintiff is entitled to no more than* their present worth, is commonly recognized in the state courts," citing among many cases the following from this State, namely, *Poe v. R. R.,* 141 N. C., 525, 528; *Benton v. R. R.,* 122 N. C., 1007, 1009; *Johnson v. R. R.,* 163 N. C., 431, 452 (Anno. Cases 1915 B, 598).

Statutes similar to the one now being considered have been construed by the courts of this country in the different state jurisdictions, and with substantial uniformity, to the effect that for the cogent and convincing reasons stated in those cases they only allow the "present value" of future benefits from the continuance of the life that has negligently been taken. We fully considered the same question in *Johnson v. R. R.,* 163 N. C., 431, and *Fry v. R. R.,* 159 N. C., 357. In the *Johnson case, supra,* it is said: "In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable *present value* of compensation for his diminished earning capacity in the future, and not the whole difference between what he would be able to earn in the future, but for such injury, and such sum as he would be able to earn in his present condition. *R. R. v. Paschall,* 92 S. W., 446. Where future payments for the loss of earning power are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth. *Goodhardt v. R. R.,* 177 Pa. St., 1. 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. *O'Brien v. White,* 105 Me., 308. The rule, as we see, may be stated with varying phraseology, but it all carries the same idea, that the estimate should be based upon the present value of the difference between plaintiff's earning capacity (now and then), and not the total difference caused

by the injury. The rule is supported by many authorities in this and other jurisdictions. *Pickett v. R. R.*, 117 N. C., 616; *Wilkinson v. Dunbar*, 149 N. C., 20 (opinion by *Hoke, J.*); *Benton v. R. R.*, 122 N. C., 1007; *Watson v. R. R.*, 133 N. C., 188; *R. R. v. Carroll*, 84 Fed. Rep., 772; *Fulsome v. Concord*, 46 Vt., 135; *Kenny v. Folkerts*, 84 Mich., 616. In *Pickett v. R. R.*, 117 N. C., 616, a similar instruction was held (opinion by *Avery, J.*) to be objectionable, because 'it left the date which should be the basis of the calculation, to say the least, uncertain, if the language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefit of his labor had he not come to an untimely end.' It is there said that the jury should be told that it is the *present value* of the net earnings or income, the rule being stated succinctly and clearly in the seventh headnote of the case. The identical rule is laid down in *Benton v. R. R., supra* (opinion by *Clark, J.*), citing *Pickett's case, supra; Burton v. R. R.*, 82 N. C., 504; *Kesler v. Smith*, 66 N. C., 154. This is not merely the just and reasonable rule, where all the damages are to be awarded and paid presently, and not as they accrue in the future, but it is the only one admissible under the statute, and it is said in *Benton's case, supra,* to have been established by the precedents. Any other principle, if adopted, would enable a plaintiff to recover more than could possibly be earned, as no man realizes at once the full earnings or accumulations of a lifetime."

The courts in the different jurisdictions have consistently agreed as to the proper measure of the damages to be recovered in such cases, and as to the "present value" rule being the correct one, under the terms of the statutes applicable to this class of cases, and it will be found that they consider the "present value" of the benefits or accumulations which would have been realized by the deceased person had he survived, as an essential or material, *and indeed an inherent* part of the rule of the statute as to damages. The omission of it in the instruction of the court must, therefore, be an affirmative error which vitiates the charge.

The view of the case here presented and insisted upon relates to the same point, the measure of damages, as the one in *Ala. R. Co. v. Carroll*, 84 Fed. Rep., 772, where it was held that "the measure of damages for an injury depriving a plaintiff of his earning power is not the amount he might probably earn during his expectancy of life, but the present value of such earnings." That case was commenced in the Circuit Court of the United States for the Northern District of Alabama, where there was a verdict and judgment therein for the plaintiff, and carried by appeal to the U. S. Circuit Court of Appeals for the Fifth Circuit, where the judgment was set aside and a new trial awarded because of a charge upon damages similar to the one in our case. In other words, it

was a Federal Court of Appeals passing upon this question of damages, and it lays down the rule obtaining in those courts upon a similar question. It cites, as one of the authorities in support of the rule it applied, *Railway Co. v. Farr,* 6 C. C. A., 211 (56 Fed., 994), and says further in the opinion by *Justice Pardee:* "To this part of the charge the plaintiff in error duly excepted, and the foregoing remarks of counsel and the charge of the judge in relation to damages are assigned as error. The remarks of counsel stated an incorrect method of arriving at the measure of damages, were unfair, and tended to mislead the jury, and there was error in permitting the same to go to the jury. In *Railway Co. v. Farr,* 12 U. S. App., 520, 528; 6 C. C. A., 211, and 56 Fed., 994, in a similar case, exactly the same error was committed. In relation to it the learned judge announcing the opinion of the Court said: 'This was a manifest error. The present value of the earnings of 40 years to come, if absolutely assured, is much less than 50 per cent of their amount, at any rate of interest that prevails in the Indian Territory, and when it is considered how uncertain these earnings are, how many chances of disability, disease, and disposition, condition the probable earnings of a young man, the rule announced is absurd. Nor was the vice of this argument, or of the court's approval of it, anywhere extracted in the general charge. The judge contented himself with the harmless remark upon this branch of the case that if the jury found for the plaintiff they should allow such a sum as would compensate him for his pecuniary loss sustained, or that he would hereafter sustain, by reason of the disabilities caused by his injuries.' "

It must be noted carefully that the decisions in the *Carroll case, supra,* and in the *Farr case, supra,* just cited, were not controlled by the construction of any statute in the State giving an action for death caused by negligence, but were decisions in cases to recover damages for personal injuries caused by negligence wherein the plaintiff sought to recover *inter alia* damages for loss of physical and mental power which would extend into the future, or common-law damages, and the courts held it to be a general and uniform rule in all cases to allow only the present value of benefits, which would have accrued in the future, if the party had not been incapacitated by the negligent act of the defendant, or if those benefits had not been lost, if death had not been caused by the same kind of act. It was a general rule, the principle of which was applicable to all like cases, whether founded on the common law or on a statute, for it was the rule of reason, and when the reason is the same, the law is the same (*ubi jus ibi remedium*).

There was but a single proposition contained in the instruction of the court to which exception was duly taken, and where this is the case, the exception has the effect, in law, of denying the correctness of the single

instruction. This is the rule of all appellate courts, and it could not well be otherwise. It was not necessary, as assumed, that appellant should have gone further and stated that his exception was based on the incorrectness of the single instruction as given, for this is most plainly implied, there being but one instruction. It is settled that where there is but one instruction in the charge of a court, the appellant complies with the requirement as to exceptions and the assignments of error, by a single and general exception to the charge as given. What more could he say? And this is so as to an exception to a judgment, and there are various other illustrations of it in procedure and practice. The instruction of the court in this instance induced the jury to give damages upon a wrong basis—not the one prescribed by the statute, and it was calculated to do so. It was a positive error in failing to lay down the rule, as fixed by the statute and required no prayer to guide the court and jury in applying the right principle.

We may as well, in this connection, refer to the fact that neither *R. R. Co. v. Kelly,* 241 U. S., 485, nor *R. R. Co. v. Gainey,* 241 U. S., 494, held, or stated, that a prayer was necessary to raise the question as to the error or insufficiency of the instruction as to damages under the act. It is simply said in the *Kelly case, supra,* by *Justice Pitney* (60 L. Ed., bottom p. 1122): "So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded." And again, at p. 1123: "Where future payments are to be anticipated and capitalized in a verdict (that) the plaintiff is entitled to no more than their present worth is commonly recognized in the state courts," and he cites numerous state cases and the following United States cases at p. 1124: *St. Louis, etc., R. Co. v Needham,* 3 C. C. A., 129; 10 U. S. App., 339; 52 Fed., 371, 377; *Baltimore & Ohio R. Co. v. Henthorne,* 19 C. C. A., 623; 43 U. S. App., 113; 73 Fed., 634, 641. We will quote from the *Gainey case, supra,* a little more fully (60 U. S. L. Ed., at p. 1125): "The only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict of $16,000. On appeal to the Kentucky Court of Appeals, it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of $16,000, if placed at interest, would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The (Kentucky) Court overruled this contention on the authority of *C. & O. R. Co. v. Kelly,* 160 Ky., 296, where the same Court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included

in the verdict without rebate or discount. A reading of the opinion of the Court of Appeals in the present case (162 Ky., 427; 172 S. W., 918) makes it evident that it was only upon this theory that the Court was able to reach a conclusion sustaining the verdict. Since we have held, in *C. & O. R. Co. v. Kelly,* this day decided (241 U. S., 485, *ante,* 1117; 36 Sup. Ct. Rep., 630), that the theory is erroneous, it results that the judgment here under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

But in Thornton's Fed. Empl. Liability Act (3 ed.), sec. 199, pp. 293, 294, it is said: *"Local state practice controls.* The practice in the state court of the locality where the action is brought prevails, both where the action is brought in a state court and in a Federal Court." This brings us to the very strong and forceful statement of the rule by *Justice Avery* in *Pickett v. R. R.,* 117 N. C., 639, for the unanimous Court: "The instruction given, *viewed without reference to the prayer of the defendant,* was objectionable in that it left the question of the date which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefits of his labor had he not come to an untimely end." This is the correct rule applicable to this and similar statutes, and, as *Justice Avery* correctly said (in *Pickett's case, supra*), the element of restriction to the present value is an essential part, even considered without regard to any request for a special instruction upon the question as to the computation of the damages.

As to the verdict and judgment awarding separate damages to each beneficiary, the mere fact that the aggregate of them amounts to $30,000 does not cure the error, as pointed out in *Central Railroad of Vermont v. White, supra,* or begin to do so. That is not the point of the objection, and has no relation to it. The separate award of damages to each of the beneficiaries is still there and the distribution will be made accordingly, and contrary to the positive rule of the *White case, supra.* 35 Supreme Court Reporter, at p. 869.

There should be a new trial on the issue as to damages, for the reasons set forth by us, which are in agreement with those stated in the decisions of the highest Federal Court on the same subject, as well as by the overwhelming weight of authority in the state jurisdictions and the lower Federal courts, which are entitled at least to some consideration, as it seems to us.

The case of *Jones v. R. R.,* 176 N. C., 260, has no bearing whatever upon the question in controversy here. It deals with entirely different questions—those not relating to the question of damages, and the proper instruction, under the Federal Employers' Liability Act in regard thereto.

But the language in the case of *In re Stone*, 173 N. C., 208, is much to the point, and also covers more than one question raised in this record, and the law is there stated very clearly.

The United States Supreme Court did not hold in *Kelley's case, supra*, that in the absence of a prayer for special instruction a charge such as the one given in this case would be sufficient, nor did it say anything like that even in substance. We have quoted above what it did say. The *Kelley* and the *Gainey cases, supra*, are decisive of this one, as to the proper rule of damages in actions arising under the Federal Employers' Liability Act, and fully sustain our view of that question.

The element as to the present value of the future benefits likely to accrue to the beneficiaries is no more an essential part of the rule under state statutes giving an action for death caused by the wrongful act of another than it is under the Federal statute, the question as to future benefits being the same, or substantially the same, in all of the said statutes. The Federal Supreme Court has not said, as we understand its rulings, that the present value rule is not the correct one, but it may have said that in some particular or individual case the court below, by its instruction, had virtually submitted that rule upon the question of damages, although it has not done so in precise or definite language, which a special prayer for instruction must have evoked from the presiding judge. If it is a part of the rule, the judge should so charge it, whether asked to do so or not, and this being so, there is no reason why the State and the Federal rule should not be the same as to this question, the statutes being substantially alike and identical in meaning, so far as this particular question is concerned.

There must be another trial, but only on the issue as to damages, and it is so ordered.

Partial new trial.

WACHOVIA BANK AND TRUST COMPANY, AS EXECUTOR OF GWYN EDWARDS, DECEASED, v. WILLIE LEE MILLER.

(Filed 13 December, 1922.)

1. Appeal and Error—Appeal—Amendments—Execution—Supersedeas—Bond—Judgment—Payment.

A judgment debtor may stay execution pending appeal by giving the bond required by our statute, or he may pay the debt and preserve his right to prosecute his appeal according to the course and practice of the court, with order for restitution should he succeed therein, unless such payment was made by way of compromise and agreement to settle the controversy, or, under peculiar circumstances, which amounted to a confession of the correctness of the judgment. C. S., 1534, and a withdrawal of the appeal.

2. Same—Evidence—Trials—Questions for Jury—Reference.

Where the appeal of the judgment debtor from a judgment of a justice of the peace is properly in the Superior Court, and it is made to appear in the latter court that the judgment had been paid since its rendition by the justice, and there is evidence in the defendant's behalf that he had paid it under duress on compulsion, and without any intention on his part to abandon the right of appeal that, instead, he had preserved, it was error for the Superior Court judge to regard this evidence as irrelevant and dismiss the appeal, said evidence, if denied, raising an issue of fact to be determined by the jury, or a finding by the court or referee, as the parties may agree, or the court may decide in proper instances. C. S., 1534.

3. Appeal and Error — Appeal — Motions—Judgment—Abandonment—Evidence—Burden of Proof.

Where, in the Superior Court, the plaintiff moves to dismiss the appeal of his debtor from a judgment rendered against him in the court of a justice of the peace on the ground that the appeal had been abandoned by the payment of the judgment, the burden is on him to show such acts or conduct as would amount to the abandonment he has alleged in his motion. C. S., 1534, the giving of a stay bond, or even the payment of the judgment, not, of itself, being sufficient to show an abandonment.

4. Pleadings—Appeal and Error—Appeal—Motions—Permission to File Answer.

Held, under the facts of this case the answer or affidavit of the defendant was in the nature of an answer to the plaintiff's motion, in the Superior Court, to dismiss the defendant's appeal from a judgment of a justice of the peace; and where the judge has erroneously dismissed the case on plaintiff's motion, on the ground that defendant's payment effected an abandonment by him of his right, plaintiff's contention, on appeal, that the court had not given its permission for the defendant to file the answer is without merit.

APPEAL by defendant from *Lane, J.*, at August Term, 1922, of BUNCOMBE.

This action was begun before a justice of the peace by the plaintiff's testator, Gwyn Edwards, and was originally entitled *Gwyn Edwards v. Willie Lee Miller*. Edwards died, and the bank above named, as his executor, became a party plaintiff. Edwards secured judgment on 21 June, 1920, against Miller for $85, with interest on that sum from 21 June, 1918, with costs. Miller duly appealed to the Superior Court, in which court his appeal was docketed 29 June, 1920. On 25 June, 1920, Edwards paid the judgment, under the circumstances stated in the uncontradicted affidavit filed by Miller.

On 23 May, 1921, the defendant filed what purports to be an answer, which is as follows:

"The defendant W. L. Miller answering, says:

"1. That the defendant, at the time the suit was brought against him by the plaintiff (meaning the action before the justice of the peace), did not owe the plaintiff, in respect of the subject-matter of said suit, more

than $12.50, which amount he offered to pay the plaintiff prior to the beginning of said suit, but the defendant refused to accept the same.

"2. That at the time of bringing the suit and the rendering of judgment therein, the plaintiff had a claim against the defendant based on certain notes, dated 20 September, 1916, secured by deed of trust of same date registered in Buncombe County, which was a lien on defendant's real estate, and which contained a power of sale, which the plaintiff Edwards was then about to enforce for the nonpayment of the debt secured by the said deed of trust. That the plaintiff Edwards used the said notes and deed of trust, and the power which they gave him over the defendant, unlawfully to extort from the defendant Miller the payment of the said sum of $100, $85 of which was in payment of the judgment aforesaid, rendered herein on 21 June, 1920, by Dermid, justice of the peace, and $15 to said plaintiff's attorney, which said $100 the defendant was wrongfully and by duress forced by the plaintiff to pay in order to procure from the plaintiff the notes and deed of trust, so that he might have the same canceled of record, and the $100, so wrongfully extorted from him as aforesaid, was by the defendant Miller paid to the plaintiff Edwards on 25 June, 1920. The judgment against the defendant in favor of the plaintiff was rendered by the justice on 21 June, 1920, and defendant appealed therefrom.

"Wherefore, this defendant prays that he have judgment against said Edwards for the restoration of the said $100, with interest thereon from 24 June, 1920; also for such damages as the jury may consider him entitled to, and for such other relief as he may be entitled to in that behalf."

(Duly certified.)

The answer was offered as an affidavit, upon plaintiff's motion to dismiss the appeal, but the presiding judge refused to hear or to consider it, or, at the request of the defendant's counsel, to find any facts stated therein, and then refused all relief to the defendant, giving as the sole reason for his refusal that the matters stated in the answer and affidavit were irrelevant, and for the same reason he dismissed the defendant's appeal from the justice of the peace. The court did not find that any of the statements of the uncontradicted affidavit or answer were untrue, but simply that they were immaterial. Defendant also requested the court to find such of the facts stated in the affidavit as he deemed to be relevant or material, and this the judge refused to do.

The court holding, in effect and as matter of law, that the judgment had been paid, and no appeal could be taken from it, thereupon dismissed the case.

The defendant duly and regularly excepted to the several rulings of the court, and appealed to this Court.

Bourne, Parker & Jones for plaintiff.
F. W. Thomas for defendant.

WALKER, J., after stating the material facts: The plaintiff's contention that there was no permission given by the court to file the answer is without merit. The court placed its decision upon no such ground, and, besides, it is too late now to come forward with such an objection. If permission was not in fact granted, it was eminently proper that it should have been. We base our decision upon the merits, discarding technical matters.

The case lies within a narrow compass. There was a judgment in the justice's court against the defendant, from which he duly and regularly appealed, and caused the appeal to be docketed in the Superior Court, in due form and within proper time. The defendant alleges that he was compelled to pay the judgment pending the appeal, because by reason of the acts of the plaintiff he was unable to give a bond to stay the execution, and that his property would have been taken and sold under process if he had not done so. That he therefore paid the judgment, not in final satisfaction of it, and without intending to further prosecute his appeal, or to defend the action, but simply because he was forced to do so. He also alleges that plaintiff had a deed of trust upon his property (which was subject, under the statute, to the lien of the judgment, which had been docketed), and threatened to foreclose it under the power of sale contained in it, if the judgment was not paid. That plaintiff "used the notes and deed of trust, and the power which they gave him over the defendant unlawfully to extort from defendant and $15 to plaintiff's attorney," and he further alleged, in substance, the $100, of which $85 was to be in payment of the judgment aforesaid, that he was reduced to such straits by plaintiff's unlawful conduct that he was, by duress, forced to decide between losing his property or paying the unjust judgment, which he was then contesting, and which it was his lawful purpose to resist to the last, and that the payment of the judgment was not voluntary, and was certainly not intended as an agreed and final satisfaction of the judgment. Defendant, on the contrary, alleges that the payment of the judgment was not only involuntary, but was induced by the threat and coercion of the plaintiff, if not by legal duress, and at all events, it was not intended as a withdrawal of all further resistance or opposition to the judgment, and as a surrender of his rights under the appeal, or any of them, and that it should not be construed to be any impairment of said rights. There are other serious allegations in the defendant's answer, which he also used as an affidavit, but they need not be more specially stated or considered. It must be noted that the court refused to consider the answer, used as an affidavit, as irrele-

vant, and therefore we must assume its allegations and averments to be true, and, if thus considered, the court should not have dismissed the appeal, but instead should at least have inquired as to the nature of the payment of the money in the judgment, whether intended as a free and full satisfaction of it or merely for the purpose of preventing the issue of an execution upon it and a sale of property of the plaintiff, so that he might continue to prosecute his appeal and to further contest the matter with the defendant.

We were cited to *Cowell v. Gregory,* 130 N. C., 80, in support of the ruling of the court in this case, but we find that case, upon a proper consideration of its facts, to be directly against the plaintiff. These were the facts in that case: "The justice of the peace heard the cause and rendered judgment upon all the issues for plaintiff in the sum of $32.63; that at the time, and within an hour after judgment rendered and announced, and in presence of the justice, one Cartwright said to defendant, 'Why don't you appeal,' and defendant announced to the justice that he did not wish to appeal, 'that he wished to pay the debt and *get rid of it,*' and asked for the bill of costs; no execution was issued, and no request or demand made on the plaintiff to pay the judgment; that then and there the defendant paid the judgment and costs into the hands of the constable for the plaintiff, and the justice satisfied and discharged the judgment at the request of the defendant." It will readily be seen that the facts there were radically different from those in this record. The debt was paid by the defendant (in that case) "to get rid of it," and he also paid the costs.

In 2 Cyc. Law & Pro., 647, it is said: "Voluntary payment or performance of a judgment is generally held to be no bar to appeal, or writ of error for its reversal, unless such payment was made by way of compromise and agreement to settle the controversy, or unless the payment or performance of the judgment was under peculiar circumstances which amounted to a confession of its correctness." And it is stated in 2 Enc. of Pl. & Prac., 181, that "Payment of a collectible judgment rendered by a court of competent jurisdiction is involuntary, and does not bar the appeal of the unsuccessful party below." And this is true, nothing else appearing. *Justice Merrimon* said in *Lytle v. Lytle,* 94 N. C., at p. 525: "It is well settled that where a party is put out of possession of land, in pursuance of a judgment or order improvidently granted, or is required to pay money, and the judgment is afterwards declared void or is set aside, the Court will promptly, as far as practicable, restore the party complaining to the possession of the land, and give him remedy for the money so paid. The law forbids injustice, and it will not allow its process to work injury to a party against whom it goes by improvidence, mistake, or abuse. It will always restore such

party promptly, and place him as nearly as may be in the same plight and condition as he was before the process issued. This is due alike to the integrity of the law and to the party asking relief," citing cases. This implies that the defendant may either file a stay bond and prevent the issuing of an execution, or pay the debt, and if successful in his appeal, may have an order for the restoration of money, if paid, or of property, if taken or turned over to the plaintiff. C. S., 1534, provides: "If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment."

It thus appears that if the appellant desires a stay of execution he must give a bond, or if he does not, he must pay the debt, in which latter case, if he prevails, it will be restored to him by order of the court.

Accepting the statement of the defendant's answer, or affidavit, to be true, it would appear that defendant did not intend, by paying the debt, to "throw up his hands" and abandon the appeal, but merely to ward off an execution and sale of his property until the case could be heard and finally disposed of by the court, or there is evidence of this being the fact.

The question raised by the defendant's answer or affidavit may be submitted to a jury, if the plaintiff takes issue with the defendant upon it, or the question thus raised may be otherwise determined by a finding of the court or a referee as the parties may agree or the court may decide.

As the plaintiff alleges that the defendant had abandoned his appeal by the payment of the amount of the judgment, the burden necessarily is on him to show it. The mere payment of the money is not of itself sufficient under the facts and circumstances of this case, so far, at least, as developed, to show the abandonment.

The defendant's answer or affidavit was in no sense a counterclaim, as contended, but was more in the nature of an answer to the motion of the plaintiff to dismiss the appeal.

There was error in the ruling of the court, which is reversed, and the case will further proceed in the Superior Court in accordance with law and the course and practice of the court.

Error.

J. C. RAINES, WILL RAINES, THEO. W. RAINES, H. C. GARRETT, AND E. R. GARRETT *v.* MARY D. OSBORNE, EXECUTRIX OF MRS. FANNY J. RICKS, DECEASED.

(Filed 13 December, 1922.)

1. Wills—Interpretation.

In interpreting a will to ascertain a testatrix's intention, the court should place itself as near as may be in her position, and when the language she has therein used is ambiguous or doubtful, it should take into consideration the situation of the testatrix at the time and the relevant facts and circumstances surrounding her at the time the will was executed, the first rule of construction being to give effect to the testatrix's intention as found in the terms of the will and within the limits which the law prescribes; and the predominant and controlling purpose of the testatrix must prevail when ascertained from the general provisions of the instrument over particular and apparently inconsistent expressions to which, unexplained, a technical force may be given.

2. Same—Devises—Domestic Servants—Employees.

A bequest in a will "to any servant or any other household employee" of the testator should be construed as if expressed "to any household servant or any other household employee," and does not include within its meaning those who worked upon the testator's farm, occasionally doing carpenter's work in the home, laying cement in the house, or laying rock on the premises, making flower boxes, etc., though occasionally, or at rare instances, they may have performed some slight service that may come within the letter of the definition though not within its spirit, and the clear intention of the testatrix.

3. Wills—Interpretation—Intent—Evidence—Parol Evidence.

Parol evidence of a testator's declarations of his intent in making a will, made before or at the time he executed it, is incompetent, the rule being that the intent as gathered from the written instrument, under the established rules of interpretation, will prevail.

STACY, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

APPEAL by plaintiffs from *Bryson, J.*, at September Term, 1922, of POLK.

Quinn, Hamrick & Harris for plaintiffs.
R. M. Robinson for defendant.

WALKER, J. This is the appeal of the plaintiffs, J. C. Raines, Will Raines, Theodore Raines, R. C. Garrett, and E. R. Garrett, or of the plaintiffs other than H. Ewart Constant, from the judgment against them in the court below.

In the defendant's appeal we settled the meaning of the two items, Nos. 11 and 12, in the will of Mrs. Ricks, with reference to what was meant by the words "To any servant, or any other household employee," construing those words as if they read "To any household servant or any other household employee," and thus considered, it is our opinion that

none of the present appellants has brought himself within the meaning of those items. Mrs. Ricks, at the time of her death and for many years before that event, owned a very large tract of land, known as "Rickshaven," upon which she resided. There were about one hundred acres of this land in cultivation, where she raised wheat, corn, rye, potatoes, cabbages, and peas. She had a granary and barns, and an orchard from which she gathered and canned a large quantity of fruits.

The appellants lived on and cultivated for themselves separate small farms of the larger tract of land, and there is testimony tending to show that at least one if not more of them occasionally did work of various kinds in and about the house. As an illustration, we extract a clause from the testimony of Joe C. Raines, one of the appellants, as to the sort of work done by him: "I did just anything she wanted done, on the road and farm and buildings, and laid rock and brick and built flower boxes and worked on the yards building up places to sow grass, and I did carpenter work in the house and laid cement floors. There were about 100 acres of land in cultivation, and she raised wheat, corn, rye, potatoes, cabbage, peas, and she had quite an orchard and canned a good deal of fruit, for I helped with the sealing of the cans. I drove her car for her. H. E. Constant worked about the house mostly. My work was here and yonder, no certain place, but the last part of Mrs. Ricks' life most of my work was up about the house." But it was not household work either in the legal or popular sense of those words. He did no such work in or about the house as that performed by H. E. Constant, or as that contemplated or intended by the testatrix when she wrote the items Nos. 11 and 12. They were not in any proper sense household servants or household employees. They were farm laborers, or persons engaged in outside work, although they may occasionally have done work near or even in the house, and even those seem to have been rare instances. Carpenter's work, done in the house, or that of laying cement or laying rock, making flower boxes, and road or farm work, would never be supposed to mean housework, or the persons doing those things upon special request of Mrs. Ricks could never be properly or correctly considered as either household servants or household employees.

In determining the testator's intention, the court should place itself as near as possible in his position, and hence where the language of the will is ambiguous or doubtful, should take into consideration the situation of the testator and the facts and circumstances surrounding him at the time the will was executed. 40 Cyc., p. 1392. This rule has been adopted in North Carolina. *Bunting v. Harris,* 62 N. C., 11; *Freeman v. Freeman,* 141 N. C., 97. There are many other cases that could be cited as adhering to this rule. The first great rule in the

construction of wills is that the intention of the testator must prevail, provided it can be effectuated within the limits which the law prescribes. *Leeper v. Neagle,* 94 N. C., 338. In the construction of a will, the predominant and controlling purpose of the testator must prevail when ascertained from the general provisions of the will over particular and apparently inconsistent expressions to which, unexplained, a technical force is given. *Francks v. Whitaker,* 116 N. C., 518.

Even if we could apply to this case the principle advanced and much relied upon by the appellants, as to the general or primary intention taking precedence of the particular or secondary one, for which they cite 40 Cyc., pp. 1393 and 1399, we would be unable to hold that the appellants were either "household servants or household employees."

The appellants do not answer the description of "household servants or household employees," who are those employed in the mansion house, and which words were certainly not intended to embrace those who worked out of doors upon the home place, and were not even regularly employed to do work within the curtilage.

The clause of the will under which the plaintiff claimed a legacy in *Frazier v. Weld,* 177 Mass., 513; 59 N. E., 118, was as follows: "I give and bequeath to each one of the servants who, at the time of my death, shall have been in my employ at my homestead, or at the stable connected therewith, a period of four consecutive years, the sum of one thousand dollars." In construing this clause, the Court said: "In the present instance we think that this testator used the expression 'at my homestead' in the sense of 'at my dwelling-house.' We think, therefore, that the bequest was intended for only such servants as were employed in the mansion house or the stable, and not for those who worked out of doors upon the home place. It was to domestic servants and to stable hands. We think the bequest is to only such servants as were hired to work in the house or the stable. Whether the plaintiff is a legatee depends upon the general nature of his employment, and he was an out of doors laborer rather than a servant employed at the house or stable. The small proportion of his work done in the house or stable was merely incidental to his main employment, and did not bring him within the class of servants employed at either of these places for the necessary four consecutive years, within the meaning of the first sentence of the clause giving the bequest."

Murphy v. Lawrence, 218 Mass., 39; 105 N. E., 380, was a case where the article of the will upon which plaintiff relied for recovery was as follows: "I also give $5,000 to each of my domestic servants, other than those mentioned in the two preceding articles, who shall be in my service at my decease, and who shall have been in such service for the five years immediately preceding my death." Upon this clause the

Court says: "The question is, Was the plaintiff a 'domestic servant' within the meaning of that term as thus used by the testator? The servants employed at this establishment consisted, at least, of Sherman, the coachman, a saddle horseman, and the plaintiff, who, as the trial judge has found, was 'engaged in the employment of the testator as a stableman or groom, whose duties were principally in connection with the care of the horse and at the stable,' and the two female servants in the house, who were sisters, one serving as cook and the other second girl or waitress. These two sisters were the only servants then or thereafter living in the house up to the time of the testator's death. It is manifest that in framing this clause the testator was thinking only of the same general class as the Kelly sisters, that is, persons whose chief or only duty was in the house, and that only such a person was regarded by him as a domestic servant within the meaning of the clause. The duties of the plaintiff, as found by the trial judge, were not of that kind, and upon such findings it follows as a matter of law that the plaintiff's case falls."

We could hardly cite two cases of such high authority and entitled to so much respect where the facts are so nearly identical with those we are now considering, and we fully concur in the construction which the court placed upon those wills, and the principle there applied is controlling in this appeal.

Our decision on the question of evidence is also against the appellants, and is the same as that in Constant's appeal. "The general rule is that parol testimony is not competent to prove a testator's declarations prior to or after the execution of his will to aid in its construction, nor are such declarations admissible even if made at the time of the execution. Since the testator's intention is to be ascertained from his written will, his parol declarations of his understanding of the meaning of his will are not admissible for the purpose of interpreting his testament. It is obvious that if verbal declarations were admitted, wills might be overthrown which expressed the intention of one who could not dispute evidence of his declarations, nor give explanations of them, and thus grave evils would result." 28 Ruling Case Law, p. 280. "It seems to be generally held that the declarations of a testator are not competent upon the question of the interpretation of the contents of his will." *In re Shelton,* 143 N. C., 218; 10 Anno. Cases, 531. In that case the Court also says: "This exception to the general rule prohibiting hearsay, however, does not make competent the testimony of the witness by whom contestant offered to prove statements made by the testator in November, 1904, as to how he was going to leave his property. It is generally agreed that the declarations of the testator may not be received to explain, change, or add to a written will, nor can it be revoked by

parol. 1 Redfield on Wills. We see no view in which said evidence was competent on this trial." See, also, note to Ann. Cas., 1915 B, page 16.

There was no error, therefore, in the opinion and decision of Judge Bryson directing a judgment of nonsuit against the appellants.

No error.

STACY, J., dissenting: The law is correctly stated in the opinion of the Court, but I am unable to agree with its application to the facts in the instant case. In my judgment the plaintiffs are entitled to take under items 11 and 12 of the will of Mrs. Ricks, or, at least, to have the question determined by a jury.

CLARK, C. J., concurs in dissenting opinion.

J. C. RAINES, WILL RAINES, THEO. W. RAINES, H. E. CONSTANT ET AL. v. MRS. MARY D. OSBORNE, EXECUTRIX OF THE WILL OF MRS. FANNY J. RICKS, DECEASED.

(Filed 13 December, 1922.)

1. Appeal and Error—Record—Instructions—Presumptions.

Where the record on appeal does not set out the charge of the trial judge to the jury, and no exception thereto appears therein to have been made, it will be presumed that it was in all respects correct, and that the jury were properly instructed as to the law.

2. Wills—Interpretation—Servants—Employees—"Household."

A bequest "to any servant or other household employee who may be in my (the testatrix's) employment at the time of my death," is construed to imply the words "household" between the word "any" and the word "servant"; and one employed around the house, sleeping in a servant's room on the premises, eating in the servants' quarters, and hired to cut and bring in wood, for use in the testatrix's dwelling, and to take care of the testatrix's greenhouse, to cut the grass on her lawn, to dust her rugs, etc., is within the intent and meaning of the words "domestic servant." This interpretation is illustrated by a specific devise in another item of the will to one employed as a companion by the testatrix, living as a member of her household, and whose duty was not that of a servant, the testatrix not intending to call her a servant, and therefore using the words "household employee" to spare her feelings, although she performed in some respects a servant's work.

3. Appeal and Error—Objections and Exceptions—Questions and Answers—Evidence—Objectionable in Part.

An objection and exception to a proper question asked a witness does not necessarily include the answer of the witness, and where the answer is competent in part, exception should be taken specifically to the erroneous part in order that it may be considered on appeal, and not merely to the question, which is competent and in proper form, but only to the incompetent part of the answer.

APPEAL by defendant from *Lane, J.*, at Fall Term, 1922, of POLK.

This is an action for the recovery of certain legacies alleged by the plaintiffs to be theirs under and by virtue of the will of Mrs. Fanny Jones Ricks.

After the disposition of a large sum in pecuniary legacies to friends and relatives, the material portions of the will required to be considered in this case are as follows:

"Item 7. To Lizzie Burkhardt, $1,000."

"Item 11. To any servant, or any other household employee who may have been in my employment for five consecutive years before my death, and not otherwise particularly mentioned by name in this will, or any codicil thereto, the sum of $250 each, and if any such employee shall have been in my service for more than five years, then $50 shall be added for each additional year over five years.

"Item 12. To any servant or other household employee who may be in my employment at the time of my death I give and bequeath a sum equal to six months' salary, and this clause shall be effective whether such person benefits under any other clause of my will, or any codicil thereto, or not."

The following testimony was introduced, so far as it relates to the question raised in the defendant's appeal:

Mrs. Lum Newman testified: "My maiden name was Maud Constant. I am a sister of H. E. Constant. I knew Mrs. Fanny Ricks for about a year and a half before she died; she lived at Rickshaven on Tryon Mountain in said county; I worked for her about nine months; was in her household longer than that, but did not work for her all the time. I was working for her when she died, 2 November, 1918; I was a house maid and worked in the house. My brother, H. E. Constant, was working at Mrs. Ricks' part of the time I was there; he was there at the time of her death; he started to work for her about the middle of the summer and he slept in a little house out in the yard. She slept in the large house and this little house had a garage in it and the chauffeur slept there before H. E. Constant came; it was a servant's house. While in Mrs. Ricks' employ my brother slopped the swine and fed and watered the cows and helped me milk, and milked sometimes by himself, and when he was not there I milked myself; he cut up wood and helped dust the rugs in Mrs. Ricks' large house, and she had chores for him in the yard. Mrs. Ricks lived in the little house once when I stayed there and rented the large house as a boarding house, and when the guests left she moved back to the big house; one of the rugs was very large and a lady person could not handle it; my brother helped move the furniture when Mrs. Ricks went back to the large house; he helped gather the fruit and put it where we could get it, and put some in the

basement; she had right much fruit stored in the basement that we sold after she died. He raked the lawn, mowed the grass, and helped take care of the pea hay and soybeans, and such as that, and worked around the barn and raked it, and kept the barn nice all the time; just did chores around the house and wherever she told him to. He ate on the porch in between her large house and the small one, and he worked in the hothouse a great deal, where the flowers were kept. The porch I spoke of was the servants' dining-room. I ate with Mrs. Ricks' white cook part of the time, and part of the time I ate out there on the porch."

Govan Constant testified: "I am the father of Ewart Constant. He worked for Mrs. Ricks at three different times; the last time was in July, 1918. I was up at the place several times while he was working there and I saw him taking the slop from the kitchen and cutting wood and working in the flower beds next to the kitchen, and putting fruit in the basement, and watering the pretties, the flowers; they had a windmill to get water to them. I was there one night and my son slept in Mrs. Ricks' house and used her bedclothes, for I slept with him. It was the little house she first lived in before the big house was finished; the big house was thirty or forty feet away. I saw him hunting the cattle."

"Q. Did you have a conversation with Mrs. Ricks in regard to your son?" Objection; overruled; exception.

"A. Yes, I asked her how she liked Ewart and she said he done very well, that he was highstrung, but was learning fast, and that she would give him more as he learned, and that if he suited her and stayed to her death there would be something there for him."

"The conversation I spoke of with Mrs. Ricks was in the fall before she died; she sent for me to come, and I went to see her. Mrs. Ricks had some women at work at the house; Emma Forrest was cook and Maud Constant was the maid, and Miss Lizzie Burkhardt lived with her; she also had on her farm cattle, sheep and goats; my son tended to those near the house; I don't know who did it at the barn. H. E. Constant did not have any house or garden up there, nothing but himself; I never saw him working in the field, but he kept the barn clean and worked in the garden and there around the house, and turned the cattle out and went for them at night."

Claud Constant testified: "I am a brother of Ewart Constant. I knew when he hired to Mrs. Ricks and when he quit. I was right there at her house when he hired to her in July. She told me she would give him $24 a month and board and laundry, and that she figured the board and laundry as close as she could, and that it would be $20, making $44 per month. I was there a couple of times after this before she died, and saw my brother gathering the fruit and putting it in the basement,

pulling weeds out of the flowers and feeding swine and cows, and milking the cows, and making a walkway around the door; he slept in the house about forty feet from the big house."

There also was testimony that Miss Lizzie Burkhardt lived with Mrs. Ricks as her house companion, and assisted in the house work or domestic duties. Mrs. Ricks had been heard to call Miss Burkhardt her house companion.

In this appeal the record shows that the jury returned the following verdict upon the issues submitted by the court:

"1. Is the plaintiff, H. E. Constant, entitled to participate under section 12 of the will of Mrs. F. J. Ricks? Answer: 'Yes.'

"2. What monthly salary was H. E. Constant receiving under his contract with Mrs. Ricks? Answer: '$44 per month.' "

Judgment was entered upon the verdict, and defendant appealed.

Shipman & Arledge for plaintiffs, appellees.
R. M. Robinson for defendant, appellant.

WALKER, J., after stating the case: The charge of the judge is not in the record, and, therefore, we may conclude that it was satisfactory to the defendant, as there was no exception to it, so far as appears. We also may assume that it was in all respects correct, and that the jury was properly and fully instructed as to the law. This being so, the only question before us seems to be whether there was any evidence for the jury that the plaintiff in this appeal was such a servant or employee as entitled him to a legacy under the will.

We are necessarily called upon to construe the will of Mrs. Ricks, and especially item 12, under which plaintiff claims the legacy awarded to him by the verdict of the jury and the judgment of the court. That item reads as follows: "To any servant or other household employee who may be in my employment at the time of my death, I give and bequeath a sum equal to six months salary, and this clause shall be effective whether such person benefits under any other clause of my will, or any codicil thereto, or not." What did the testatrix mean by the use of the words "To any servant or other household employee"? And to arrive at this meaning we must clearly understand the relation of the testatrix to those who were members of her household. It is not disputed, but agreed, that Miss Lizzie Burkhardt, to whom a legacy was given by item 7 of the will, and who is frequently mentioned in the record and briefs of counsel, was not in the strict sense of the word a mere servant, whether that word be used in its legal or technical or in its popular sense, or as used in common parlance, but she was Mrs. Ricks' friend and companion, and while she may have regularly per-

formed some of the duties and chores of a servant, or even those of a menial kind, she yet was regarded and treated by Mrs. Ricks as socially her equal, and in this way and for this reason, she sought, and for a long time enjoyed, her companionship. Notwithstanding the fact that Miss Burkhardt also was employed to perform, and she did perform, various and sundry duties in and about the house, as an ordinary domestic servant would do, knowing the domestic life of these women as we do, and how they stood toward each other, and were regarded by each other, we can well understand why Mrs. Ricks resorted to the use of the words "or other household employee," and in connection with the preceding words "To any servant," as her object is manifest. She wished to favor her friend and daily companion by giving her a part of her large estate, but she wished also to avoid placing her in the attitude towards herself as an ordinary domestic servant. Her intention was, to be sure, that Miss Burkhardt should be rewarded for her faithful service and companionship, but, at the same time, to spare her feelings by excluding any, even the slightest suggestion, that she was to be regarded as a servant rather than as her friend and social equal, though performing some of the duties of a servant in the household. Therefore, it was that the word "employee" was used in contradistinction to the word "servant." Miss Burkhardt was brought into her home, not as a servant, but as a companion and associate, and not as a menial, though she may have made herself useful in other respects by attending to many of the duties of the household which servants generally perform.

The expression "To any servant or other household employee," with the above explanation, means the same thing as if it had read, "To any household servant or other household employee, etc., I give and bequeath," the word "household" being clearly implied in the first part of the sentence as it is clearly expressed in the last. The very construction of the sentence shows this without any doubt, and that it was intended is plainly established even by the item itself, even considered apart from the other portions of the will but in the light of the evidence and admitted facts.

But it is sufficient to say that the use of the word "other" was manifestly intended to describe one who was employed in the household, but not the same as or identical with, but different from a servant, who had been specified; not in the same class, though at times and on occasions doing household work of a like or even the same kind. The term "employee" was a milder type of expression, which more nearly and distinctly characterized the position held by Miss Burkhardt. But the words "other household" unfold the whole meaning of the item, for they unmistakably apply as well to the preceding word "servant" as they do to the word "employee," so that the gift, according to the natural and

obvious interpretation of the language, is and must be to "any household servant or other household employee," and as if it had been so expressly framed by the testatrix.

In 28 R. C. L., sec. 186, the proper rule of construction to be applied to a phrase of this sort is stated as follows: "A rule frequently applied in construing wills is that, where certain things are enumerated, and such enumeration is followed or coupled with a more general description, such general description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned. In such cases it is presumed that the testator had only things of that class in mind. The reason for the rule is that the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory and make the testator employ additional language without any additional meaning." If the words "other household employee" are not to be given the effect of imparting to the previous word "servant" the meaning of "household or domestic servant," we have a case in which the testator used such additional words without clearly indicating any additional meaning.

But while that is the rule, as contended by the defendant, and we have construed the will in accordance therewith, and not in the least departed from it, the plaintiff H. E. Constant's duties in and about the house were such as pertain largely to household work. The cutting and bringing in of wood, taking care of the greenhouse, watering the flowers, mowing the grass on the lawn and raking it, storing the fruit in the basement of the mansion, dusting rugs, milking cows on the lot, moving the carpet, and such other services as he performed were as much household duties, and were in some respects as necessary to the proper conduct and maintenance of the house and the convenience and comfort of its occupants or inmates as the services of the cook, maid, or other domestic servants or household employees. Besides this, plaintiff slept in the servants' house in the yard, ate in the servants' dining-room, and was in all respects as fully treated and recognized as a household servant as was the maid or the cook. We therefore think that the evidence was such as to warrant the court in submitting to the jury the question as to whether the plaintiff was embraced within the class of servants mentioned in item 12 of the will above quoted. We do not, therefore, hesitate to decide that the plaintiff has offered evidence sufficient to include him in the description of the persons who take legacies under item 12 of Mrs. Ricks' will, if the jury believed that evidence and found the facts accordingly, which it appears that they have done, by their verdict, and, also, we believe that he was in the mind and contemplation of the testatrix when she wrote that item of her will, as one of her household servants or employees.

The question asked the witness as to a conversation he had with Mrs. Ricks about his son was not in itself incompetent, as it was a natural inquiry for a father to make of the person who employed his son, and, at least, a part of the answer to it was competent. Where this is the case, the objection should also be made to the answer, and specifically to the objectionable part of it, otherwise, if any of the answer be competent, though a part may be incompetent, the objection fails. *S. v. Ledford,* 133 N. C., 714. It was there held that "A general objection to evidence will not be entertained if such evidence consists of several distinct parts, some of which are competent and some not competent." That decision has been since approved in numerous others by this Court.

This being our conclusion, there is no error in the case.

No error.

W. T. ROSE v. ROCKY MOUNT.

(Filed 13 September, 1922.)

Appeal and Error—Docketing—Certiorari—Dismissal—Rules of Court—Statutes.

Appeals to the Supreme Court are only within the rights of the parties when the procedure is in conformity with the appropriate statutes or rules of court, and neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals in the Supreme Court; and where the appellant has failed to docket his appeal or move for a *certiorari* under the rule regulating the matter, the appeal will be dismissed.

APPEAL by defendant from *Allen, J.,* at November Term, 1921, of EDGECOMBE.

F. S. Spruill and J. P. Bunn for plaintiff.

L. V. Bassett and T. T. Thorne for defendant.

PER CURIAM. The summons in this case was issued 6 October, 1919, and the cause was tried at November Term, 1921. The appeal should have been docketed here at last term, but it was not docketed until this term. It has been too often held, to be a matter of debate, that an appeal is not a matter of right, but is allowed upon conformity with the provisions of law and the rules of the Court, which, if not complied with, the cause is not legally in this Court and cannot be considered by us.

In *Mimms v. R. R.*, 183 N. C., 436, at last term, it was held as a settled rule of this Court that "where a case on appeal has not been docketed by appellant within the time required in the rule of practice in the Supreme Court, and a motion was not made at that time for a *certiorari*, the appeal will be dismissed"; and the consent of parties for such failure to docket in apt time will not justify it. *Stacy, J.*, in the opinion in that case, referring to the decisions, said: "The statute must be complied with, and the cause docketed here at the next term after the trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper (at the proper time) and apply for a *certiorari*, which this Court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a State case, to assume the functions of this Court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this Court." To the same purport at the last term was *S. v. Johnson*, 183 N. C., 730; *S. v. Brown, ibid.*, 789; *S. v. Barksdale, ibid.*, 785.

At a preceding term the same ruling was upheld in *Buggy Co. v. McLamb*, 182 N. C., 762; *Kerr v. Drake, ibid.*, 766 (in which the matter was again fully discussed); *Tripp v. Somerset, ibid.*, 767. These are some of the cases within the last year. Besides, it has been the uniform ruling of this Court always, of which counsel must take notice, that parties have no authority to make any agreement to disregard a statute or the rules of Court.

While *Magna Carta* did not originate, or require, trial by jury, as at one time was thought, it is very certain that it did guarantee that there should be a prompt administration of justice by providing (ch. 47) that the courts will neither sell justice nor deny it nor delay it, and a delay of justice is often a denial of justice.

It would be impossible to have an orderly and regular dispatch of business in the courts if the parties either themselves or through their counsel (who certainly have no greater authority than the parties themselves) can, to suit their own convenience or whim, set aside at their will the regulations governing litigation, and taking the matter out of the hands of the courts, substitute their own agreements.

When an appeal is not docketed here in the time required, the party or his counsel should apply for a *certiorari* at that time, for then the Court, on hearing the grounds for failure to docket, can adjudge whether a *certiorari* should issue or the cause be dismissed. The Court does not favor even these applications, for it is not very often the case that the

cause cannot be prepared and docketed in the time required by statute and the rules of this Court.

It is not often that counsel are so overwhelmed with business that they cannot attend, in the required time, to docketing an appeal, and when this occurs there are a sufficient number of lawyers who can be called in to the aid of their brethren who are so overwhelmed at the moment that they cannot wade through the swollen tide of business that surrounds them. It is much better that in these emergencies aid should be sought from their brethren of the bar, who are not lacking either in ability or numbers, than that counsel should, by private agreements, interfere with the orderly procedure and practice of the courts in disregard of the prescribed regulations.

Appeal dismissed.

W. J. ROEBUCK v. BOARD OF TRUSTEES OF ROBERSONVILLE GRADED SCHOOL DISTRICT.

(Filed 13 September, 1922.)

Appeal and Error—Agreements—Amendments—Remanding Case—School Districts—Elections.

On the appeal of this suit to restrain the issuance of bonds for the erection of schoolhouses, a material fact was omitted from the case agreed, as to whether the question was carried by a majority of the qualified voters at an election in the district, which the Supreme Court permits the parties to supply, under the alternative of remanding the case for the finding of additional facts.

APPEAL by defendants from *Connor, J.*, at chambers, August, 1922, from MARTIN.

PER CURIAM. It not appearing from the record whether the election, here called in question, was carried by a majority of the qualified voters resident in the district—and this being one of the controverted matters raised by the pleadings—the parties will be given an opportunity to supply the omission by amending their agreed statement of facts and file same in this court on or before 1 October, 1922, failing in which, the cause will be remanded, to the end that such additional facts may be found.

GEORGE JAMES v. L. J. BAKER.

(Filed 20 September, 1922.)

Ejectment—Instructions—Appeal and Error.

Upon the trial of this action in ejectment and for damages, the charge of the court upon the principles of constructive and adverse possession are held to be without error.

APPEAL by plaintiff from *Calvert, J.*, at November Term, 1921, of HALIFAX.

Ejectment, and to recover damages for an alleged trespass.

Upon denial of the plaintiff's title and claim, there was a verdict and judgment in favor of defendant. Plaintiff appealed.

Roswell C. Bridger and S. Brown Shepherd for plaintiff.

A. Paul Kitchin, Stuart Smith, and Daniel & Daniel for defendant.

PER CURIAM. The exceptions debated before us, and which are brought forward in plaintiff's brief, deal principally with the charge of the court on the subject of constructive and adverse possession. After a careful perusal of the record, as it relates to these exceptions, we are unable to discover any error. The case seems to have been tried in substantial conformity to our decisions on the subject, and we have found no sufficient reason for disturbing the result of the trial.

No error.

BRANCH BANKING AND TRUST COMPANY, GUARDIAN, ET AL. v. DAN GEAR AND WIFE.

(Filed 20 September, 1922.)

Evidence—Nonexpert Testimony—Deeds and Conveyances—Mental Condition—Opinion.

A witness may not only testify to the facts he knows concerning a grantor whose deed is being impeached for his mental incapacity to have made it, but may also give his opinion or belief upon the personal knowledge he has of his sanity or insanity.

APPEAL by defendants from *Cranmer, J.*, at June Term, 1922, of WILSON.

Action to set aside a lease and a deed alleged to have been executed by Mariah Taylor at a time when she was *non compos mentis*.

From a verdict and judgment in favor of plaintiffs, the defendants appealed.

O. P. Dickinson and F. D. Swindell for plaintiffs.
F. S. Hassell for defendants.

PER CURIAM. The controversy, on trial, narrowed itself principally to questions of fact. The jury, upon ample evidence, has determined these in favor of the plaintiffs. Quite a number of the exceptions are directed to the admission of nonexpert testimony—consisting of the opinions of the witnesses—as to the mental capacity of the plaintiff's ward at the time of the execution of the instruments in question. In the leading case of *Clary v. Clary,* 24 N. C., 78, opinion by *Gaston, J.,* decided over eighty years ago, it was held that "a witness who had opportunities of knowing and observing a person whose sanity is impeached may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity." And such is still the law as it obtains in this jurisdiction.

After a careful investigation of the record, we have found no ruling or action on the part of the learned judge which would warrant a reversal or an order for a new trial. The judgment will be upheld.

No error.

N. E. WARD v. M. C. WINSTON.

(Filed 20 September, 1922.)

Usury—Injunction—Appeal and Error.

The action of the Superior Court judge in dissolving a temporary restraining order for the sale of certain collateral upon the ground of alleged usury is sustained on appeal under the authority of *Owens v. Wright,* 161 N. C., 131.

APPEAL by plaintiff from *Calvert, J.,* at chambers, 24 March, 1922, from JOHNSTON.

Action to restrain the sale of securities held by the defendant as collateral to an indebtedness due by plaintiff to defendant. From an order dissolving the injunction, the plaintiff appealed.

The plaintiff admitted that he was due the defendant $5,472.50, and pleaded usury. The order provided that if the plaintiff paid this sum to the defendant within ten days, the sale of the property should be postponed until the issues as to usury and other defenses could be heard. The plaintiff declined to make payment.

Ray & Ray and W. H. Lyon for plaintiff.
Pou, Bailey & Pou for defendant.

PER CURIAM. His Honor's judgment is affirmed on the authority of *Owens v. Wright,* 161 N. C., 131, and numerous other decisions of this Court.

J. R. BRIGHT ET AL. v. PEERLESS LUMBER COMPANY.

(Filed 20 September, 1922.)

Appeal and Error—Instructions—Evidence—Burden of Proof—Deeds and Conveyances—Reservations in Deeds—Timber.

Where the defendant's rightful cutting the timber that the plaintiff seeks to enjoin depends upon whether it falls within the reservation of the plaintiff's deed of "second-growth timber and original-growth in the pastures," the burden is upon the plaintiff to show that the timber in question is within the exception, and an instruction that places it upon the defendant is reversible error.

APPEAL by defendant from *Ferguson, J.,* at February Special Term, 1922, of CHATHAM.

Plaintiffs sold defendant all the timber of prescribed dimensions within certain boundaries, "excepting from the above the second-growth timber and original growth in the pastures." The consideration was $7,500, of which $6,000 has been paid. The plaintiffs obtained a restraining order to prevent defendant's removal of the timber in controversy. The plaintiffs contend that the timber is in the pastures; the defendant contends it is not. The issue and the answer are as follows:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount?"

And that for its verdict, said jury answered said issue: "$1,500, and interest."

His Honor instructed the jury as follows: "The defendant having admitted the execution of the contract, exhibit 'A,' in which they promise to pay the plaintiffs $7,500, and having further admitted that they have only paid $6,000 on it, the court charges you that you would answer the issue submitted to you 'Yes, $1,500, with interest,' unless the defendant has satisfied you by the greater weight of the evidence that this timber in dispute was actually sold to it by the plaintiffs; if they have so satisfied you, you would answer it 'No,' it being admitted that the plaintiffs have prevented the defendant from cutting it." The defendant excepted.

Judgment for plaintiffs. Appeal by defendant.

Siler & Barber and Long & Bell for plaintiffs.
K. R. Hoyle and A. C. Ray for defendant.

PER CURIAM. The contract excepts the second-growth timber and the original growth in the pastures. The timber in controversy is embraced within the boundaries of the land described in the contract, and as the plaintiffs have prevented its removal, they have the burden of showing that the timber is within the exception. It is not admitted that the timber which the defendant has been prevented from cutting is second growth, or in the pastures. This is a question which the jury should determine. *Batts v. Batts,* 128 N. C., 22; *Wyman v. Taylor,* 124 N. C., 426; *Bernhardt v. Brown,* 122 N. C., 589; *Steel Co. v. Edwards,* 110 N. C., 354.

New trial.

J. J. COOPER ET AL. v. BOARD OF COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 20 September, 1922.)

1. Supreme Court—Rules of Practice—Petition to Rehear—Appeal and Error.

The requirement of Rule 52 that petition for rehearing be filed within forty days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced.

2. Same—Statutes—Conflict—Constitutional Law.

The Supreme Court is given, by Article I, section 8, of our Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed.

PETITION to rehear. See 183 N. C., 231.

PER CURIAM. When the petition to rehear was filed, the justices to whom it was referred submitted it to the consideration of the Court in conference. *McGeorge v. Nicola,* 173 N. C., 733. The opinion in the instant case was filed on 29 March, 1922, and the petition to rehear on 16 September, 1922. The petitioners rely upon the provision of C. S., 1419, as to the time within which a petition for rehearing may be filed, this section apparently extending the time twenty days after the commencement of the term succeeding that in which the opinion is filed. The rules of practice in the Supreme Court expressly require petitions for rehearing to be filed within forty days after the filing of the opinion in the case. 174 N. C., 841, Rule 52. In *Lee v. Baird,* 146 N. C., 363, *Hoke, J.,* said: "There is no doubt of the power of the Court to estab-

lish the rules in question, and in numbers of decisions we have expressed an opinion both of their necessity and binding force. Thus, in *Walker v. Scott,* 102 N. C., 490, *Merrimon, J.,* for the Court, said: 'The impression seems to prevail to some extent that the rules of practice prescribed by this Court are merely directory—that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. Const., Art. IV, sec. 12; The Code, sec. 691; *Rencher v. Anderson,* 93 N. C., 105; *Barnes v. Easton,* 98 N. C., 116. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect, and are duly observed whenever they properly apply.' And in *Horton v. Green,* 104 N. C., 403, the present *Chief Justice,* in speaking of one of our rules of practice, said: 'We have stated this much to show the reasonableness and necessity of the rule, for the power of the Court to make it is as clear as that it is our duty to rigidly adhere to it after it is adopted, and enforce it impartially as to all cases coming under its operation. The late *Chief Justice Pearson* was accustomed to say of the rules of Court: There is no use of having a scribe unless you cut up to it.' And the same judge, in *Calvert v. Carstarphen,* 133 N. C., 27, 28, on this subject, said: 'The rules of this Court are mandatory, not directory.' *Walker v. Scott,* 102 N. C., 487; *Wiseman v. Comrs.,* 104 N. C., 330; *Edwards v. Henderson,* 109 N. C., 83. As the Constitution, Art. I, sec. 8, provides that 'The legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from one another,' the General Assembly can enact no rules of practice and procedure for this Court, which are prescribed solely by our rules of Court. *Herndon v. Ins. Co.,* 111 N. C., 384; 18 L. R. A., 547; *Horton v. Green,* 104 N. C., 400; *Rencher v. Anderson,* 93 N. C., 105." The attention of the profession is again called to the fact that the requirement of the rule of practice in the Supreme Court is mandatory in this respect, not merely directory, and must be observed. The petition to rehear is dismissed.

Petition dismissed.

NEWBY AND WEEKS v. ATLANTIC COAST REALTY COMPANY.

(Filed 27 September, 1922.)

Appeal and Error—Verdict—Excessive Damages.

Held, the question of the award of excessive damages in this case was subject to the correction of the trial judge, and is not reviewable on appeal.

APPEAL by defendants from *Bond, J.*, at the April Term, 1922, of PERQUIMANS.

Ehringhaus & Small and Meekins & McMullan for plaintiffs.

Charles Whedbee, Thompson & Wilson, E. F. Aydlette, and Small, MacLean, Bragaw & Rodman for defendants.

PER CURIAM. This case has been here twice before, and is reported in 180 N. C., at p. 51, and 182 N. C., 34, and was most carefully considered by us at both terms upon all controverted questions. It is here again, after a trial by jury, with verdict and judgment for the plaintiffs, from which the defendants appealed.

We have again gone carefully and critically over the case, as shown in the record, and especially that part of it supposed to contain new features, or rather those which may not have been presented in the same way as they were at former hearings, and we have found no reversible error in any of the rulings of the court or in the judgment, but the case seems to have been tried in strict accordance with the former opinions of this Court therein, and certainly in substantial conformity therewith.

The verdict does not seem to be at all excessive, and, if it were so, any error in that respect should have been corrected by the presiding judge. On the question as to what amount would have been realized by plaintiffs, if defendants had observed and kept their contract, the charge of the court was free from any substantial error, and, moreover, was as favorable to the defendants as they might reasonably have expected it to be.

The rule applicable to this case as to damages was stated by *Justice Allen* in the same case, 180 N. C., 51-54, and the judge appears to have followed it in his instructions to the jury at the last trial of the case in the Superior Court.

There were objections to the manner of stating many of the exceptions and assignments of error based thereon, but we have not deemed it necessary to make more than a bare reference to them, having decided the case upon other points, but it would appear, speaking generally, that none of the said objections is well taken.

Upon a consideration of the defendants' exceptions and assignments of error, we find no departure from our former decisions, or any ground upon which there should be any reversal, or modification of the judgment herein.

No error.

STATE v. DORCAS WARD ET AL.

(Filed 27 September, 1922.)

Appeal and Error—Rules of Court—Procedure—Statutes—Constitutional Law.

The rules prescribed by the Supreme Court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a *recordari* prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by the Constitution, Art. I, sec. 8, as distinguished from procedure applying to courts inferior thereto, Art. IV, sec. 2, a statute in conflict therewith will not be observed.

APPEAL by defendants from *Cranmer, J.*, at January Term, 1922, of PITT.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Julius Brown and Albion Dunn for defendant.

PER CURIAM. The defendants were convicted at January Term, 1922, of Pitt. The appeal was not docketed here until 9 September, 1922. The record proper was not docketed last term, and no motion of *certiorari* was asked for, and the appeal must be dismissed.

This has been the uniform rule of this Court always, and we have repeatedly called the attention of counsel for appellants to the fact that the procedure in this Court, by the Constitution, is left entirely to this Court, and no act of the Legislature has sought to or could modify the procedure here. *Herndon v. Ins. Co.*, 111 N. C., 384. At last term, in *S. v. Johnson*, 183 N. C., 730, this Court again fully discussed the settled rule, and said: "This Court has never changed its rule, of which it is sole judge, that in every case when the record is not docketed in the time required at the next term, the appellant must docket the record proper and ask for *certiorari*. Whenever this is not done, the case not docketed until the next succeeding term will be dismissed. *S. v. Telfair*, 139 N. C., 555 (2 Anno. Ed.), and cases there cited; *Buggy Co. v. Lamb*,

182 N. C., 762; *Rogers v. Asheville, ibid.*, 596." The Court in that case fully discussed the matter now before us, and we reiterate what was there said.

The Constitution provides, in Art. I, sec. 8, "The legislative, executive, and *supreme judicial powers* of the Government ought to be forever separate and distinct from each other." Art. IV, sec. 2, of the Constitution further provides that the "General Assembly may regulate by law, if necessary, the methods of proceeding in the exercise of their powers of all the courts *below the Supreme Court,* so far as the same may be done without conflict with other provisions of this Constitution."

The above is discussed fully in *Horton v. Green,* 104 N. C., 400, and the Court there points out that while the Legislature may, as above stated in the Constitution, regulate the procedure in the courts below, it cannot interfere with the regulations of this Court as to the procedure here, which includes, of course, the time within which an appeal must be docketed.

This Court has often stressed the fact that there should not be any unnecessary delay in bringing up appeals, and while the Legislature may regulate procedure in the lower courts, provided it does not interfere in bringing up appeals to this Court, it is forbidden by the Constitution, and has never attempted, to interfere with the regulation of procedure in this Court.

It is to be trusted that this matter will receive the attention of the bar, and that we will not be called upon so often to enforce the procedure that we have deemed necessary to prescribe, and that counsel will thus save the time of the Court and consider the interest of their clients.

Appeal dismissed.

J. B. MORTON v. AMERICAN NATIONAL INSURANCE COMPANY.

(Filed 27 September, 1922.)

Insurance—Indemnity—Accident—Health—Contracts.

Where the insured is indemnified under his policy for disability by injury or sickness for more than thirty days, upon report of his attending physician of his condition every thirty days, he must show that he has complied with the terms of the policy requiring the physician's continued report; and where he has introduced evidence tending only to show that the first or preliminary report had been so made, he may not recover an amount that will extend beyond the thirty days period. *Semble,* the issue submitted was insufficient to sustain a verdict for the full period of disability.

APPEAL by defendant from *Cranmer, J.*, at June Term, 1922, of CARTERET.

Action to recover upon a health and accident insurance policy.

Issues were submitted to the jury, and answered by them as follows:

"1. Did plaintiff, in good faith, substantially comply with the contract of insurance, as alleged in the complaint? Answer: 'Yes.'

"2. What amount, if any, is plaintiff entitled to recover from defendant? Answer: '$303.66, with interest from 15 January, 1917.'"

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

E. H. Gorham for plaintiff.

Julius F. Duncan for defendant.

PER CURIAM. The contract of insurance, which forms the basis of plaintiff's suit, contains the following provisions: "Indemnity will be paid for injury or sickness only for the time the insured is under the professional care and regular attendance of a legally qualified physician and surgeon. If the insured is disabled by injury or sickness for more than thirty days, he or his representative must furnish the company every thirty days with a report from his attending physician or surgeon, fully stating the condition of the insured. Not more than one indemnity provided in this policy will be paid for loss resulting concurrently from sickness and accident."

Plaintiff was injured 15 February, 1916. A preliminary report, as required by the policy, was mailed to the defendant 25 February, 1916. No other report was made until some time in December, 1916. Plaintiff testified: "I did not make any character of reports after the preliminary report and prior to the December report. I did not undertake to cause my physician, Dr. Royal, to make any report after the preliminary report; he was called on by the company for a report. I don't remember the date between February and December, for what period, those reports were called for." Plaintiff further testified that he had written several letters to the defendant company during this period, but was unable to elicit any reply.

Dr. Royal, the attending physician, testified that he filled out the preliminary report and the December report, "and perhaps more," but he would not say that any other report was made, as he kept no record of such reports.

The defendant tendered judgment for $50, being the amount due under the policy for the first thirty days, and asked the court to instruct the jury, if they believed the evidence, to answer the first issue "No."

It would appear from the instant record that the defendant was entitled to this instruction. It is also doubtful as to whether the answer to the first issue (note wording of issue) was sufficient to establish full liability on the part of the defendant.

New trial.

MILEY C. GLOVER v. UNION GUANO COMPANY.

(Filed 4 October, 1922.)

Injunction—Issues of Fact—Bills and Notes—Acceptance for Cash—Innocent Holder—Due Course—Questions for Jury—Trials.

Plaintiffs executed notes for the purchase of certain patent rights to I., and afterwards they mutually agreed to cancel them, but I. had hypothecated them with the defendant, and there was conflicting evidence in the plaintiff's application for an injunction, whether the defendant was to return the notes to I., if not accepted as a cash credit on the debt owed it by I., which had not been done, or whether the defendant was a holder for value without notice of the plaintiff's equity: *Held*, the preliminary restraining order obtained in the suit should have been continued to the final hearing for the determination of the jury of the fact at issue.

APPEAL by defendant from *Horton, J.*, at February Term, 1922, of NASH.

The defendant appealed from his Honor's judgment continuing a restraining order until the final hearing of the action.

Finch & Vaughan and Manning & Manning for plaintiff.
Swink & Hutchins and Austin & Davenport for defendant.

PER CURIAM. For the plaintiff there is evidence tending to show the following circumstances. On 1 January, 1920, I. N. Glover contracted to sell the plaintiff a patent right, and as evidence of the purchase price the plaintiff executed and delivered two promissory notes, each in the sum of $1,000, due respectively 1 January, 1922, and 1 January, 1923. Some time after the notes were executed, the parties mutually agreed that the contract between them should be canceled and the notes returned to the plaintiff. I. N. Glover, however, retained possession of the notes, and being indebted to the defendant in the sum of about $5,000, delivered them to the defendant with the understanding that they should be returned to him if not accepted as a cash credit on his indebtedness. The defendant neither accepted the notes as a credit nor returned them. On the other hand, the defendant insists that it became a holder of said notes in due course without notice of any infirmity or equity.

Plaintiff applied for and obtained an order enjoining the defendant from disposing of the said notes until the final hearing of the action. If the contention of the plaintiff and I. N. Glover be accepted by the jury, the defendant has no right to the notes in question, but otherwise, if the contention of the defendant be accepted. In these circumstances the controversy between the parties should be referred to the jury for determination, and the alleged rights of the plaintiff protected pending the hearing. *Jones v. Jones,* 115 N. C., 209; *Hyatt v. DeHart,* 140 N. C., 270; *Tise v. Whitaker,* 144 N. C., 507; *Dunlap v. Willett,* 153 N. C., 317; *White v. Fisheries Co.,* 183 N. C., 228.

The judgment of the Superior Court is

Affirmed.

J. W. MATTHEWS v. HUDSON BROTHERS.

(Filed 11 October, 1922.)

1. Negligence—Dangerous Machinery—Vendor and Purchaser—Implied Invitation.

A purchaser of cotton seed who enters upon the premises of the owner of a cotton gin for that purpose in accordance with the owner's arrangement, is upon the premises at the implied invitation of the owner.

2. Same—Questions for Jury.

Evidence that the owner of a cotton gin had left the ends of bolts dangerously projecting at a place they had connected power-driven shafting, and about eighteen inches from the place where a purchaser has to select the seed he wants and take them away, is sufficient to take the case to the jury, and for the jury to pass upon the question of the want of ordinary care upon the issues of defendant's actionable negligence in the purchaser's action.

3. Same—Instructions—Ordinary Care.

Under the evidence of this case: *Held,* an instruction that makes the nearness of eighteen inches from the dangerous part of the shaft, if so found by the jury, negligence as a matter of law, and also leaves out the element of defendant's want of ordinary care on the issue of negligence, is reversible error.

APPEAL by defendant from *Lyon, J.,* at March Term, 1922, of SAMPSON.

The plaintiff sued to recover damages for personal injury. Verdict and judgment for the plaintiff.

Butler & Herring and Langston, Allen & Taylor for the plaintiff.
Grady & Graham for defendants.

PER CURIAM. The defendants owned and operated several gins that were connected by shafting. The pieces of shafting were joined together by cuffs which were secured by set screws. Over the cuffs and between the set screws was a circular housing. These screws projected from the shafting about two or two and a half inches, but not as far out as the rim of the housing. The distance from the gins to the side of the building in which they were operated was about eight feet. The seed were carried in a trough under the gins to a hopper outside the building; but if a customer wanted seed of a certain kind or for a particular purpose he diverted the seed to the floor by lifting a lid. There was evidence tending to show that customers were in the habit of going into the gin room and selecting seed and putting them in a sack with the assistance of the ginner, or any one else who was present, and that a person standing immediately in front of a gin would be about eighteen inches from the shafting, and in order to shovel seed would have to change his position and stand nearer the end of the gin. The plaintiff went to the gin with a load of cotton and was awaiting his "turn." Wincey Wells had hauled cotton for another, and while it was being ginned he went into the building to get some seed for planting. The plaintiff went in to buy some of the seed that Wells was getting, and was asked to assist Wells by throwing the seed in a sack, and after throwing in one pile he moved to another and was caught by the unprotected set screws and injured.

His Honor refused the defendant's motion for judgment of nonsuit, and exception was noted.

We think the motion was properly refused. The evidence, when considered in the light most favorable to the plaintiff, does not exclude the inference that the plaintiff entered the building under the defendants' implied invitation; and if so, the question of actionable negligence was determinable only by the jury.

However, the defendants, we think, are entitled to a new trial. His Honor instructed the jury as follows: "If you find from the evidence that the defendants had two set screws on its collar that connected the shafting between the gin, and that those set screws projected two or two and a half inches out from the collar that they were placed in, and one-half inch from the middle of the collar, and you find that the shafting was so near the place where the people had to stand and get their seed, and you find that the plaintiff was there by implied invitation to the public to go in there and get seed, or assist others in getting their seed, and you find that that set screw, placed where it was on this revolving shaft, was the proximate cause of the plaintiff's injury, it would be your duty to answer the first issue 'Yes,' but if you do not so find, you would answer it 'No.'"

There was evidence tending to show that a person standing in front of one of the gins would be eighteen inches from the shafting, and that there was no way for a person at this distance to get into the shafting except by falling on it. The instruction refers to the plaintiff as standing "so near" the shafting, and appears to be elliptical or incomplete. If his Honor intended to say that the circumstances recited in this instruction, if found by the jury to be true, would amount in contemplation of law to a want of ordinary care, we think the circumstances as stated are inadequate for this purpose. We cannot hold as a legal conclusion that a distance of eighteen inches from the shafting was so slight as necessarily to menace the plaintiff's injury from the unprotected screws. Whether his proximity was such as to hazard his safety was for the jury, under a definite instruction. On the other hand, if such was not his Honor's intention, the instruction is deficient in that it omits all reference to the defendants' exercise of reasonable care in protecting against damage those who came into their gin by implied invitation. *Gaither v. Clement,* 183 N. C., 456.

New trial.

B. R. HARRELL v. C. D. BRINKLEY AND M. L. BRINKLEY.

(Filed 11 October, 1922.)

1. Contracts—Breach—Damages—Loss of Business—Profits Prevented—Duty of Damaged Party—Rule of Prudent Man.

Where a party to a contract willfully interferes with the other party and wrongfully causes him to quit operation, or prevents him from filling it, which results in loss to his established business and property used in his undertaking, the party so injured may recover in his action such damages as may reasonably be shown as a result of the wrong done him, including profits prevented thereby, after deducting therefrom such amount of the loss as he might have avoided in the exercise of ordinary business prudence.

2. Same—Evidence.

Where a party to a contract may recover for the loss to his established business wrongfully caused by the breach of the other party, evidence of past profits may be shown as an element for the jury to consider in passing upon the issue, with the other facts in evidence.

3. Same—Nonsuit—Trials—Punitive Damages.

The evidence in this case held sufficient to be submitted to the jury upon the question whether the defendants wrongfully prevented the plaintiff from fulfilling his obligation under a contract with him, within the life of the contract, causing loss to his business, etc., and the defendant's

position that the loss was caused by the plaintiff's weakly submitting to the defendant's acts instead of asserting his rights is untenable. *Semble*, the plaintiff was entitled to recover punitive damages had he chosen to assert them.

APPEAL by plaintiff from *Allen, J.*, at May Term, 1922, of BERTIE.

Gillam & Davenport, Roswell C. Bridgers, and S. Brown Shepherd for plaintiff.

W. H. S. Burgwyn and Winston & Matthews for defendants.

PER CURIAM. This action was brought to recover damages for the alleged breach of a contract for the sale of a sawmill and a lease of land, plaintiff alleging that defendants had wrongfully interfered with his business, and broken it up, and by their illegal conduct had compelled him to abandon the lease, his business and lease being valuable and profitable, plaintiff having paid $1,000 for the mill and lease of land on which it stood. Issues were submitted on the pleadings, and the jury returned the following verdict:

"1. Did the defendants breach their contract with the plaintiff, and wrongfully interfere with plaintiff, thereby putting an end to the said contract? Answer: 'Yes.'

"2. If so, what damage has plaintiff sustained by reason thereof? Answer: '$300.'"

Judgment for plaintiff on verdict, and defendants appealed.

The plaintiff claimed that he was to keep the plant on defendants' land and operate it until the following January—about a year—while defendants alleged that he was to have only a month or two to operate and remove it.

There were several exceptions to evidence, but all untenable. It was competent to show the value of the plant, lease, and business. In other words, it was competent and relevant to show the loss sustained by plaintiff by the alleged wrong of the defendants in breaking up his business and forcing him by their interference to quit the premises. There was a question about the plaintiff's duty to insure the premises, which they alleged to have been part of the contract, but which was denied by the plaintiff, and the jury evidently found with the latter as to this matter. "The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. Where the defendant has maliciously and by his wrongful act destroyed the business, credit, and reputation of the plaintiff, the law will require him to make good the loss sustained. As a general rule, the loss of profits to a business which has been wrongfully interrupted by another is an element of damages for which a recovery may be had,

where such profits can be made to appear with reasonable certainty; but the evidence must afford the jury some data from which they can with reasonable certainty determine the loss. Outside of this rule, no certain guide for estimating such damages can be established." 13 Cyc., p. 57. And again: "Past profits cannot be taken as an exact measure of future profits; but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury. Where an established business is wrongfully injured, destroyed, or interrupted, the owner of such business can recover damages sustained; but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one; that it had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable. Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." 13 Cyc., pp. 58 and 59. "In many jurisdictions evidence of profits which would probably have been received is admissible, not as the measure of damages, but as affording the best guide or aid to the jury of which the nature of the case admits in the exercise of a proper discretion in estimating the damages; and for like purpose evidence of the actual past profits and receipts is ordinarily admissible, if not too remote from the injury or wrong complained of." 13 Cyc., p. 213. The evidence is received, not for the purpose of showing what profits were lost with a view of allowing the plaintiff to recover the amount of them, but as some evidence to be considered by the jury, with other facts and circumstances in the case, in order to estimate the damages suffered by the wrongful acts of the defendants. And it was evidently in this view that his Honor, Judge Allen, admitted the evidence, as the charge of the court tends to show. But his Honor's instructions as to damages were distinctly favorable to the defendants in another respect, as he charged them carefully and correctly as to plaintiff's duty to minimize the damages. It is an established principle that when there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage, or the damage which arises from his own neglect will be considered too remote for recovery. *Tillinghast v. Cotton Mills,* 143 N. C., 273. As is said in Benjamin on Sales (7 ed.), p. 934: "In every case, the buyer, to enable him to recover the full amount of damages, must have acted throughout as a reasonable man of business and done all in his power to mitigate the loss." And in Sedgwick on Damages, vol. 1, sec. 201: "The same principle which

refuses to take into consideration any but the direct consequences of an illegal act is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them." And again, at sec. 202: "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences which the plaintiff, acting as prudent men ordinarily act, can avoid, he is not legally damaged. Such consequences can hardly be the correct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as remote. In this view the doctrine would rest on the intervention of the plaintiff's will as an independent cause. *Ad hoc* he is not damaged by the defendant's act, but by his own negligence or indifference to consequences." The court in this case charged the jury substantially in accordance with and with reference to these principles.

We are unable to agree with the defendants that there is no evidence of any actionable breach of contract, or tort, in interfering with the plaintiff's business, and we are disposed to believe that upon the authorities, as we understand, the judge might have gone further, and permitted the jury, in the exercise of their sound discretion, to have assessed punitive or exemplary damages, if plaintiff had seen fit to ask for such an instruction. The jury have found that plaintiff's statement of the contract was the correct one, and that he was entitled, under the same, to occupy the land until the first day of the following January. If this be so, there is some evidence indicating that defendants were willfully if not maliciously attempting all the time to embarrass and harass the plaintiff in his operations, so as to get rid of him long before his time was up. But the plaintiff asked for no such instruction, being contented with compensatory damages, though small and inconsiderable they were, as allowed by the jury.

Reading plaintiff's testimony, as it appears in the record, we infer, and the jury found, no doubt, that there was some physical interference with plaintiff. One of the defendants (C. D. Brinkley) drew his pistol and ordered logs to be changed so that his own would have the preference of others in the sawing, and the negro employee obeyed him, and arranged the logs as Brinkley ordered him to do, whereas plaintiff testified that Brinkley's logs had not been misplaced. The Brinkleys seemed to act as if they had the present right of possession to the mill and premises, and attempted to exercise authority over the same, as the jury might well have inferred from the evidence, and especially that of the plaintiff.

The defendants will not be permitted to excuse their interference upon the ground that plaintiff should not have yielded to them, or been intimidated by them. This would be taking an undue advantage of their own

wrong, for they succeeded in accomplishing their purpose by reason of it, and now seek to avoid its consequences by relying on plaintiff's alleged weakness in being influenced and overcome by it, instead of asserting and defending his own rights under the contract and resisting the defendants' invasion of them.

The case has been tried with substantial accuracy, and there is no reversible error.

No error.

A. D. BYRD v. MISS GEORGIE HICKS AND I. R. WILLIAMS, TRUSTEE.

(Filed 11 October, 1922.)

Injunction—Mortgages—Sales—Deed in Trust—Parties.

It appears in this case that plaintiff had mortgaged his land to secure balance of purchase money by deed of trust to the defendant and her trustee, and the controversy depends upon whether the defendant had agreed to cancel the trust deed and the notes it secured in consideration of the payments she had already received, with evidence that a part of one of the notes had been purchased by a stranger to the transaction: *Held*, the sale under the power contained in the trust deed should be enjoined until the final hearing, and that the part purchaser of one of said notes be made a party.

APPEAL by defendant from *Lyon, J.*, 15 March, 1922, from DUPLIN.

Action, heard on return to a preliminary restraining order.

The action is to restrain sale of certain lands sold to plaintiff by defendant Georgie Hicks, and advertised to be sold under a deed of trust given to secure purchase price. On the facts presented there was judgment continuing the restraining order till the hearing, and defendants excepted and appealed.

H. D. Williams and R. D. Johnson for plaintiff.

H. E. Faison, Robinson & Robinson, and Stevens, Beasley & Stevens for defendants.

PER CURIAM. On the hearing there were facts in evidence on the part of plaintiff tending to show that on 18 December, 1919, defendant Georgie Hicks sold at auction and conveyed to plaintiff five tracts of land situate in said county, for $18,074.73. That plaintiff at time of sale paid cash to the amount of $3,614.97, and executed for remainder of purchase price seven promissory notes, payable one, two, three, etc., to seven years from date, each for sum of $2,065.68, giving also a deed of trust on the property to I. R. Williams, with power of sale to secure said

indebtedness. That on 21 January, plaintiff paid to the grantor, Miss Hicks, on said indebtedness, the interest on the notes, $867.60, and made a further payment thereon of $82.60, the payee agreeing to extend the period of maturity for said indebtedness for one year, etc., or until 18 December, 1921. That in October, 1921, plaintiff, finding that he would be unable to carry out the terms of sale, and meet his indebtedness for the land, proposed in writing to surrender his entire interest in the property and lose all payments made by him to date to Miss Hicks, on cancellation of the remainder of the debt, and that said proposition was accepted in writing by defendant, and she took possession of the property pursuant to the agreement.

There was denial on part of defendant that there had been any binding acceptance of plaintiff's proposition, and with averment further that the first note of $2,065.68 had been transferred at the time of sale to the Atlantic Coast Realty Company, for conducting the sale, and by them transferred for value to one S. T. Hooker. That in order to grant to plaintiff the one-year extension referred to in plaintiff's affidavits, it became necessary for defendant to purchase one-half of the note held by said Hooker; that he is now the owner of the other half of said note, and insisting on a sale of the property.

From a perusal of this evidence, and as now advised, it appears that there are serious questions of fact presented involving the right of defendant to proceed further under the deed of trust, and under our decisions on the subject, his Honor has correctly ruled that the restraining order be continued to the final hearing. *Seip v. Wright,* 173 N. C., 14; *Tise v. Whitaker,* 144 N. C., 507.

The Court is of opinion further that in order to a full determination of the rights and interests involved in this controversy, it is necessary that S. T. Hooker, at present holding a one-half interest in the first note secured by the deed of trust, shall be made a party.

Judgment affirmed.

HENRY VANN v. J. B. WINDERS.

(Filed 11 October, 1922.)

Appeal and Error—Homestead—Judgment—Incomplete Appeal.

On this appeal from an allotment of a homestead by the judgment debtor, it appears that the record failed to show a signed judgment, and the appeal is incomplete.

APPEAL by defendant from *Lyon, J.,* at February Term, 1922, of SAMPSON.

Exceptions to allotment of homestead and personal property exemptions filed by the defendant before the clerk of the Superior Court and transferred by him to the civil issue docket.

From a judgment overruling the defendant's exceptions, this appeal is prosecuted.

Butler & Herring for plaintiff.
John D. Kerr, Sr., for defendant.

PER CURIAM. This was a proceeding under C. S., 740, in which the judgment debtor, defendant herein, being dissatisfied with the valuation and allotment of his homestead and personal property exemptions, as assessed by the appraisers in an execution, undertook to have the same set aside and vacated for alleged irregularities in the returns.

It is stated in the record that "after a hearing, the defendant's exceptions were overruled, defendant excepted and appealed," but there was no order or judgment signed by the judge; at least, none appears on the record. The record seems to be incomplete. *Logan v. Harris,* 90 N. C., 7. However, we have examined the defendant's exceptions and find them to be without merit. No error has been shown.

Affirmed.

WADE MEADOWS ET AL. v. T. C. MANN.

(Filed 8 November, 1922.)

Appeal and Error—Verdict—Proposition of Law.

The verdict, upon conflicting evidence, determines the issue of fact, and will not be disturbed when it appears that there is no error in the application of the principles of law involved in the controversy.

APPEAL by defendant from *Daniels, J.,* at May Term, 1922, of CRAVEN.

Civil action to recover damages for an alleged breach of contract in the sale of seed oats.

Upon denial of liability and issues joined, there was a verdict and judgment in favor of the plaintiffs, from which the defendant appealed, assigning errors.

Guion & Guion for plaintiffs.
Mann & Mann for defendant.

PER CURIAM. The controversy, on trial, narrowed itself principally to the questions of fact, which have been settled by the verdict. After a careful investigation of the record, we have found no ruling or action on the part of the learned judge which would seem to justify a reversal or an order for a new trial. The judgment will be upheld.

No error.

DAVIS BROTHERS CHEESE COMPANY v. J. H. CULBRETH ET AL.

(Filed 15 November, 1922.)

Verdict—Issues of Fact—Appeal and Error.

APPEAL by defendants from *Connor, J.*, at February Term, 1922, of CUMBERLAND.

Civil action in *assumpsit*, tried upon the following issues:

"1. Did plaintiff deliver to the defendants 50 boxes of cheese, in accordance with defendants' order? Answer: 'Yes.'

"2. In what sum, if any, are defendants indebted to plaintiff? Answer: '$323.64, and interest.' "

Judgment on the verdict in favor of the plaintiff, from which the defendants appealed.

Cook & Cook for plaintiff.

Oates & Herring for defendants.

PER CURIAM. The controversy, on trial, narrowed itself to questions of fact, which have been settled by the verdict. After a careful perusal of the record, we are convinced that the case has been tried in substantial conformity to the law as bearing on the subject, and we have found no sufficient reason for disturbing the result below.

No error.

TILDA COMBS ET AL. V. SMETHPORT EXTRACT COMPANY ET AL.

(Filed 22 November, 1922.)

Evidence—Nonsuit—Trials.

APPEAL by defendants from *Harding, J.,* at April Term, 1922, of ASHE.

Civil action for trespass, and to remove cloud from title.

Both parties claimed title to the *locus in quo;* and, upon the traverse and issues thus joined, there was a verdict and judgment in favor of the plaintiffs. Defendants appealed.

Charles B. Spicer for plaintiffs.

R. A. Doughton and T. C. Bowie for defendants.

PER CURIAM. Defendants rely chiefly upon their exception taken to his Honor's refusal to grant defendants' motion for judgment as of nonsuit, made first at the close of the plaintiff's evidence, and renewed at the close of all the evidence. Viewing the evidence in the light most favorable to the plaintiffs, the accepted position on a motion of this kind, we think his Honor was justified in submitting the case to the jury, and that the verdict is amply supported by the evidence.

After a careful perusal of the record, we have discovered no sufficient reason for disturbing the result of the trial.

No error.

STATE v. W. B. FAULKNER.

(Filed 29 November, 1922.)

Intoxicating Liquor—Spirituous Liquor—Evidence—Instructions.

APPEAL by defendant from *McElroy, J.,* at March Term, 1922, of BURKE.

Criminal action. The defendant was convicted of a violation of the prohibition law, and from the judgment pronounced he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel contra.

PER CURIAM. The jury found the defendant guilty of having spirituous liquor in his possession for the purpose of sale, and of receiving at

one time spirituous liquor in a quantity greater than one quart, in violation of C. S., 3379 and 3385. The defendant excepted to the court's refusal to dismiss the action as in case of nonsuit, and to the instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had on hand for the purpose of sale "one gallon, or any other amount, of spirituous liquor" they should find the defendant guilty of a violation of section 3379.

We concur in his Honor's decision. Neither exception can be sustained.

No error.

THELMA HUFFMAN, ADMINISTRATRIX, v. F. B. INGOLD.

(Filed 6 December, 1922.)

Negligence—Personal Injury—Wrongful Death—Damages.

APPEAL by defendant from *Bryson, J.*, at February Term, 1922, of CATAWBA.

Civil action to recover damages for an alleged negligent injury and wrongful killing.

From a verdict and judgment in favor of plaintiff, the defendant appealed.

W. B. Councill and E. B. Cline for plaintiff.
A. A. Whitener & Son for defendant.

PER CURIAM. This case was before us at the Spring Term, 1921, and is reported in 181 N. C., 426. The facts, which are fully set out there, need not be repeated here. The case seems to have been tried in substantial conformity to the decision rendered on the first appeal, and the law appertaining to the new questions raised on the second trial. We have discovered no reversible error on the present appeal, and hence the judgment will be

Affirmed.

ADAMS, J., did not sit.

J. B. MORRIS v. BOARD OF TRUSTEES OF THE NEWTON GRADED SCHOOL DISTRICT.

(Filed 29 November, 1922.)

1. Schools—Elections—Taxation—Statutes.

An election held under the provisions of the act of 1920, ch. 87, authorizing the board of trustees of any school district to issue bonds for erecting, enlarging, altering, and equipping of school buildings, acquiring lands therefor, etc., and annually to levy a tax, etc., sufficient in amount to pay the maturing principal and interest, will not be held invalid because the question was submitted upon levying a limited tax, when it appears that the levy submitted is at present sufficient to meet the requirements of the act authorizing the election, and there is no valid reason shown that it will ever be insufficient for the purposes intended.

2. Same—Notice—Purpose of Election.

An election called under the provisions of the act of 1920, ch. 87, authorizing the trustees of any district to issue bonds for certain school purposes, will not be declared invalid upon the ground that the notice given had not stated the purpose for which the election was held, when it stated that it was for the purpose of issuing serial bonds not exceeding a certain amount, and of levying the special tax, specifying the act under which it was proposed to issue them; and there is nothing to indicate that any voter was misled or misinformed, and the election was carried with practical unanimity.

3. Schools—Elections—Taxation—Registration—Notice—Bonds.

In this suit to enjoin the issue of bonds for certain school purposes in accordance with the act of 1920, ch. 87, *it is held*, that objection that a proper notice for the new registration of voters was not given cannot be sustained, it appearing that the notice thereof was previously published in a newspaper in the district for five successive weeks and there was no evidence or finding of fact that any elector was prevented from registering on account of want of notice, or deprived of the right to vote on that account.

APPEAL by plaintiff from *Webb, J.*, at chambers, 3 November, 1922, from CATAWBA.

Controversy without action, heard on plaintiff's motion to enjoin the issuance of school bonds and the levy of a special tax. Judgment for defendant. Plaintiff appealed.

J. L. Morehead for plaintiff.
Wilson Warlick for defendant.

PER CURIAM. The Newton Graded School District was established by an act of the Legislature in 1907. Private Laws 1907, ch. 39, sec. 104. At the session of 1920 an act was passed authorizing the board of

trustees of any school district to issue the bonds of such district for the purpose of erecting, enlarging, altering, and equipping school buildings and acquiring land for such buildings, or for either of these purposes, and annually to levy a special tax *ad valorem* on all taxable property in the district sufficient in amount to pay the maturing principal and interest. On 5 June, 1922, the board of commissioners of Catawba County ordered that a special election be held in the Newton Graded School District on the question of issuing bonds in the sum of $100,000, and of annually levying a special tax to pay the principal and interest. The commissioners ordered a new registration of the qualified voters of the district and directed that the registration books should be opened on Monday, 12 June, and closed on Saturday, 1 July. A majority of the qualified voters voted in favor of the bonds, and the result of the election was duly declared and published. The trustees of the graded school district announced their purpose to issue the bonds authorized in the election so that four bonds of $1,000 each should mature annually in the years 1924-1946 inclusive, and eight bonds in the year 1947. The assessed valuation of the taxable property in the graded school district for 1921 was $3,943,406, and for the current year it is $4,099,949.

His Honor rendered judgment denying the plaintiff's petition for injunctive relief, and declaring that the defendant is authorized to issue and to sell said bonds.

The plaintiff excepts to the judgment on the ground that the act under which the election was held provides that the special tax shall be in an amount sufficient to pay the principal and interest of all bonds issued under the act as such principal and interest become due, and that in the election the special tax was limited to 25 cents on property valued at $100. The plaintiff contends that the question of levying a limited tax was illegal in itself, and having been submitted in connection with the question of issuing bonds rendered the election void. It is admitted that the proposed levy is at present sufficient to meet the requirement of the act authorizing the election, and there is no valid reason for assuming that it will ever be insufficient for the purpose intended. We should hesitate to hold an election invalid by reason of the mere possibility of a contingency which may never occur. Besides, it is strongly intimated in *Trustees v. Pruden,* 179 N. C., 618, that in any event the provisions of the statute would be controlling.

The second ground of exception is the alleged failure of the board of commissioners to state in their notice the purpose for which the election was to be held. The notice specifically states that the special election was to be held for the purpose of determining the question of issuing not exceeding $100,000 of serial bonds of the graded school district, and of levying the special tax, and particularly refers to the act (Public

Laws 1920, ch. 87) which prescribes the purposes for which the bonds were to be issued. There is nothing in the record to indicate that any voter was misled or misinformed as to the purpose of the bonds. Indeed, the practical unanimity of sentiment on the part of the voters would seem clearly to show that the purpose for which the bonds were to be issued was not only understood, but fully approved. *Keith v. Lockhart,* 171 N. C., 451.

The plaintiff further excepts to the judgment on the ground that proper notice of the new registration of voters was not given. The record shows that notice of the election and new registration was given in a newspaper published in the school district on 6, 13, 20, 27 June, and 4 July. It is not suggested that any elector was prevented from registering on account of any want of notice that a new registration had been ordered, and in the absence of evidence or a finding of fact we cannot assume that any one was deprived of the right to vote in the election. *Hardee v. Henderson,* 170 N. C., 572; *Hill v. Skinner,* 169 N. C., 407; *Miller v. School District, ante,* 197; 113 S. E., 786.

The judgment is

Affirmed.

W. L. GREEN v. GOOD ROADS COMMISSION OF WATAUGA COUNTY.

(Filed 20 December, 1922.)

Appeal and Error—Fragmentary Appeal—Roads and Highways—Road Commission.

An appeal to the Supreme Court in an action to recover damages from a county road commission for injury to land in laying out a highway will be dismissed as premature when it appears that in the orderly procedure in such matters the commission has not reached the stage for the assessment of damages, and has not assessed them, and the appeal is properly dismissed in the Superior Court.

APPEAL by plaintiff from *Bryson, J.,* at March Term, 1922, of WATAUGA.

W. C. Newland for plaintiff.
Linney & Coffey for defendant.

PER CURIAM. This case proceeded very irregularly before the road commission, and also in the court below, and in the state of the pleadings there was nothing for the judge to do but dismiss the appeal as he did. The case was not ripe for an appeal, as, judging from the complaint filed by the plaintiff and the other proceedings, the plaintiff was

seeking to recover the sum of $1,500 as damages for injury to his land by laying out the road thereon. It does not appear that the commission or local authorities have as yet reached the stage of the proceedings for the assessment of damages, or for ascertaining the amount of the plaintiff's compensation for taking his land, or for any injury thereto, and as the plaintiff seems to be seeking compensation, he should wait until the time comes for fixing it, of which he should have, and we presume will have, due notice.

The order dismissing the appeal is affirmed, and the cause will be remanded without prejudice to the good roads commission, for such other and further proceedings therein as may be proper in the premises and according to law.

Affirmed.

STATE v. LOOMIS JOHNSON.

(Filed 20 September, 1922.)

1. **Homicide—Murder—Justification—Evidence—Burden of Proof—Nonsuit.**

Where the killing of a human being by the use of a deadly weapon is shown, the jury will be justified in rendering a verdict of murder in the second degree, at least, and the burden of proof being upon the prisoner to show matters in mitigation or to justify the jury in rendering a verdict in a less degree, or of acquittal, as they may be satisfied upon the evidence; a motion for a judgment as of nonsuit thereon cannot be sustained.

2. **Criminal Law—Evidence—Nonsuit.**

Upon a motion as of nonsuit, in a criminal action, the State is entitled to the most favorable consideration of the evidence.

3. **Homicide — Murder—Justification—Evidence—Reasonable Apprehension—Questions for Jury—Trials.**

Where there is evidence in justification, on the trial of a homicide, that the prisoner was without fault in bringing about the fight that resulted in the death, had fought unwillingly, and had committed the act with a deadly weapon while being attacked with one by the deceased, with murderous intent, it is not required that the prisoner show that it was actually necessary for him to have taken the deceased's life in order to preserve his own, but only whether in the judgment of the jury upon the evidence he had reasonable grounds to believe that it was necessary to do so under the circumstances.

4. **Homicide—Murder—Justification—Murderous Intent.**

Where justification is set up as a defense on a trial for murder, and it is proved by the prisoner that the deceased had attacked him with murderous intent, and that he had killed deceased without fault on his part,

the prisoner was under no obligation to fly, but could stand his ground and kill his adversary, if need be. The distinction between assaults with and without a felonious intent shown by WALKER, J.

5. Appeal and Error—Instructions—Reversible Error—Conflicting Instructions—Homicide—Murder.

Where the judge has erroneously charged, on the trial for a homicide, that the prisoner must show, with his evidence, the actual necessity for his having taken the life of the deceased in preserving his own life, as a justification for the killing, a correct instruction given elsewhere in the charge, without retracting the erroneous part, does not cure the error or render it harmless.

APPEAL by defendant from *Calvert, J.*, at the May Term, 1922, of CHATHAM.

The defendant was convicted of manslaughter, and from the judgment upon such conviction appealed to this Court.

The jury, in rendering the verdict of manslaughter, accompanied it with a request that the judge should be lenient in his punishment. The judgment was that the defendant be confined in the State's Prison for three years. Exceptions 1 and 2 were addressed to the refusal of his Honor to render judgment as of nonsuit at the end of the State's evidence, and again at the end of all the evidence.

The State's evidence tended to show that there was a dance and frolic on Saturday night, in February, 1922, at the house of Clarence Steele, in Chatham County. A party of young men at the dance engaged in shooting craps. Of this party were the defendant Johnson and the deceased, Guy McLean. Guy McLean charged Johnson with owing him a dime. Johnson denied this, and thereupon McLean grabbed at the money, and failing to get it, hit Johnson in the mouth. At this point Clarence Steele interfered and parted the two men. Johnson was standing talking to Clarence Steele, after the latter had parted the two fighters, when the deceased, Guy McLean, ran around and grabbed Johnson about the neck and was holding him and was striking him. Jasper McLean, a brother of Guy, interfered to keep Guy from hurting Johnson. While Guy McLean had Johnson around the neck and was striking him about the face and head, Johnson was trying to get away from him, but in the scuffle Johnson was pushed up in the corner, against the wall of the house. It was then that he struck backward with his knife and cut Guy McLean in the abdomen. This seems to have been the fatal blow. A wound was made in McLean's right side, a little below and to the right of the navel. It was at such a place, through the abdominal wall, that some of his intestines had oozed out, but none were punctured. McLean died at a hospital the following Tuesday week.

The witness Nettles testified: "At the time Loomis stabbed at Guy, Guy had him tight around the reck, with his head bent over. He had

his head under his arm and Loomis stabbed at Guy when he had him in that way. Loomis left the house just as soon as Guy turned him loose."

Dr. Harper testified that he saw the prisoner several days after the occurrence and dressed his wounds three times. He had a severe cut, which had extended entirely around his neck. There were quite a number of cuts on his neck and face, and he had a gash across his lip.

Wiley Crutchfield testified that at the time McLean ran around to the back of Johnson, Johnson was standing talking with Clarence Steele and had already quit the fight.

The defendant's own account of the transaction is as follows, and he is corroborated in his statement of the occurrence by other witnesses, particularly by Clarence Steele, the man at whose house the affray occurred: "I am 21 years old. Was born and raised in Chatham County. I have never been in any trouble before. I live with my father. I went to a party at Clarence Steele's. He lives about a half-mile from my home. This occurred on a Saturday night in February. Steele gave a dance and invited me. I got there about 8 o'clock. I had been working hard all day and lay down and went to sleep while the others were dancing, and about 11 o'clock I waked up and it was raining very hard. Some of the boys began shooting craps. I took part in the game, which was going on in the kitchen part of the house. The kitchen was a very small room. There were ten or twelve men in there at the time. Guy McLean was shooting craps. We were good friends, and I had known him for about ten years. I had a half-dollar lying on the floor. We were shooting for ten cents a shot. He claimed that he had a dime in the half-dollar. I told him that he was mistaken. He grabbed for the money and I snatched it back, and as I snatched the money back he struck me in the mouth. He hit me just as I grabbed at the money. I didn't strike him back. I jumped up and he got up and started toward me. Clarence Steele stepped right up between us and said, 'I am not going to have any fuss here.' I was not trying to get to him; I didn't make a step toward him. Clarence was standing between us, and while he was standing there Guy ran around to my back and grabbed me. He got me around the neck, held my head down and began cutting me. (The prisoner then exhibited to the jury a cut on his throat which extended from one ear almost around to the other, and several cuts about the face and ears.) He was still holding me. He had me around the neck so that I could not get loose, and we were going round and round. I was trying to break his hold. He was still cutting me and cutting at me. I did not know that he was mad when he first grabbed me. At this time he had gotten me in the corner and against the wall of the room, and I ran my hand in my pocket and got out my knife and opened it and stabbed back at him, because there was no other

way for me to get loose, and I thought he was trying to kill me. He had already cut my throat and my face in a number of places before I got my knife out, and was still cutting me when I stabbed him. There was no chance for me to get loose from him in any other way. I was trying to get away from him. My back was to him when he had me around the neck cutting me. Just as soon as he released his hold I ran away from him and left the house. His brother Jasper was there, and I think he was trying to keep Guy from cutting my throat, and his holding his arm and trying to pull him away from me is why I think he did not succeed in killing me."

At the conclusion of the State's evidence, and again at the conclusion of all the evidence, the prisoner moved for a nonsuit, which was denied, and he excepted.

The judge then charged the jury, and to the instructions of the court the prisoner entered several exceptions.

The jury returned a verdict of manslaughter, and the prisoner was sentenced to three years in the State's Prison.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Douglass & Douglass, Wade Barber, and A. C. Ray for defendant.

WALKER, J., after stating the material facts: There would seem to be very slight evidence of the prisoner's guilt, and yet there is sufficient to prevent a judgment of nonsuit, as a jury may find, from all the facts and circumstances, that the prisoner was not entirely blameless, or without any fault. And, besides, we could not nonsuit the State, because there is some evidence for the jury in another view, for when there is a killing with a deadly weapon, as there was in this case, the law implies malice, and it is, at least, murder in the second degree, and the burden then rests upon the prisoner to satisfy the jury of facts and circumstances in mitigation of or excuse for the homicide, the credibility of the evidence, and its sufficiency to produce this satisfaction being for the jury to consider and decide. The burden is not only upon the prisoner to mitigate or excuse the homicide, with the presumption of malice against him, but the State is entitled to the most favorable consideration of the evidence when there is a motion to nonsuit.

But, while this is so, we are of the opinion that the learned judge who presided at the trial committed an error in the following instruction to the jury, to which exception was duly taken: "In order to excuse the killing, on the plea of self-defense, it is necessary for the accused to show that he quit the combat before the mortal wound was given, or

retreated or fled as far as he could with safety, and then, urged on by mere necessity, killed his adversary for the preservation of his own life."

It was incorrect and material error to charge the jury that the prisoner must have killed the deceased from mere necessity, in order to excuse the homicide. Whether there was any actual necessity for killing the deceased in order to save his own life, or to prevent great bodily harm to him, makes no difference, provided, at the time, the prisoner believed, and had reason to believe, that from the facts and circumstances as they then appeared to him he was about to be killed, or to suffer some enormous bodily harm.

The identical question is so fully discussed in *S. v. Barrett,* 132 N. C., 1005, at 1007, that we will refer somewhat copiously, but not literally, to what is there said in respect to this special principle. In some of the early cases expressions may be found which would seem to indicate that a case of self-defense is not made out unless the defendant can satisfy the jury that he killed the deceased from necessity, but we think the most humane doctrine, and the one which commends itself to us as being in accordance with the enlightened principles of the law, is to be found in the more recent decisions of this Court. It is better to hold, as we believe, that the defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under the evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation, and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken, provided always, as we have said, the jury find that his apprehension was a reasonable one, and that he acted with ordinary firmness. We think that the foregoing principle has been clearly stated and adopted by this Court in several cases.

In *S. v. Scott,* 26 N. C., 409; 42 Am. Dec., 148, this Court says: "In consultation, it seemed to us at one time that the case might have been left to the jury favorably to the prisoner on the principle of *Levet's case,* Cro. Car., 538 (1 Hale, 474), which is, if the prisoner had reasonable grounds for believing that the deceased intended to kill him, and under

that belief slew him, it would be excusable, or, at most, manslaughter, though in truth the deceased had no such design at the time."

And in *S. v. Nash,* 88 N. C., 618, the Court cites and approves the passage just quoted from *S. v. Scott, supra,* and then makes the following extract from *Com. v. Selfridge,* Harrigan & Thompson Cases on Self-defense, p. 1: "A., in the peaceful pursuit of his affairs, sees B. walking towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the instant the pistol is fired, and of the wound B. dies. It turned out, in fact, that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." The judge inquired, "Will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Cr. Law, sec. 1026 (g), and note; Wharton Law of Homicide, 215 *et seq.*

So, in *S. v. Matthews,* 78 N. C., 534, the Court quotes with approval Foster's Crown Law, as follows: "It is stated in all of the authorities, and cannot be doubted, that if a man who is assailed believes, and has reason to believe, that although his assailant may not intend to take his life, yet he does intend, and is about to do him *some enormous bodily harm,* such as maim, for example, and under this reasonable belief he kills his assailant, it is homicide *se defendo,* and excusable. It will suffice if the assault is felonious." Foster, 274. See, also, *S. v. Nash,* 88 N. C., 618, where the principle herein stated was applied.

It is true that the judge in this case did, in another part of his charge, give the correct instruction, but he did not retract the erroneous one and substitute the other in its place; and, therefore, the jury were left to conjecture as to which of the two essentially different principles applied to this case. And in this connection we may well refer generally to what was said in *S. v. Barrett, supra,* at p. 1010, with reference to the same kind of charge: "The prisoner requested the court to charge the jury in accordance with this reasonable principle, and the court had given the special instructions, but in the general charge it changed the same materially by omitting therefrom the most important portion and requiring the prisoner to satisfy the jury that there was, at the time he fired the pistol, an actual necessity for killing the deceased. The jury, therefore, were left in doubt and uncertainty as to what was the true rule of law by which they should be guided in passing upon the prisoner's plea of self-defense, and the last instruction, which we may assume made the greatest impression upon the jury, called for more proof from the prisoner than the law required of him. He was, therefore, placed at a disadvantage, and consequently embarrassed and prejudiced in his

defense. There is a marked difference between an actual necessity for killing and that reasonable apprehension of losing life or receiving great bodily harm, which is all that the law requires of the prisoner in order to excuse the killing of his adversary, and it was just this difference that may have caused the jury to decide against the prisoner upon this most important issue of the case."

Upon a similar question to that we have here, *Justice Bynum* said, in *S. v. Turpin,* 77 N. C., at p. 477: "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury should be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed."

The question, therefore, was not whether he was confronted by the actual necessity to kill the deceased in order to preserve his own life, or to escape great bodily harm, but whether he believed, and had reasonable ground to believe, that such would be the result if he did not kill the deceased.

While we cannot nonsuit in this case, because of the presumption of malice arising from killing with a deadly weapon, and the further fact that the burden is upon the prisoner to satisfy the jury of the facts and circumstances which will either mitigate the homicide or excuse it altogether, and further, because the jury must pass upon the credibility of the evidence, we are of the opinion that, upon the evidence, as it is now presented, the court could well have instructed the jury, in accordance with *S. v. Dixon,* 75 N. C., at p. 278, that the innocence of the prisoner depends upon whether, from the whole testimony or from that of any witness, he himself at the time of the killing was without fault, and then had a reasonable ground to believe the attempt of the deceased was with the design of taking his life. *S. v. Harris,* 1 Jones (46 N. C.), 190. It is not denied that the advance of the deceased with the knife was an assault. Was it made with a felonious intent, or did the prisoner have reasonable ground to believe it was? The reasonableness of his apprehensions was not a question to be decided by the prisoner or the court, but by the jury, to whom it was not submitted. Assuming that there was evidence from which the jury could infer that the prisoner had reasonable apprehension of the felonious intent, the remaining question

is, Was the prisoner himself without fault? That depends upon the evidence, upon which the jury must pass, though there may be very slight, if any, evidence that he was in fault. But the jury should say how it was, under instructions as to the law.

The general rule is that one may oppose another attempting the perpetration of a felony, if need be, to the taking of the felon's life; as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant. He is justified. 2 Bishop Cr. Law, sec. 332. A distinction which seems reasonable, and is supported by authority, is taken between assaults with felonious intent and assaults without felonious intent. In the latter the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force, and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground and kill his adversary, if need be. 2 Bish. Cr. L., sec. 6333, and cases there cited. And so, Mr. East states the law to be. "A man may repel force by force, in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, burglary, robbery, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense." 1 East P. C., 271; 2 Bish. Cr. L., sec. 633. The American doctrine is to the same effect. "If the person thus assaulted, being himself faultless, reasonably apprehends death or great bodily harm to himself, unless he kill the assailant, the killing is justifiable." 2 Bish. Cr. L., sec. 644. The above statement of the law is taken from *S. v. Dixon,* 75 N. C., pp. 278, 279, 280, opinion by *Justice Bynum.* The questions arising in this case upon the prisoner's right of self-defense are fully considered and discussed in *S. v. Pollard,* 168 N. C., 116; where *S. v. Dixon, supra; S. v. Barrett, supra; S. v. Kimbrell,* 151 N. C., 702, are approved. And *Justice Allen* said, in *S. v. Johnson,* 166 N. C., 392, referring to the cases just cited: "These authorities, and many others to the same effect, could be cited establishing the following propositions: (1) That one may kill in self-defense to prevent death or great bodily harm. (2) That he may kill when not necessary if he believe it to be so, and has a reasonable ground for the belief. (3) That the reasonableness of the belief must be judged by the facts and circumstances as they appear to the party charged at the time of the killing." And in *S. v. Gray,* 162 N. C., 613, by the same justice: "One may kill when necessary in self-defense to himself, his family, or his home, and he has the same right when not actually necessary if he believes it to be so, and

has a reasonable ground for the belief." See *S. v. Vann,* 162 N. C., 535; *S. v. Robertson,* 166 N. C., 356; *S. v. Ray, ibid.,* 420.

It all comes to this, that if the jury find that the prisoner did not fight willingly, except in the sense that he was compelled to do so in order to defend himself and was himself without fault, and he was feloniously or murderously attacked by the deceased, so that it reasonably appeared to him, and he believed, that his life was in danger, or that he was about to receive great bodily harm, his right of self-defense was, in such a case, if found by the jury, complete and justifiable, and if he slew his adversary under such circumstances, the jury should acquit him. But there being the presumption of malice from the use of the deadly weapon, and, as we have said, the burden being upon the prisoner to show facts in mitigation or excuse of the homicide, and the credibility of the witnesses being for the jury to find, the case must be submitted to them with proper instructions, in accordance with the principles we have stated as especially applicable to this case.

While the evidence of the prisoner's guilt is very slight, we cannot find the facts, but must leave it to a properly instructed jury to do so, to whose province it properly belongs.

The error of the court in its charge entitles the prisoner to another jury, and it is so ordered.

New trial.

STATE v. ED. DILL.

(Filed 27 September, 1922.)

1. **Appeal and Error—Objections and Exceptions—Briefs.**

   The exceptions of the appellant are restricted to those considered in his brief on appeal.

2. **Instructions — Trials — Stenographer's Notes—Evidence—Appeal and Error.**

   It is not error for the judge to permit a part of the evidence transcribed by the official stenographer to be read to the jury at the request of the jurors upon their returning to the court from their deliberation of the case submitted to them, under instruction that it was only for the purpose of refreshing their minds, and objection that the corresponding evidence for the adverse party had not been read, is untenable, especially when his counsel were present and remained silent at the time.

3. **Instructions—Evidence—Credibility—Rape.**

   In an action for rape, a charge of the court that the delay of the prosecutrix in making known the offense does not necessarily discredit her

testimony is not reversible error when, construed with the charge as a whole, it appears that the judge had properly instructed the jury as to the effect of such delay upon the credibility of her testimony.

4. Same—Appeal and Error—Requests for Instruction—Prayers for Instruction.

Where there is evidence that the prosecutrix in an action for rape did not make known the offense for several days thereafter, and has testified that it was in fear of her assailant, etc., an instruction that upon the credibility of her evidence the jury should consider her environment, etc., and ascertain from the evidence whether her conduct was attributable to her temperament or some other cause, is not objectionable as emphasizing the State's contention when it appears from the charge that the prisoner clearly received the benefit of his defense thereto, and did not ask for a more definite statement of his contention.

5. Rape—Outcry—Explanation—Evidence—Presumptions—Questions for Jury—Trials.

The failure of the prosecutrix to make outcry after the commission of rape on her by the prisoner raises only a presumption of the fact that she gave her consent, which she may explain by her testimony tending to show that she had remained silent for several days for shame, and for fear, under threats made on her life, etc., by the prisoner; and the presumption being one as to the fact, and not a rule of law, it presents a question of fact for the jury to decide by their verdict, under proper instructions from the court.

APPEAL by defendant from *Connor, J.*, at June Special Term, 1922, of BEAUFORT.

The prisoner was convicted of the crime of rape upon the person of one Mattie E. Williams, and appealed from the sentence of death pronounced by the court. A synopsis of the evidence is necessary to explain the exceptions.

The State's evidence tended to show the following circumstances. The prosecutrix is the wife of Samuel Williams. Their only child is two years of age. They lived at Dr. Mariner's place, on the Pea Ridge road, about three miles from Belhaven, with the husband's mother, sister, and brother. Mrs. Satterthwaite, a sister of the prosecutrix, lived at Hope Store, a quarter of a mile down the road. Seventy-five yards from the junction of the Pea Ridge and Belhaven roads was the Williams mail box. Along the road between the Williams home and the mail box two-thirds of the adjoining land is cleared, and one-third in woods. There are two or three houses on the cleared land. At about eight in the morning of a Thursday in March, 1922, while her husband was working at a distance in the field, the prosecutrix went to the mail box, and from there to the home of her sister, where she remained perhaps fifteen minutes. She did not know how long it took her to walk to her sister's. On her return home, impelled by sudden indisposition, she went into the woods, and while there was criminally assaulted by the

prisoner. She begged, pleaded, and struggled. After accomplishing his purpose, the prisoner said that if she told what he had done, he would kill her husband and the whole family. She had known the prisoner for some time, and he had never before offered her any indignity. As she walked home, she wept, but made no outcry. On reaching home about 10 o'clock, she went first to her room for a minute or two and then to the cook-room, where she found her husband's mother and sister. She remained there until dinner time, when her husband came. He was at home Thursday, Friday, and a part of Saturday. He and she occupied a room together. She mentioned the subject first to her husband on Sunday night after they had retired. In the meanwhile, she had frequently wept in his presence and had repeatedly refused to tell him the cause. She testified: "From the moment this occurred until I told my husband, my physical condition was such that I was just feeling it all the time, and I could not rest in any way, and when he mentioned anything to me, I couldn't keep from crying; it would hurt his feelings and he would turn and go off and not say anything to me. I do not mean that he turned in anger. He would ask me if I was sick and didn't want a doctor, and I told him no. He would ask what was the matter, and I would commence crying, and he would leave me. He couldn't bear to see me cry. . . . I did not tell him before Sunday simply because I didn't see how I could. Such a thing as that I would rather die than tell it; then he threatened our lives, that was a hard part, too; it made me fearful for myself and my family's safety. . . . I did not mention it to him until Sunday night after we had gone to bed. I saw my sister a few minutes Sunday night. I lived with my sister before I was married, and we were fond of each other."

The prosecutrix was corroborated by her husband, who said, also, that the prisoner came back to his home at 10:30; and Dr. Mariner testified that about a week after the assault was said to have occurred he examined the prosecutrix and found her genital organs bruised and inflamed. There was evidence tending to show that the character of the prosecutrix and her husband is good.

For the defendant there was evidence tending to show an alibi. Noland Davis testified that the prisoner came to his house at 7 o'clock Thursday morning, saying he had come from Williams's and remained there until after the mail car passed, and that the two then went to Satterthwaite's store, and were together until 9:45, when the prisoner said he had to go to Belhaven. J. B. Satterthwaite, a witness for the defendant, testified that he is a brother-in-law of the prosecutrix, and conducted a mercantile business at Hope Store; that the prosecutrix left his house at 8 o'clock going home; that between 6 and 7 o'clock the prisoner passed his store going to Williams's, and about 10 o'clock came

to the store with Norval Davis and asked what time it was. He did not act as if drinking, and was not under the influence of liquor. The prisoner testified: "I went to Williams's house on Thursday morning. I stopped at Mr. Satterthwaite's store. I was riding on my wheel and I left the store and went to Mr. Williams's. He was in the kitchen. I went from the house to the stables to hitch up the mules. After the mules were hooked up, he told me to take my wheel and carry a package to Mr. Stevens. Stevens was a conjure doctor. He told me it was 25 minutes of 8, or half-past 7 at that time. He told me to meet the fellow on the road. I went as far as Norval Davis's. I stopped there and sat on the front porch and talked with Norval Davis until about half-past nine. I went from there to Mr. Satterthwaite's store with Norval. We walked side by side, and I carried the wheel with me. Norval asked Mr. Satterthwaite to carry him to Hyde County, and Mr. Satterthwaite agreed to do it. I left about the same time they did. I rode my wheel. It was about 10 o'clock. I did not pass anybody. The only time I saw Mrs. Williams that morning was through the window. That was about 7 o'clock in the morning. When I got back I put my wheel over the fence. Mr. Williams was drinking some water from the kitchen well five or six steps from the kitchen. Mr. Williams asked me if I wanted anything. I told him I wanted some candy. He told me, "I haven't anything very much for you to do," and gave me a bush hook to work on the ditch. After I came out of the shop, I looked up the road and saw Dr. Mariner coming in. I went on down the field to go to Norval Davis's around 7 o'clock in the morning. I did not see Mrs. Williams. On my way back from Satterthwaite's store I did not see anybody. I worked in the field two hours, from 10 to 12. I stopped at 12 o'clock and walked out with Haywood. I asked him if he thought I had time to go home and get dinner. He said, yes, if I didn't take too long to eat. I didn't go back to work for Mr. Williams that afternoon, because I stopped to get my corn, some new corn I wanted to plant. I worked for Mr. John Craddock that evening, and on Saturday I went to Leechville. Saturday evening I went to Belhaven; coming back I went to Mr. Williams's. I saw Mr. Williams, Mrs. Williams, and their mother. I bought some baking powder. I went to Belhaven with Mr. Williams Sunday morning. We went to see the conjure doctor. I don't know a thing about the crime against Mrs. Williams." There was evidence tending to corroborate the prisoner's theory.

In rebuttal, a witness for the State, Lesofsky, said: "I had a conversation with Ed. Dill about this matter while he was in the jail at Belhaven. I have known Dill for 20 years. I saw a crowd and went to the jail. I didn't know who it was at the time, but found it was Ed. Dill. There was a crowd on the corner, two or three, or more.

There was nobody there except me and him, when I spoke to him. I went to see him just for curiosity. No one heard the conversation except him and me. Nothing said by me, or anybody, by way of threats or inducements. I said, 'Ed., what in the devil are you doing in here?' He said, 'I was drunk, I got a white woman, and the white woman said I done something to her, but I wouldn't dispute her word.' I didn't say anything to him then. He was sober and not frightened."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. C. Rodman, Ward & Grimes, and Daniel & Carter for prisoner.

ADAMS, J. During the progress of the trial, as a matter of caution, we presume, the prisoner's counsel entered of record twenty-one exceptions, but they have restricted their brief to a consideration of only five. All not included in the brief are deemed to be abandoned. Rule 34, 174 N. C., 837; Amended Rule, 182 N. C., 922; *S. v. Freeman,* 146 N. C., 615; *Britt v. R. R.,* 148 N. C., 37; *S. v. Spivey,* 151 N. C., 679.

The first to be considered is exception 17. The charge was concluded in the afternoon, and after deliberating three or four hours, the jury returned to the court room and one of the jurors requested that the testimony of the prosecutrix be read by the stenographer. The court thereupon cautioned the jury that they must rely upon their recollection, and that the reading of the testimony should be permitted only for the purpose of refreshing their memory. The stenographer then read the evidence of the prosecutrix taken on the direct examination, whereupon the juror who had made the request said, "That is all I want." The prisoner excepted because the court did not require the stenographer to read the evidence taken on cross-examination, and the testimony of the witnesses who had been examined by the defense. The prisoner and his counsel were present, and they neither made request to this effect nor intimated disapproval of his Honor's order or instruction. Surely this exception is entirely without merit. The prisoner's silence may well be deemed a waiver of his right to object after the verdict is returned. *Davis v. Keen,* 142 N. C., 502; *Simmons v. Davenport,* 140 N. C., 407; *S. v. Yates,* 155 N. C., 455; *S. v. Willoughby,* 180 N. C., 677.

Exception 18: At the same time a juror requested further instruction as to the legal effect of Mrs. Williams's delay in telling her husband of the assault. The prisoner excepted to this instruction: "The mere fact that she delayed in making her statement does not in itself discredit her testimony." His Honor had previously said that her delay was a circumstance to be considered in determining her credibility, and subsequently, that her conduct after the alleged assault should be weighed

in finding whether she had told the truth—in finding whether it impaired, discredited, or corroborated her testimony. The exception must be overruled. Where the charge taken in its entirety fairly and correctly presents the law it will afford no ground for reversing the judgment, even if an isolated expression should be found to be technically inaccurate. *S. v. Exum,* 138 N. C., 602; *Hodges v. Wilson,* 165 N. C., 323; *White v. Hines,* 182 N. C., 289.

Exceptions 19, 20: In response to a juror's inquiry, the court instructed the jury to consider the environment, training, and experience of the prosecutrix, while investigating the reason of her delay in making known the assault, and to ascertain from the evidence whether her conduct was attributable to her temperament or to some other cause. The prisoner excepted to the instruction on the ground that the court emphasized the State's contention regarding her failure to make outcry without sufficient explanation of the circumstances on which the prisoner relied. But a careful perusal satisfies us that the charge, instead of being subject to this criticism, embodies a clear presentation of the circumstances relied on to establish the defense. Besides, the prisoner made no request for more specific instructions or for a more definite statement of his contentions on any phase of the evidence. *Simmons v. Davenport, supra; S. v. Yates, supra.*

The ninth is the prisoner's cardinal exception. It is made to rest upon the decision in *S. v. Stines,* 138 N. C., 686, and is addressed to his Honor's modification of a requested instruction that it was incumbent on the State, if it could do so, to show that the prosecutrix made outcry soon after the occurrence, and that her failure to do so was a suspicious circumstance, tending to impeach her credibility. The instruction given was as follows: "It has been suggested that it was incumbent upon the State, if it could do so, to show that the prosecutrix made an outcry at or shortly after the occurrence; and her failure to do so from Thursday morning until Sunday night, and keeping to herself the facts of the assault, unless satisfactorily explained to you by the evidence, would be a suspicious circumstance against her as to the credibility of her testimony. The fact, however, that she made no disclosure to any person from Thursday until Sunday does not mean that you must disregard her testimony, but it is a fact and circumstance to be considered by you as to what effect you ought to give it in determining the credibility of her testimony." The prisoner excepted to the interpolation of the phrase "unless satisfactorily explained to you by the evidence."

In the History of the Pleas of the Crown, 633, *Sir Matthew Hale* said: "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far

forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.

"For instance, if the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, showed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place wherein the fact was done was remote from people, inhabitants, or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

"But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned." See East's Pleas of the Crown, 445; 4 Bl. Com., 214. The principle crystallized in Hale's statement has received the approval of eminent jurists; but the words "strong presumption" must not be accepted as implying a rule or presumption of law, but merely an inference of fact. The origin of the rule admitting evidence of the woman's timely disclosure or failure to complain is involved in doubt. By some the admission of such evidence is said to be a survival of the practice which prevailed in early times of receiving previous statements of a witness not under oath for the purpose of corroboration; and by others, a perverted survival of the rule which required the injured woman to make hue and cry. The latter custom is referred to by Bracton, fol. 147: "When, therefore, a virgin has been so deflowered and overpowered, . . . forthwith and whilst the act is fresh, she ought to repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her, the blood, and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the sergeant of the lord, the king, and to the coroners, and to the viscount." Whatever the origin of the rule, the best of judges in ancient and modern times concur in saying that the woman's conduct is relevant in determining the question of her consent. Evidence that she made outcry tends to show nonconsent, and the want of it is a circumstance to be considered in favor of the accused. Underhill on Cr. Ev., 470, sec. 411; *S. v. Peter,* 53 N. C., 21. In *Peter's case, Pearson, C. J.,* expressed the idea in the following language: "The fact that the witness Narcissa did not make known or complain of the outrage which had been perpetrated on her

for two weeks was presented to the jury by his Honor as a circumstance which affected her credibility. This portion of the charge is excepted to on the ground that he ought to have gone further and told the jury that her not making an earlier disclosure raised a presumption of falsehood, to be acted on by the jury in the absence of any proof to rebut it.

"It is not a rule of law that silence, under such circumstances, raises a presumption that the witness has sworn falsely. The passages in the books to which reference was made on the argument use the word 'presumption,' not as a rule of law, but as inference of fact, and treat of silence as a circumstance tending strongly to impeach the credibility of the witness, on the ground that a forcible violation of her person so outrages the female instinct that a woman not only will make an outcry for aid at the time, but will instantly and involuntarily, after its perpetration, seek some one to whom she can make known the injury and give vent to her feelings. The want of this demonstration of feeling or 'involuntary outburst' is treated of as a circumstance tending to show consent on her part; but it is nowhere held that this female instinct is so strong and unerring as to have been made the foundation of a rule of law, as distinguished from a rule in respect to evidence and the weight to which it is entitled, which is a matter for the jury." *S. v. Smith,* 138 N. C., 700.

While the silence or delay of the prosecutrix in complaining may be urged to lessen the force or credibility of her evidence, it is equally unquestionable that her delay may be explained or excused by proof of sufficient cause therefor. Among causes that have been held to excuse such delay Underhill mentions shame, threats of the prisoner, and fear of injury. Cr. Ev., 470. If in the estimation of the jury the evidence reconciles the woman's silence with her nonconsent—*i. e.,* shows sufficient explanation or excuse—her failure to make complaint should not be deemed a "suspicious circumstance" tending to show that she consented to the act. This we understand to be the sum and substance of his Honor's modified instruction.

The evidence discloses circumstances that are uncommon, if not singular in their kind. The prosecutrix made no outcry, gave no alarm, and uttered no complaint for more than three days; two hours after the occurrence the prisoner was at work in a field near her home; on Saturday he saw the prosecutrix, her husband, and his mother, and on Sunday went with her husband to Belhaven. If the theory of the State be accepted, the prosecutrix, resisting to the utmost, tried to make outcry and could not; afterward she suffered the torture of shame and the fear of death; she was physically injured; and the prisoner practically admitted his guilt. The courts do not presume to reconcile conflicts or inconsistencies of testimony in a judicial proceeding. This duty must

be discharged by another agency of the law. Advocates of the jury system who admit that it does not merit all the encomiums it has received, are pronounced in the conviction that wherever the element of a moral doubt enters into the consideration of a case, it can best be weighed on the balance of probabilities by a proper tribunal. Concerned with the law, the courts are not inclined to disturb this prevailing assurance.

Owing to the gravity of the offense with which the prisoner is charged, we have examined all the exceptions in the record, *in favorem vitae,* and find

No error.

STATE v. ROBERT W. MAYNARD AND WALTER McGEHEE.

(Filed 4 October, 1922.)

1. Evidence—Criminal Law—Preliminary Hearings—Trials—Witnesses—Testimony as to Evidence at Former Hearing—Common Law.

Under the common-law rule, where a witness in a criminal action on the preliminary trial in a court having jurisdiction, has been examined by the State under oath, in the presence of the defendant, to whom the right to cross-examine has been accorded, and being bound over to the Superior Court, it has been properly made to appear that his presence had wrongfully been prevented at the trial by the act of procurement of the defendant, it is competent, at the second trial, to show, by the testimony of another witness, that he was present at the preliminary trial, and to his own knowledge the absent witness had there sworn to a certain state of facts relevant to the inquiry.

2. Same—Stenographer's Notes.

In the above case the stenographer's transcribed notes, taken at the preliminary trial of a criminal action, are competent evidence on the second hearing of what a witness had testified on the former one, when the stenographer, as a witness, has testified that his notes are substantially correct; and they come within the common-law rule as to the admissibility of evidence of this character.

3. Same—Constitutional Law—Right of Accused.

The common-law rule of evidence, allowing, upon the second trial of a criminal action, testimony of a witness of the evidence given by a witness on the preliminary trial, under the conditions specified, does not deprive the defendant of his constitutional right to confront his accuser and his witnesses, Const., Art. I, sec. 11, this right having already been accorded him on the preliminary hearing.

4. Evidence—Criminal Law—Common-law Rule—Preliminary Hearings—Statutes.

Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action does not affect the common-law rule, but it is an extension of

its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. C. S., 4560, 4563, 4572.

5. **Evidence — Criminal Law—Preliminary Hearings—Trials—Procuring Absence of Witness—Questions for Court—Questions for Jury.**

The findings of the trial judge, in his sound discretion, and upon sufficient evidence, that the defendant had wrongfully procured the absence of a witness at the second hearing, whose evidence on the preliminary hearing was permitted to be testified to by another witness is conclusive of this question on appeal, when this discretion has not been abused by him; and a requested instruction that makes this finding a question for the jury, is properly refused.

6. **Appeal and Error—Instructions—Harmless Error—Criminal Law—Trials.**

Where two defendants are on trial for the breaking into and stealing from a store at night, and there is evidence of the admission of one of them that he, with the other, was in an automobile in front of the store on the night in question, and the court has given the requested instruction that one of them should not be bound by the admission of the other, it is harmless error for indefiniteness as to time and place, for the judge to qualify the requested instruction by adding, "unless the circumstances go to show that they were together that night," there being plenary evidence that both defendants were then acting in pursuance of the unlawful design, and the one who admitted the fact was dominated by the one who excepted to the instruction.

APPEAL by defendant from *Allen, J.*, at June Term, 1922, of VANCE.

Defendants, Robert Maynard and Walter McGehee, with two others, Guy Barnes and Raymond Taylor, were indicted for felonious breaking into the store of the prosecutors, A. J. and C. S. Smith, with intent to steal, etc. Second, for stealing a number of articles from said storehouse, and with a count in the bill for receiving the articles knowing that they were so stolen, etc. Guy Barnes having made his escape from prison, and being at the time a fugitive from justice, and Raymond Taylor being absent, the first named defendants only were on trial.

There was evidence on the part of the State tending to show that on the night of 22 March, 1922, the store of the prosecutors was broken into and several articles of the property described in the bill stolen therefrom, and that the four defendants named in the bill were guilty parties. It further appeared that in May, 1922, at a preliminary trial before the recorder's court, defendants being present, Guy Barnes having been duly sworn, testified as a witness, defendants Maynard and McGehee being present, and that personally and by counsel said Barnes was cross-examined in behalf of the defendants now on trial. That said Barnes gave in detail the doings of the four defendants named, on the night the store was robbed, stating, among other things, that the four were in

McGehee's car, and went to one Manning's, where they procured an acetylene torch and some cutting points, two of them saying it was their intent to rob the bank, but being persuaded from this enterprise by Barnes on the ground that it was beyond their skill and intelligence, they rode in the car to several points in the county, and finally, about four a. m. they broke into the store of the prosecutors, and several articles were stolen. There was much other evidence tending to support the account of the witness Barnes, identifying the car and the defendants, who were met at different places during the night, and that the occupants of this car were the persons who committed the robbery. It was shown that this testimony of Barnes was given under oath after he had been duly warned of his rights, and that defendants now on trial had subjected him to cross-examination. That the said evidence was taken down by a stenographer, who was first duly sworn, and who had preserved his notes and transcribed same. It appeared that at the close of the preliminary hearing before the recorder, the defendants were bound over to Superior Court, the two defendants on trial giving bond, and Barnes being committed to jail.

There was evidence offered on a preliminary inquiry to the effect that some time before the trial Barnes had escaped from custody and was now a fugitive from justice, and that this escape had been brought about by the aid and procurement of the defendants now on trial, and on hearing the evidence, the court so found. The State then introduced the stenographer, who, after being duly sworn, testified that he took the stenographic notes of Barnes' evidence on the preliminary investigation; that same was taken correctly, and had been accurately transcribed by him, and he had the notes with him, and by the aid of the notes he could give the testimony of Barnes as delivered on the preliminary hearing.

The court having found, as stated, on a preliminary inquiry, that the escape and absence of Barnes was by the aid and procurement of present defendants, allowed the stenographer to state to the jury the evidence of Barnes before the recorder, to which ruling defendants excepted. In connection with this ruling, the stenographer further stated that his notes of the evidence were not read over to Barnes, nor signed by him at the close of his evidence, nor was a copy of same filed with the clerk.

In apt time, defendants, in writing, asked the court to charge the jury as follows: "It is a principle of law that persons charged with the commission of crime are entitled to be confronted by the witnesses, who shall be examined in the presence of the jury and the parties. This prosecution depends largely upon the testimony of Guy Barnes given before the recorder of Vance County, given upon the preliminary hearing of this case, as stated by the witness Oliver. This testimony is not admissible, and ought not to be considered by you against the defendant,

unless it shall appear to you from the evidence that Barnes is absent by the inducement or other act of the defendant." Prayer refused, and defendants excepted.

There was verdict of guilty against both defendants, judgment, and defendant Maynard excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Jasper B. Hicks and Thomas M. Pittman for defendant.

HOKE, J. Defendant Maynard, who alone appeals, objects to the validity of this conviction on account, chiefly, of the admission of the testimony of the stenographer by which the evidence of the accomplice, Barnes, was placed before the jury, and on the ground: (1) that he was not properly confronted with the accusing witnesses; (2) that the evidence of said witness was not completed, attested, or filed as required by the statute in order to a proper reception of such evidence.

In regard to the first position, it is a recognized principle of trials at common law that where, in a judicial proceedings before a court having power to compel the attendance of witnesses, administer oaths, and hear evidence pertinent to the inquiry, a witness has given his evidence and the defendants are present and have the right and have been afforded opportunity to cross-examine the witness, such testimony, when properly attested and verified, may be introduced and used on a second trial of the cause against said defendants, where the witness is since dead, or has become hopelessly or permanently insane, or is wrongfully absent from the trial by the acts and procurement of the defendants. And by the weight of authority when the witness has departed from the jurisdiction of the court and become permanently a nonresident. *S. v. Bridgers,* 87 N. C., 562; *S. v. Thomas,* 64 N. C., 75; *S. v. Valentine,* 29 N. C., 225; *Mattox v. U. S.,* 156 U. S., 237-242-244; *Reynolds v. U. S.,* 98 U. S., 145; *People v. Elliott,* 172 N. Y., 146; *Commonwealth v. Richards,* 35 Mass., 434; *State v. John Nelson,* 68 Kansas, 556; *Trial of Lord Morley,* 6 Howell State Trials, 770.

These authorities proceed upon the principle fully approved with us that in the cases specified, the right and privilege of a defendant in a criminal case to confront the accuser and his witnesses, as contained in Art. I, sec. 11, of our Constitution, is fully accorded by the opportunity given to meet and cross-examine them at the former trial, and that the position referred to in no way offends against the constitutional guarantee.

As to the second ground of this objection, our legislation as to these preliminary examinations appearing in C. S., ch. 83, art. 1, sec. 4560,

provides that "the evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively, etc.," and in section 4563: "That the answers of a prisoner shall be reduced to writing. They shall be read to the prisoner, who may correct or add to them, and when made conformable to what he declares is the truth, they shall be certified and signed by the magistrate." And in section 4572: "That all examinations had pursuant to the provisions of this chapter shall be certified by the magistrate, taking the same to the court at which the witnesses are bound to appear, within twenty days after taking of the same, etc., and the examinations taken and subscribed as herein prescribed may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof, and had opportunity to hear the same and to cross-examine deposing witnesses, and if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant has removed from the State, or is of unsound mind."

It will be noted that this examination was never either subscribed or certified, nor was it read over to the witness Barnes or approved by him, said Barnes being then a defendant, and we concur in the view of defendant's counsel that the stenographer's notes do not comply or come within the provisions of the statute. But a proper perusal of this legislation will disclose that the same is in extension of the common-law principle which we are considering, that its purpose was to make these preliminary examinations, when properly taken, certified, and filed, in the nature of an official record, to be read in evidence on mere identification, and that it does not and was not intended to restrict or trench upon the common-law principle that evidence of this kind, when repeated by a witness under a proper oath, and who can and does swear that his statements contain the substance of the testimony as given by the dead or absent witness, shall be received in evidence on the second trial. And well considered authority is to the effect that stenographers' notes, when the stenographer who took them goes on the stand and swears that they are accurate and correctly portray the evidence as given by the witness, come well within the principle.

Speaking to this question, in the case of *Mattox v. U. S., supra,* at p. 244, *Associate Justice Brown* said: "That all the authorities hold that a copy of stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, is competent evidence of what he said." And the principle is approved by us in *Settee v. R. R.,* 171 N. C., 440. In that case it was held, among other things, as follows: "The testimony of a witness, stenographically taken

at a former trial, who is absent from the State under such circumstances that his return is merely contingent or conjectural, may be received as evidence on a subsequent trial of the same cause of action when its correctness is testified to by the official stenographer who took and transcribed it, and there is no suggestion that the record thereof was not full and entirely accurate. As to whether this will apply when the witness is temporarily absent, *quære.*"

Defendant excepts further to the refusal of the court to give his special prayer for instructions, but such an objection cannot for a moment be sustained. The prayer, as shown above, embodies the proposition, in effect, that although the court on a preliminary hearing and with ample evidence in support of the position had found that the witness Barnes was absent by procurement of the defendant, that the evidence of the witness is inadmissible, and should not be considered by the jury, unless they should find from the evidence that Barnes is absent by the inducement or other act of defendant. And all the authorities on the subject so far as examined are to the effect that this question of admitting the evidence and the pertinent findings preliminary thereto, are for the courts and not for the jury; that they are referred primarily to the sound discretion of the trial judge, and his action thereon will not be disturbed on exception or appeal unless there has been manifest abuse of such discretion. *Reynolds v. U. S.*, p. 145, *supra; State v. Wiggins,* 50 La. Ann., 330; *People v. Bruno Lewandowski,* 143 Cal., 574; *Rex v. Stephenson,* 9th Cox Cr. App., 156.

In the *Reynolds case, supra, Chief Justice Waite,* speaking to the question, said: "Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's case, supra,* it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is at least to have the effect of the verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest." The objection, therefore, is overruled.

Again, on the trial, one of the prosecutor's witnesses had testified that McGehee, at the preliminary trial in Henderson, had made the statement and sworn to it that he, McGehee, had been in the front of the store that was broken into, and counsel for appellant requested the court to instruct the jury that the statement made by McGehee could not be considered as against Maynard. The court gave the instruction with the qualification "unless the circumstances go to show that they were together that night."

This statement of the witness, as it appears in the record, is so indefinite, giving neither time nor circumstance, that the statement itself, and anything that concerns it, might well be disregarded—but conceding that the statement referred to such time as would make it a pertinent circumstance, the entire evidence tended to show that the parties, McGehee and Maynard, were together that night, seen at different places, and evidently engaged in a common purpose in which Maynard appeared to be a leader, and McGehee running the car they were using, his own car. The car that had been at the store was very well identified by the peculiarity of the marks made by two of its wheels on the ground. It was tracked into the Perry plantation, and in the early forenoon after the robbery, coming out of the Perry plantation, at a point where it had stalled, and both of the present defendants trying to get it up a hill. And this qualification of his Honor, even if technically erroneous, was of such slight significance that it could have had no appreciable effect on the verdict, and should not be held for reversible error. In *Powell v. R. R.*, 178 N. C., 243-248, the Court, in reference to some immaterial objection, said: "This cause requiring much time and work, has been fully and carefully tried with the assistance of competent, alert, and diligent counsel on both sides, the determinative issues have been fairly decided, and the result of the hearing should not be disturbed unless it appears that appellant's defense has been in some way prejudiced." And further: "In a well considered opinion by *Associate Justice Walker,* in *Brewer v. Ring,* 177 N. C., 476, it was said, 'Courts do not lightly grant reversals or set aside verdicts on grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be something like a practical treatment of a motion to reverse, and it should not be granted except to subserve the ends of substantial justice,' citing Hilliard on New Trials (2 ed.), secs. 1-7."

On careful consideration, we are of opinion that no reversible error appears in the record, and the judgment of the trial court is affirmed.

No error.

STATE v. WILLIAM JENKS.

(Filed 11 October, 1922.)

Appeal and Error—Improper Remarks of Counsel—Jury—Absence of Defendant's Witnesses—Objections and Exceptions—Prayers for Instruction—Evidence—Nonsuit—Trials.

Where there is evidence that the defendant and others were present, participating in the operation of a still, evidently being in use at the time and extensively in the manufacture of liquor, who had left to avoid arrest; and conflicting evidence whether or not it was the defendant who was seen to help another put the cap on the still, there was sufficient to sustain a verdict of guilty, without the necessity of proving this single fact as to the cap; and the remarks of the solicitor to the jury commenting upon the absence of defendant's witness to prove that he did not help with the cap, is regarded as harmless, and upon an immaterial point, especially as the defendant's attorney permitted the solicitor's remarks to go unchallenged at the time, and did not offer special prayers for instruction thereon.

APPEAL by defendant from *Devin, J.*, at July Term, 1922, of WAKE.

The defendant was indicted jointly with Wilson Wagoner, Luther Clark, Ed. Marshall, and one Bowling for the illicit distilling of whiskey and aiding therein. He was convicted, sentenced, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Armistead Jones & Son for defendant.

CLARK, C. J. The evidence of the State showed that on 4 February, 1922, the officers, Sears and Howard, found a distillery plant being operated in Wake County by the defendant Jenks, Wilson Wagoner, Luther Clark, Ed. Marshall, and one Bowling. The still was on the furnace, and nearby were large boxes containing beer ready for distillation. Ed. Marshall testified that the defendant Jenks and Bowling put the cap on the still. From appearances about the still, there had been much whiskey made there before. At the time Sears and Howard came up the cap had been put on the still and the still was running.

Upon the evidence it does not seem that it was material whether the defendant Jenks put the cap on the still if, as the uncontradicted evidence shows, that the defendants and others named were at the still and it was running when the officers went up to it. Sears testified that when he and Howard went up to the still there were five men there: "Jenks, the defendant, Wilson Wagoner, Luther Clark, Marshall, and another man we did not recognize. All were white men. The still was located about a mile from Jenks' house."

He further said: "I got in 24 steps of those parties, and they left the still as we went on up. I found the still and the copper was in the furnace and it was running. I did not see any whiskey; I did not know but they said the worm was on. I saw two stands of beer; there was one barrel and a box something like two-thirds full. One of the boxes was six or seven feet long, and something like four or five feet wide, and the other, three or four feet square. They would average something like two and a half feet deep. There was beer in one of the boxes. I did not see any of the parties named at work at the still. As I went up to the still there was a gun between us and Mr. Jenks, and as Mr. Jenks started off he walked back and picked up the gun and he went about thirty or fifty yards. It was a shotgun. I did not go to where Jenks stopped. I did not have any conversation with him, or the others, except Marshall, that night. From the appearance around the still there had been a whole lot of whiskey made there. There was a little ditch leading to the branch and it was full of slops, and all the stands had been filled. I could not tell how much had been run out that way, and the space was as long as from here to the back of the court room, and it was in a little trench place." After giving other details, he said: "I saw these men when we got within 24 steps of the still. When we got that near Jenks started off and went back and got his gun. He made no effort to run, but walked off to the branch. He did not undertake to use the gun."

Ed. Marshall testified for the State to the same state of facts. He said: "Bowling and Jenks put the cap on. It was copper. Jenks sat down on the keg. He put his gun by the side of a pine. The cap had been on three or four minutes before Sears and Howard came up."

On cross-examination he stated that he had never seen any one at work there at the still except Bowling and defendant Jenks; that Clark, Wagoner, and Bowling were filling up the still. Jenks helped; he took hold of it and set it down. Bowling took up the sack and set it down on a keg. Bowling took up the cap and Jenks took hold of it and put it down in there. It took about 4 or 5 minutes to do this. I don't know that Bowling was in charge of the operation. He was helping fill up the still with beer.

There was other evidence in corroboration for the State. The defendant put on no evidence.

The defendant in this Court put his argument chiefly upon the following statement by the solicitor. The solicitor in the course of his argument said: "The defendant could have had other witnesses who were testified to have been present at the still, who could have been put on the stand to prove that he did not put the cap on the still. They are here in the courthouse to prove that he did not put the cap on the still (men-

tioning the names of the defendant's witnesses), who were testified to have been present at the still, but whom he did not put on the stand to prove that he did not put the cap on the still."

It appears in the record that Wilson Wagoner and Luther Clark had been disposed of at March Term, 1922, and that the defendant Norman Bowling had never been taken. It also appears that the defendant Ed. Marshall testified on this trial.

It would seem from the statement of the judge that these witnesses named by the solicitor were present in the court room. It is a reasonable inference, and there was no finding asked or made which defendant's able counsel would have done, had they not been present. We cannot presume that they were not for the presumption is of the correctness of the proceedings below.

There can be no presumption that the solicitor untruthfully stated that the witnesses, whose names he mentioned, were not in the court room, or that the judge was a party to such statement, if untrue, by refusing to make him correct it.

But even if they were not present, of which there is no proof or finding, it would have been harmless error, for in view of the testimony in this case it was immaterial whether the defendant put the cap on or not, or, indeed, whether the cap was on.

In *S. v. Blackwell,* 180 N. C., 733, where the defendant was arrested, as here, at an obscure place suitable for making whiskey, the still being complete except for the cap and worm, which would not be needed in a week (the meal, however, being reduced to beer), *Allen, J.,* said that though the defendant had not produced any completed product, and the cap and worm were not present, there was evidence, as in this case, that the still had been used before and this was sufficient evidence to justify the conviction.

In this case the evidence was that the still was in operation; that much whiskey had been manufactured there; that this defendant was caught there with the other men charged in the indictment, and that he and all of them left immediately when the officers appeared.

In *S. v. Jones,* 77 N. C., 520, it was held no error that the solicitor commented on the failure of the defendant to examine one Whitley, who had been sworn as a witness. In *S. v. Johnston,* 88 N. C., 623, the Court held that it was not reversible error that the solicitor in his argument said: "If the defendant did not make the tracks, who did? If the defendant did not make them, if they were made by another, the defendant ought to show it."

In *S. v. Kiger,* 115 N. C., 746, where the defendant, as in this case, introduced no testimony, the counsel for the prosecution, addressing the jury, said the defendant had called ten witnesses and had them present

himself, but that he had failed to show by any witness where he was that night. Again he said, addressing the defendant himself: "Your brother, Jack Kiger, knows whether you brought that brandy to his house; he is here in the court room. Why, if you did not carry it there and conceal it, did you not show it by him?" The Court held that this was not grounds for a new trial.

In *S. v. Costner,* 127 N. C., 566, the solicitor commented on the fact that the defendant had able counsel and had not brought a witness to show or explain where he spent that night. The Court held that on the facts of that case such comment was not out of place. In *S. v. Goode,* 132 N. C., at p. 984, the Court held that the solicitor's remarks were improper solely because he stated that the unexamined witness had been subpœnaed, and there was proof to the contrary. In this case, however, there was no such statement.

The other exceptions do not require discussion. The verdict of the jury was in accordance with the evidence (which was uncontradicted) and the law. *S. v. Perry,* 179 N. C., 718; *S. v. Blackwell,* 180 N. C., 733.

No error.

STATE v. LEE FULCHER.

(Filed 18 October, 1922.)

1. Criminal Law—Evidence—Nonsuit—Statutes.

Where the State's evidence and that of the defendant is substantially to the same effect, in an action for an assault, and tends only to exculpate the defendant, his motion as of nonsuit after all the evidence has been introduced, considering it as a whole, should be sustained. C. S., 4643.

2. Same—Assault—Parent and Child—Right of Parent to Protect His Child.

The father may shield his child from the assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. C. S., 4643.

WALKER and ADAMS, JJ., dissent.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1922, of CARTERET.

Criminal prosecution, charging the defendant with an assault on one Malissa Sharp.

From an adverse verdict and judgment of six months on the roads, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Charles L. Abernethy and Julius F. Duncan for defendant.

STACY, J. Malissa Sharp and her husband, Ed. Sharp, were tenants of the defendant, living on his farm; and in the same house the defendant's mother occupied a room on the second floor. It was the habit of the defendant's boy, a child about four years old, to visit his grandmother, and the boy soon became a source of annoyance to Malissa.

On 19 October, 1921, the defendant went over to get his horse and buggy, which he kept in his mother's lot; his boy came down to the barn and the defendant put the child in the buggy while he was taking off the wheels to grease them. Fulcher called to his mother and asked her to bring him his oil can, which she did. About this time Malissa Sharp came down to the barn, where the defendant, his mother, and child were. She told the defendant that his boy "had been messing with her," and if he didn't keep him away from there she was going to whip the little "slick-headed" urchin. Whereupon, the defendant replied: "Now, Malissa, there's no use talking that way; I dare you to put your hands on him." Malissa said, "I don't take a dare," and further, according to her own evidence: "I had the tobacco stick in my right hand, and Fulcher grabbed hold of my two wrists; I jerked away from him; went in the house and got my gun; when I came out of the house Fulcher was running down the road, away from the house." The defendant's version of the matter was as follows: "Malissa Sharp came down to the lot and said, 'Lee, what are you going to do with that slick-headed boy of yours? If you don't keep him away from here, I'm going to beat him.' I said, 'Now, Malissa, there's no use talking that way; I dare you to put your hands on him.' She said, 'I don't take a dare from nobody,' and grabbing up a tobacco stick, she made towards the boy, and I grabbed her hands and wrung the stick out of them; then she turned around and ran to the house, saying she was going to get her gun; then I got out of there and ran down the road."

The defendant met Ed. Sharp some distance away and told him to go and take care of his wife. This was all that happened. No harm was done. Malissa herself testified: "Didn't hurt me; made marks of his hands on my wrists when he took hold of me. These marks were bruises." The State offered other evidence tending to show that her wrists were "not bruised or cut," but only stained with grease.

From the foregoing, it will be noted Malissa Sharp does not say, in so many words, that she started towards the boy with the stick in her hand, while the defendant says that she did. This is the single point of difference in their testimony, if, indeed, it be material on the present record. There is no denial of the fact itself, and we think that such is

but the natural interpretation and construction to be placed on the testimony of the prosecutrix. No other conclusion seems to be permissible from all the evidence, and the second motion for judgment as of nonsuit is to be considered in the light of the whole case. The record is free from any conflict of evidence on this point, and, in considering the motion at the close of the entire evidence, the defendant's testimony, where not in conflict with that of the prosecution, may be used to explain or to make clear what has been offered by the State. This was the purpose of the Legislature in providing that such motion might be renewed at the conclusion of all the evidence.

The case was not settled by the judge, and it is possible that some of the evidence does not appear in the statement of case on appeal; but, upon the instant record, we are disposed to grant the defendant's motion for judgment as of nonsuit. Fulcher had a right to shield his boy from harm, and it does not appear that he used any excessive force. *S. v. Harrell,* 107 N. C., 947. On the contrary, the prosecuting witness seems to have been the aggressor, from the beginning to the end, and she apparently provoked all that took place. Indeed, such is the irresistible conclusion to be drawn from the State's evidence.

It is true that in a case of this kind, where the defendant has the burden of exculpation, it is often very difficult to determine just what evidence will warrant the judge in taking the case from the jury. In many instances, perhaps, it will call for careful discrimination. *S. v. Bridgers,* 172 N. C., 882.

The motion we are now considering was made under C. S., 4643, a statute which serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by C. S., 567, in civil actions. Originally, under this latter section, in cases to which it was applicable, there was considerable doubt as to whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Wright v. R. R.,* 155 N. C., 329; *Horne v. R. R.,* 170 N. C., 660, and cases there cited.

For like reason, and in recognition of the avowed purpose of the statute applicable to criminal cases, we are of opinion that where a complete defense is established by the State's evidence, a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit. See *S. v. Johnson, ante,* 637.

In the instant case and on the present record we think the action should have been dismissed.

Reversed.

WALKER and ADAMS, JJ., dissent.

STATE v. O. G. THOMAS.

(Filed 25 October, 1922.)

Appeal and Error—Case—Settlement by Judge—Mistake—Certiorari.

The case on appeal, as settled by the trial judge, imports verity, and must be accepted as absolutely true in the Supreme Court on appeal; and unless it is made to properly appear by the judge's own statement that he will correct the record as to matters relied on by the movant, a motion for writ of *certiorari* will not be granted; the averment of the movant's belief that the judge will supply the omission if afforded an opportunity is insufficient.

THE defendant was convicted of a felony and files his petition for *certiorari* to correct the case on appeal.

J. J. Parker for petitioner.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

ADAMS, J. At the January Term, 1922, of the Superior Court of Cabarrus County, the defendant was convicted of murder in the second degree, and from the judgment pronounced he appealed to the Supreme Court. His appeal in apt time was docketed at the spring term, but as the case on appeal had not then been settled, a *certiorari* was granted on motion of the defendant, after which the case on appeal was settled by the trial judge, and in due time was certified and filed in the office of the clerk of this Court.

The defendant now files his petition for a second writ of *certiorari,* on the alleged ground that the case on appeal does not correctly and truly set forth certain things which occurred on the trial and omits matters which are important for the defense. To set out in detail the particular matters referred to in the petition would serve no useful purpose. In his petition the defendant alleges that he "has reason to believe, and does believe, that said omissions and misstatements were made by reason of mistake or inadvertence on the part of Judge Ray, and that he will supply the omissions and correct the misstatements if the court will direct to him a writ of *certiorari* empowering and *directing* him to certify to this Court the truth with regard to the said matters." In the defendant's brief his counsel say, "We feel that an application to him [the trial judge] by us for a letter [suggesting that the case on appeal should be amended] would be worse than futile." So far as the record shows the judge who tried the case has not indicated his readiness to change his statement of the case on appeal. Nor has he been asked to do so. The defendant requests us to hold that the case on appeal is

incorrect notwithstanding the judge's certificate that it is correct. Such procedure would lead to interminable perplexity. In a number of cases it has been held that the settlement by the trial judge of a case on appeal to the Supreme Court imports verity and must be accepted as absolutely true, and that a *certiorari* will not be granted requiring him to make up a new case or to insert matters alleged to have been omitted. *S. v. Gay,* 94 N. C., 822; *S. v. Gooch, ibid.,* 982; *S. v. Journigan,* 120 N. C., 568; *Cameron v. Power Co.,* 137 N. C., 101; *Slocumb v. Construction Co.,* 142 N. C., 349; *S. v. Faulkner,* 175 N. C., 788. In *Barber v. Justice,* 138 N. C., 21, the *Chief Justice* said: "It is only when the judge has settled the case, in the exercise of his proper jurisdiction, that upon affidavit of error therein and a letter from the judge that he will correct it if given the opportunity, the Court will give him such opportunity. Such letter from the judge is required, not as a courtesy to him, nor as an acknowledgment of any inherent discretion in him, but because it would usually be doing a vain thing, and most often would result in needless delay, to grant a *certiorari* to give the judge opportunity to correct a case, already certified by him as correct, unless counsel have had the diligence to procure a letter from the judge that he wishes to make the correction." For these reasons the petition is denied.

Petition denied.

STATE v. E. F. MALLARD.

(Filed 25 October, 1922.)

Indictment — Motion to Quash—Jurors—Selection—Qualification—Statutes, Directory—Grand Jury.

The board of county commissioners, in drawing the names for the grand jury, placed the scrolls with the names of the qualified jurors separately in envelopes, as to each precinct, with the name of the precinct marked on each envelope, and proceeded to draw the jurors apportioned to each precinct from the scrolls of names of the jurors therefrom, placed in box No. 1, and drawn by a child under ten years of age, with the purpose and effect of thus drawing from each and every of the precincts of the county its proportionate number of qualified jurors. In other respects the directions of the statute, C. S., 2212, 2213, 2214, were complied with, and this having been done in good faith, and without the opportunity for fraud: *Held,* these statutes being directory upon the matter excepted to, except as to the qualification required of jurors, the irregularity complained of did not invalidate the indictment of the defendant in this case, and his motion to quash it for irregularity was properly denied. The importance of conforming to the directory provisions of these statutes emphasized by WALKER, J.

STATE *v.* MALLARD.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1922, of BRUNSWICK.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McLean, Varser, McLean & Stacy, associate counsel for State.

Rountree & Carr and John D. Bellamy & Son for defendant.

WALKER, J. The defendant was indicted in the court below for willfully, fraudulently, and corruptly embezzling and converting to his own use certain money, checks, notes, bonds, mortgages, and other valuable papers and securities, to the amount of $107,000, belonging to the Citizens Bank of Shallotte, in Brunswick County.

The defendant was convicted of the embezzlement at the April Term, 1922, of Brunswick County Superior Court, and from the sentence of five years in the State's Prison appealed to this Court. There is only one point presented in the appeal. The defendant at the proper time, before pleading to the bill of indictment, entered a plea in abatement on the ground that the bill of indictment was found by an illegally constituted grand jury. It seems from the evidence that in Brunswick County, certainly since 1906, the jurors of the various Superior Courts have been chosen in the following way: At the time for the revision of the jury list, at the proper biennial period, the board of commissioners revised the same in the manner provided by the statute, C. S., 2312. They also caused the names of the jury list to be copied on small scrolls of paper of equal size and put in a box procured for that purpose, having two divisions, marked Nos. 1 and 2. Instead, however, of putting all these scrolls loosely and indiscriminately in box No. 1, they divided the same according to the residence of the taxpayers in the townships of the county. The scrolls of residents of a particular township were enclosed in a large envelope, which was sealed. In this way the names of all jurors belonging to a particular township were placed in an envelope marked with the township's name, and then the envelopes were placed in box No. 1. When the time came on to draw jurors for a term of the Superior Court, the board of county commissioners, having assigned to each township, according to its population, a proper and just proportion of the jurors so to be drawn, took from box No. 1 the envelopes containing the scrolls of the taxpayers for a particular township, emptied the same in a hat and had a child, under ten years of age, to draw from it the number of jurors assigned to that township. They continued this process, thus distributing the jurors throughout the whole county in proportion to the population of the various townships. The names not drawn, but left in each envelope, were again enclosed in that envelope and returned to box No. 1, while the names of the jurors drawn were

put in box No. 2, in accordance with the statute. This had been the custom, as above stated, in Brunswick County for many years, and there was no corruption or bad faith in thus drawing the jury, but it was all done with a good motive, if not the best of motives, the purpose being to distribute the jurors equally among the several townships or portions of the county. The grand jury in question, which found the bill, was drawn by a child under ten years of age from a hat, as above described.

It seems to have been quite definitely decided by the court, in several cases, that the irregular action of the board of county commissioners, where there is no fraud or corruption, and no opportunity for fraud, on the part of the person interested, in drawing a jury not in strict accordance with the statute, does not invalidate the array.

In *S. v. Martin,* 82 N. C., 672, the commissioners refused to put on the list of jurors names which were drawn because they thought too many were drawn from one section of the county, and, wishing to equalize the number among the different townships, they were put back in the box and others drawn in their stead. More was done, and of a more serious character, than was done here. The Court refused to allow the challenge of defendant's counsel to the array in that case. It appears to us that what the commissioners did in *S. v. Martin, supra,* departed further from the letter of the law and its substance or spirit than what was done by the commissioners of Brunswick in this particular case. There the commissioners, after drawing the scrolls, and knowing the names thereon, refused to put them on the jury list of their own accord. Here, however, the names already separated, or segregated, according to townships, were drawn by a child under ten years of age from a hat after they had been mixed up indiscriminately, and only that number drawn and put on the list to which the township, as the commissioners verily believed, was entitled according to its proportion of population. There could, therefore, be no opportunity or chance for fraud. The general effect of the act of the commissioners was to distribute the jurors to each of the townships throughout the county.

In *Moore v. Guano Co.,* 130 N. C., 229, Stanley, one of the commissioners, objected to a number of names in Shallotte Township, and those names were discarded and returned to box No. 1. Sheriff Walker also objected to several from Town Creek Township. When the name of Monroe Hickman was drawn, some one said, "He is right there among the rest," meaning that he was drawn from the same community, or neighborhood, as others whose names had been drawn. Commissioner Stanley, however, replied, "I want him," and his name was placed on the list. Stanley's own son was selected, he, the father, having stated that his son was so anxious to come to Southport that he had better be taken. The challenge to the array was allowed in that case.

In *Boyer v. Teague,* 106 N. C., 576, the defendant Teague was sheriff of the county and a party to the particular action. There was no actual or intentional fraud, but the challenge to the array was allowed because the commissioners permitted Teague to participate in the drawing. In each of these cases, though, there was no actual fraud established by proof, yet the action of the commissioners was such as to open the door to fraud, and for that reason the challenge to the array was allowed, and properly so, as the personnel of the jury was made to depend, to some extent, at least, upon the will, or conduct, of an interested party.

S. v. Perry (Hatton), 122 N. C., 1018, was to this effect: "It has always been held that the regulations in The Code, secs. 1722 and 1728 (now C. S., 2312 to 2319, inclusive) are directory only to the board of county commissioners, and while they should be observed, the failure to do so did not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners." All of the previous cases seem to have been cited in that case.

In *S. v. Dixon,* 131 N. C., 808, it appears that, at the time of the revision of the tax list in June, 1901, the commissioners added no new names to the jury list, but had purged the box by taking out the names of those who had not paid their taxes. This, though an irregularity, was held by the court not to be sufficient ground for challenge to the array, citing *S. v. Perry, supra,* and other decisions, and then proceeded: "These cases are not overruled in *Moore v. Guano Co.,* 130 N. C., 229, which merely holds that the conduct of the county commissioners in that case went beyond mere irregularity, and involved a matter so serious in its nature as to invalidate the panel drawn in such a manner."

In *S. v. Daniels,* 134 N. C., 641, the Court again reaffirms the principles set forth in the older cases. There the county commissioners failed to make the prepayment of taxes a qualification for persons on the jury list. Again the Court in that case distinguishes *Moore v. Guano Co., supra.*

In *S. v. Teachey,* 138 N. C., 587, the board of commissioners revised the jury list at a time not fixed by the statute, and included in it names of persons otherwise qualified, but which did not appear upon the tax list. It was held that this was a sound objection to the panel.

In *S. v. Banner,* 149 N. C., at p. 521, the objection was that three years had elapsed without a revision of the jury list by the board of commissioners. It was held that this did not avoid the panel. There was a challenge to the array in *Lanier v. Greenville,* 174 N. C., 311, and the challenge was overruled, though the irregularities in that case were apparently much greater than they are in this. The subject is referred to again in *S. v. Wood,* 175 N. C., 819.

It is admitted by the State in this case that the defendant is entitled to have the bill of indictment found by a grand jury, the individual members of which are legally qualified to act as grand jurors. *S. v. Baldwin,* 80 N. C., 390; *S. v. Smith, ibid.,* 410; *S. v. Watson,* 86 N. C., 624; *S. v. Sharp,* 110 N. C., 604; *S. v. Paramore,* 146 N. C., 604. In this instance, however, there is not the slightest attack upon the competency of any individual upon the grand jury to serve as a grand juror. It is admitted, and so found by the court, that there was no fraud or collusion in the selection of this particular grand jury. There was a mere irregularity, which in itself was intended to promote justice and to prevent fraud and collusion. In every case cited above, from *S. v. Seaborn,* 15 N. C., 305, to *S. v. Perry, supra,* such irregularities have been held not a ground of challenge to the array, the statute being directory in those matters not concerning the essence of the jury's constitution.

The State has requested us, in a supplemental brief, to still further consider and review the authorities upon this important question, and we will now proceed to do so, at the risk, perhaps, of slight repetition, but the case is of sufficient moment to justify it, and especially so as there have been expressions used in some of the cases heretofore decided which seem to be misleading and are apt to produce confusion.

The court found the following facts:

1. That there was no corruption nor bad faith in drawing the jury.

2. That the jury list was revised each two years, as required by statute.

3. That the grand jury which found the bill was drawn by a child under ten years of age, and from the jury list so constituted and as contained in the several envelopes.

4. That the jury was apparently drawn from the several townships proportioned according to population, as disclosed by the evidence and cross-examination of John Jenrette, chairman of the board of commissioners.

C. S., 2212, provides, as to the manner for the selection of those from whom the jurors shall be drawn, that three qualifications shall be necessary: (1) taxpaying citizens; (2) those of good moral character; (3) persons of sufficient intelligence. All of these qualifications existed in this case, according to the testimony of the witness Jenrett and the findings of fact.

Section 2313 provides as follows: "The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names of their jury list to be copied on small scrolls of paper of equal size and put into

a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, and the other by the chairman of the board of commissioners, and the box by the clerk of the board.

In the present instance two boxes, marked No. 1 and No. 2, were used, and there was a proper observance of the statute with reference to these boxes. The statute does not, in terms, prevent or prohibit the name of the township from being written on the slip containing the name of the juror, and this is the practice in most counties for the evident purpose of showing the residence to the process officer in summoning the jury. In this case, the only variation from the custom was that all the names from a particular township were put in one envelope and the township name written on the outside of the envelope. It is admitted, as well as found by the court, that all of this was done in good faith, and was without corruption or bad motive.

The State contends that there is nothing in section 2314 which prohibits this method or requires the drawing of the jury to be done otherwise. That this section, in other respects, was scrupulously complied with, and the jury drawn out of box marked No. 1, and in addition to the regulations of the statute, the commissioners added the precaution of drawing the jury from the townships proportionately. That even if this case presented a violation of the provisions of the statute with reference to drawing the jury, which are merely directory, and such violation was done in good faith, no reversible error could be declared. That there is no material violation of the statute in the present case, but even if there was, it could not invalidate the venire in the absence of bad faith or corruption. These are some of the contentions of the State.

The Court, in *S. v. Banner,* 149 N. C., 519, when passing upon a similar motion in a capital case, used this language: "Besides the regulations contained in sections 1722-1728 of The Code (then Rev., secs. 1957-1960, now C. S., secs. 2312-2314), relative to the revision of the jury list, are directory only, and while they should be observed, the failure to do so does not vitiate the venire, in the absence of bad faith or corruption on the part of the county commissioners. *S. v. Dixon,* 131 N. C., 810; *S. v. Perry,* 122 N. C., 1021; *S. v. Daniels,* 134 N. C., 641. *S. v. Teachey,* 138 N. C., 591, cited by the defendant, holds that the jury list may be revised at dates other than those specified in the statute, and if properly done at such times, the list will be sustained. The Court, in the *Teachey case, supra,* quotes from the opinion of *Justice Connor,* in *S. v. Daniels,* 134 N. C., 648, as follows: "It has been held from the earliest period of our judicial history that the provisions of these statutes are directory and not mandatory."

In the case of *Moore v. Guano Co.*, 130 N. C., 229, cited by the defendant, the Court was of the opinion that the method of allowing commissioners to throw out such names as were drawn by the child under ten years, in any given community, and put in the son of one of the commissioners and to take another juror, because one of the commissioners said, "I want him," and such other unseemly and unwarranted rejection of those drawn, was not evidence of good faith, but was essentially and morally wrong. And, therefore, the State contends that *Moore v. Guano Co., supra,* cannot be a controlling authority in this case.

In *S. v. Hensley,* 94 N. C., 1021, the Court held that the regulation with reference to revising and correcting the jury list, and placing the names in the box and not keeping the boxes locked and safely protected, were highly important, but only directory and not mandatory, and used this significant language: "It is only strictly necessary that the person summoned to be a juror shall be eligible as such in other material aspects."

In *S. v. Potts,* 100 N. C., 457, the commissioners did not label the boxes No. 1 and No. 2, as required by the statute, but marked them "Jurors drawn and jurors not drawn," respectively, and had only one key, which was kept by the register of deeds, and the Court held this did not invalidate the venire drawn from it, citing *S. v. Hensley, supra.*

In *S. v. Watson,* 104 N. C., 736, the Court, through *Shepard, J.,* censured the commissioners severely for disregarding the plain provisions of the statute, but sustained the venire, and refused the defendant's motion to quash, because they were directory only, and relied upon *Hensley's case, supra. S. v. Martin,* 82 N. C., 672; *S. v. Haywood,* 73 N. C., 437, which cases hold that in the absence of a corrupt motive the failure to strictly observe the law (now C. S., 2312-2314) does not invalidate the venire.

The drawing of a jury not in strict accordance with directory provisions of the statute is nevertheless valid if it is otherwise properly done, and certainly so if no prejudice appears. *Lanier v. Greenville,* 174 N. C., 311.

S. v. Wilcox, 104 N. C., 847, held by a divided Court that where the county commissioners, while drawing the jurors, laid aside the names of several persons who were actually qualified, but were then supposed to be nonresidents, and completed the jury list by substituting other qualified persons, and such action was taken in good faith, it did not invalidate the venire. This case clearly distinguishes the rule applying to the case at bar from the rule announced in *Moore v. Guano Co., supra.*

Our attention is called to the fact that while, of course, the Legislature has full power to prescribe the method of selecting juries, and the defendant has no constitutional right in any particular method of doing

so (*S. v. Brittain,* 143 N. C., 668), several counties have different methods and different regulations, sanctioned by the Legislature, some of which are collected in C. S., 2315.

This Court has had occasion frequently to consider the question now before us. It is highly conducive to the fair and impartial administration of justice that these details of the statute should be strictly observed and followed, and any intentional nonobservance of them is the subject of censure, if not of punishment. But it is well settled that they are only rules and regulations, which are directory, and have never been held to be mandatory where the persons summoned are qualified jurors in other respects. *Bynum, J.,* in *S. v. Haywood,* 73 N. C., 437, quoted with approval in *S. v. Daniels,* 134 N. C., at p. 649. It will be found by an examination of the decisions of this Court that the views expressed by *Justice Bynum* in the *Haywood case, supra,* and those in *S. v. Daniels, supra,* have been generally adopted by this Court. There are seeming departures from them in several of the cases, but when the opinions of the Court are examined in the light of the facts in each particular case, it will be found that the discrepancies are more apparent than real. *Moore v. Guano Co.,* 130 N. C., 229, may be well selected as a leading type of one class of such cases. The language of *Chief Justice Furches* in that case is, at times, very caustic and condemnatory of what was termed the irregular action and conduct of the commissioners of this same county in drawing the jury. But even a cursory examination of that case will disclose the fact that there the commissioners had not only disregarded the terms of the statute and selected a jury in a manner virtually forbidden by law, at the request of interested persons, who were present, but had actually dispensed with the use of a boy under ten years of age, and the commissioners themselves instead performed the function allotted to him, and the irregularities in that case were of a substantial character and calculated, if permitted, to withdraw from those entitled to the protection of the law in such vital matters affecting their rights, liberty, and property, the safeguards so carefully provided for their preservation. We cannot concur in all that was said by the learned judge who spoke for the Court in *Moore v. Guano Co., supra,* but in the main we do concur with him, and condemn any and all departures from the terms of the statute, though we may not hold that they are so far mandatory in character as to require strict conformity to them in certain instances.

It is not for the commissioners, or others selected to perform public duties, to substitute for the methods chosen by the Legislature those of their own as being more desirable and better adapted to accomplish the end in view. It is sufficient that the law-making body, appointed by the Constitution for the purpose, has declared its will and its conception

of the best public policy and expediency, and there can be no disagreement among us as to the positive duty of the commissioners to act as, and in the manner, the statute requires and directs, and for an intentional failure to do so they will be "subject to censure if not to punishment," as said by *Judge Bynum* in *S. v. Haywood, supra.* We wish it distinctly understood that we do not approve or sustain, in this case, what the commissioners did in selecting the jury, because they disobeyed the law, but we simply hold, as we have for so long a time held with substantial consistency, that the provisions of the law disregarded by them are directory, and as no harm has come to the defendant, and the commissioners acted in good faith and with no wrong motive, we will not permit their conduct to have the baneful effect of invalidating the indictment, and we add that while we do this in the interest of public justice, it is with the hope and belief that officers charged with the performance of such grave public duties, the neglect of which may entail serious consequences to the public, will hear—and we earnestly hope that they will heed—what we have said in respect to their official obligations. It was asserted before us that this procedure in selecting jurors in this county had been one of very long continuance, and this was suggested, in a measure, as being in the nature of a justification of it. But not so at all. No violation of the law can ever be hallowed, and certainly not excused, or even palliated, because it is suffered to have the merit, or rather the demerit, of age and frequent repetition. But not so, as the longer it continues the more reprehensible it becomes. The better view is that the Legislature writes the laws and we should obey them as they are thus written (*ita lex scripta est*). And thus has it been crystallized into this familiar maxim of the law.

To sum it up: Our courts have not approved the doctrine as formulated and adopted, in *O'Connell and Others v. The Queen,* 11 Ch. & Fin., 15, by the House of Lords, and from which *Lord Denman* so vigorously dissented, but the more reasonable one, as stated in Thompson on Trials, sec. 33, and in *People v. Jewett,* 3 Wendell, 314, and expressly approved by this Court in numerous cases, and especially in *S. v. Daniels,* 134 N. C., 650, where it is said: "The extent to which the authorities go is thus set forth in Thompson on Trials, sec. 33: 'Statutes which prescribe the manner of selecting by county, town, or other officers, the list of persons liable to jury duty from which the panel is drawn, are generally treated as directory merely. It is hence a general rule that irregularities in the discharge of this duty constitute no ground for challenging an array. If the jurors who have been selected and drawn are individually qualified, that is usually deemed sufficient.' In *People v. Jewett,* 3 Wendell, 314, *Savage, C. J.,* says: 'By the act directing the mode of selecting grand-jurors, passed in 1827, the duty of making the

selection is conferred upon the supervisors of the several counties of the State. They are required to select such men only as they shall know, or have good reason to believe, to be possessed of the necessary property qualifications to sit as petit jurors; to be men of approved integrity, of fair character, of sound judgment, and well informed. Thus the qualifications of the grand jurors are defined by statute, and if those selected possessed the required qualifications there can be no objection to the array. A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious.' The learned *Chief Justice* further says: 'But if they (the officers) did thus err, the array cannot for that reason be challenged. While those who are selected are unexceptionable, the fact that others equally unexceptionable are excluded is no cause of challenge of the array. A challenge can be supported only by showing that the persons selected are not qualified according to the requirements of the statute.'" The right of challenge is a right only to object and not to select.

Although the commissioners acted with the highest and most laudable motive—the desire to promote the public interest by securing, in all cases, intelligent and impartial juries—it is yet better, in the administration of the law, and especially of a statute, to follow the method and directions prescribed therein, as a departure from them may, as in this case, be productive of useless litigation, and for the additional reason that it is the rule the Legislature has enacted, where it had full power to adopt it as the only one; and, moreover, in this instance, it is simple and easy to follow.

We adhere to our former decisions, as we understand them, and applying them to the facts of this case we must refuse to quash the bill and discharge the defendant.

No error.

STATE v. R. A. VICKERS.

(Filed 25 October, 1922.)

1. Criminal Law—Sentence.

The sentence of a defendant for a criminal offense does not require the fixing of the commencement of the term of the imprisonment, and is complete if it specifies the kind of punishment to be inflicted and the duration thereof.

2. Same—Courts—Capias—Clerks of Court—Sheriffs.

A court having jurisdiction may order the arrest of one already convicted, for the enforcement of its sentence, if the defendant is present at the time; and if not present, the court may order a *capias* to be issued by the clerk to bring him before the court for sentence.

3. Same—Judgments—Suspended Judgments.

An order for the arrest of a defendant by *capias* to be issued by the clerk of the court, for the enforcement of its sentence, upon the application to him by the sheriff of the county, is not in that respect a suspended judgment.

4. Habeas Corpus—Appeal and Error—Certiorari.

An appeal to the Supreme Court will not lie from the denial of a petition in *habeas corpus* proceedings, such as were taken in this case, the remedy being by application to this Court for a writ of *certiorari.*

APPEAL by defendant from *Kerr, J.,* at March Term, 1922, of DURHAM.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. O. Everett and J. R. Patton, Jr., for defendant.

WALKER, J. This is an appeal from an order of Kerr, J., made at the March Term, 1922, in proceedings for a writ of *habeas corpus,* by which he ordered the defendant into the custody of the sheriff of Durham County to serve a sentence of twelve months on the public roads of said county, imposed by Horton, J., at the February Term, 1921, of the Superior Court.

It is clear that no appeal lies from such an order. The defendant should have applied to this Court for a writ of *certiorari. S. v. Yates,* 183 N. C., 753; *Ex parte McGown,* 139 N. C., 95.

The judgment, as entered by Judge Horton, at February Term, 1921, of Durham County Superior Court, was as follows: "The defendant comes into open court and pleads guilty of receiving more than one quart (of liquor) within fifteen days. The court then orders that the defendant be sentenced to twelve months on the roads, with *capias* to issue at the request of the sheriff of Durham County." The judgmnt was actually entered on 5 March, 1921. On 22 February, 1922, the sheriff of Durham County applied to the clerk of the Superior Court of that county for a *capias.* The *capias* on which the defendant was arrested was issued by the clerk on 6 March, 1922. The defendant was arrested under this *capias,* and while in the custody of the sheriff, and before entering upon the service of his term, the writ of *habeas corpus* was sued out before Judge Kerr. The testimony taken upon the return of this writ is contained in the record.

It is evident, we think, that the form of the judgment as rendered by Judge Horton was adopted at the suggestion of, and for the benefit of the defendant. It is in no sense a suspended judgment. *S. v. Burnette,* 173 N. C., 734, and *S. v. Hardin,* 183 N. C., 815. On the contrary, the judgment was a direct one, sentencing him to the public roads of Durham County for a period of twelve months, the execution of the sentence, however, to be delayed until the sheriff asked for a *capias.* In North Carolina, and it is so in numerous other jurisdictions, the time at which a sentence shall be carried into execution forms no part of the judgment of the court. *S. v. Cockerham,* 24 N. C., 204; *S. v. McClure,* 61 N. C., 491; *S. v. Cardwell,* 95 N. C., 643; *S. v. Yates, supra.* In the latter case, many of the decisions from this and other states are cited. This Court has been very emphatic and definite upon this question. In *S. v. Cardwell, supra,* referring to and adopting the language of *Gaston, J.,* in *S. v. Cockerham, supra,* the Court said: "Upon the defendant appearing in court, and his identity not being denied, and it being admitted that the sentence of the court had not been enforced, it was proper to make the necessary order for carrying the sentence into execution. So, in the present case, it was the duty of the judge, not so much again to sentence to death, but recognizing as in force the judgment before rendered, to direct that it be carried into effect." And in *S. v. McClure, supra,* the Court (by *Reade, J.*), also citing *Cockerham's case, supra,* held: When it came to the knowledge of the court that the defendant had not suffered the punishment, it was proper to order process of arrest against him, and upon his appearance in court, to order the execution of its former judgment. . . . It was, therefore, error in his Honor to discharge the defendant under the idea that the process for his rearrest was unauthorized. If there had been no process at all, it would have been proper for the court to order him into custody (he being in court) and to order the execution of its judgment. In *S. v. Gaskins,* 65 N. C., 320, the defendant contended that the judgment was defective and ought not to be executed, as it did not specify with sufficient certainty the term of his punishment or confinement in the State's Prison. But the court rejected the suggestion of counsel, as unwarranted by the law, it being quite sufficient that the term be fixed by the judge within certain limits. And this seems to be the almost universal rule. The Attorney-General, in *McClure's case, supra,* contended that one escaping, or at large when he should not be, is always supposed to be in custody, at least constructively, and when actually present in court, it will proceed to judgment, or direct one formerly given to be carried out, and for this he cites 2 Hale P. C., 407; 1 Hale, 566, and *Cockerham's case, supra,* and his position was sustained by this Court. 61 N. C., 492.

It is stated in 18 Corpus Juris that, as a rule, the duration of imprisonment must be stated clearly and definitely, although it has been held that when the period of imprisonment is definitely fixed by statute, such period need not be specified in the sentence. As a general rule, the time for imprisonment to commence, or to be inflicted, is no part of the judgment or sentence proper, and according to the weight of authority, in the absence of a statute requiring it, the time when the imprisonment is to begin or end need not be specified in the sentence, it being sufficient to state merely its duration. 16 R. C. L., p. 1304 (sec. 3079); *Gaskin's case, supra.* But we very recently passed upon the question, when it was said that the time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the same at all. The essential portion of the sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it shall begin to be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should, as a rule, be strictly executed. But the order of the court, with reference to the time when this shall be done, is not so material. Expiration of the time without imprisonment is in no sense an execution of the sentence. *S. v. Yates,* 183 N. C., 753-758, citing cases. And to the same effect is 8 Ruling Case Law, sec. 230, where it is stated that a sentence which does not specify any time for the imprisonment to commence is not void. The better practice is not to fix the commencement of the term, but merely to state its duration and the place of confinement, where the statute does not otherwise provide. *Ex parte Gafford,* 25 Nev., 101 (83 A. S. R., 568) Bishop's New Cr. Proc., 804.

It can hardly be questioned that when the court was informed that its judgment had not been enforced, it was not only authorized, but it was its duty to provide for the commitment of the convict in execution of the sentence.

In December, 1918, the Circuit Court of Appeals of the United States, sitting at Richmond, in *Burstein v. U. S.,* 254 Fed., 955, had before it a similar question, and the Court declared that the time when a sentence of imprisonment shall commence, although specified in the same entry, is properly no part of the sentence, and may be changed by the court at a subsequent term, if for any reason execution of the sentence has been delayed. In our case, Judge Kerr directed that the defendant be committed to the custody of the sheriff that he may serve the sentence of twelve months imposed by Judge Horton. This is more than an order remanding him. It requires, also, the service of the twelve months upon the roads. In this point of view, the *Burnstein case, supra,* is also material. In that case, the Court further held, that although the order

so recites, we think it inaccurate to say that he was resentenced, since the court made no change in the original sentence, but merely changed the previous direction as to the time when imprisonment should begin.

In that case it was also held, in accordance with the authorities, that such an order (that is, an order fixing the time at which the sentence is to begin) is not a judicial, but merely a ministerial act, citing 12 Cyc., 784; 16 C. J., 1304; *Holden v. Minn,* 137 U. S., 483; *Schwab v. Bergren,* 143 U. S., 442.

It is manifest, then, we think, that if the judge had no authority to leave the time at which the *capias* should be issued to the discretion of the sheriff, that is no part of the judgment, and so under the circumstances of this case it may be enforced at any time for the full term upon an order of the court, as the defendant was in court, or upon the issuing of a *capias* by the clerk of the Superior Court under the direction of the judge, if he was not in court.

It would be a mockery of justice if the defendant could, upon such slight departure from correct procedure, escape the lawful punishment for his crime.

Appeal dismissed.

STATE v. S. G. BRADSHAW.

(Filed 1 November, 1922.)

Intoxicating Liquor—Spirituous Liquor—Statutes—Evidence—Possession—Criminal Law.

Evidence that half a gallon of whiskey, in a fruit jar, and one pint thereof, in a bottle, were found concealed in defendant's overcoat, hanging in his store, and of his breaking the jug and bottle in the officer's presence, and saying, "Damn it, if I can't drink it, I guess you won't get to drink it either," is sufficient to sustain a verdict that the defendant was guilty of receiving more than one quart of spirituous liquor at one time, or in a single container or package, as prohibited by C. S., 3385.

APPEAL by defendant from *Kerr, J.,* at the June Term, 1922, of ALAMANCE.

Criminal prosecution, tried upon an indictment charging the defendant with receiving more than one quart of spirituous liquors at one time, or in a single package, in violation of C. S., 3385.

From an adverse verdict and judgment thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel for defendant.

STACY, J. The only exception presented for our consideration is the one directed to his Honor's refusal to grant the defendant's motion for judgment as of nonsuit.

It appears from the State's evidence—there was none offered by the defendant—that Sheriff Story and his deputy, while searching the premises of the defendant on 22 February, 1922, found one pint of corn whiskey in the pocket of an overcoat, hanging on the wall of defendant's store, and one-half gallon of corn whiskey in a fruit jar which was tied in the sleeve of the overcoat. The defendant admitted that the overcoat belonged to him. The officers also found in defendant's store a number of fruit jars which had the odor of whiskey about them. Soon after the witnesses had found the whiskey and set it on the counter, the defendant broke both vessels, remarking at the time: "Damn it, if I can't drink it, I guess you won't get to drink it either."

This evidence was amply sufficient to warrant the jury in finding, as they did, that the defendant had received more than one quart of spirituous liquors at one time, or in a single container or package, as prohibited by C. S., 3385. The evidence here is fully as strong as that in the case of *S. v. Alston,* 183 N. C., 735, where a similar conviction was sustained.

No error.

STATE v. J. S. PULLIAM.

(Filed 1 November, 1922.)

1. Constitutional Law—Trial by Jury—Criminal Law—Facts Agreed.

In order for a conviction of a criminal offense, including misdemeanors, it is required by Article I, section 13, of our State Constitution that the final sentence be upon a "unanimous verdict of a jury of good and lawful men in open court," etc., and the accused cannot be lawfully convicted otherwise, though he has agreed with the solicitor upon the facts in the case, under a plea of not guilty, and the judge has found him guilty upon the agreed facts, as a matter of law, and imposed a sentence.

2. Same—Inferior Courts—Superior Court—Trial de Novo.

The right to a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial *de novo* in the Superior Court on appeal from a court of subordinate jurisdiction, and conviction in the Superior Court cannot be had unless upon the verdict of the jury, in accordance with the provisions of Article I, section 13, of our Constitution. Const., Art. I, sec. 12.

3. Same—Appeal and Error.

While the sentence in this criminal action was unlawfully imposed by the Superior Court upon the facts agreed, and the judgment is set aside,

the Supreme Court, on appeal, passes upon the legal inferences upon which it is founded, under the reasons stated in *S. v. Wells*, 142 N. C., 596.

4. Statutes—Sunday—Transaction of Business.

An act which makes it a crime to expose for sale or selling, or offering for sale, on Sunday, any goods, etc., within four miles of an incorporated city, etc., and in the same sentence, divided by a semicolon, prohibits the keeping open of any store, etc., on Sunday, does not permit the keeping open of the store for the sole purpose of running a restaurant therein on Sunday, for the sale of food, etc., though the latter may not be of itself unlawful, when conducted in a separate place of business.

5. Constitutional Law—Statutes—Transaction of Business.

A statute which prohibits as a criminal offense the exposing of goods, merchandise, etc., for sale, and keeping open of a store on Sunday, except for the sale of drugs, etc., is constitutional and valid.

APPEAL by defendant from *Brock, J.*, at July Term, 1922, of FORSYTH.

The defendant was prosecuted in the municipal court of the city of Winston-Salem, the charge against him being that "at and in the county aforesaid, and within the corporate limits of the city of Winston-Salem, or within one mile of the corporate limits of the city of Winston-Salem, he did unlawfully and willfully keep his store, shop, fruit stand, ice-cream stand, or soft-drink stand open on Sunday, for the purpose of the sale of goods, merchandise, and soft drinks, and did sell coca-cola and other soft drinks on Sunday, against the statute in such cases made and provided, and against the peace and dignity of the State, and in violation of the city ordinance." At the trial he was found guilty by the court, without a jury, adjudged to pay a fine of $10 and costs, from which judgment he appealed to the Superior Court, in which he was tried upon a case agreed upon by the solicitor and the defendant's attorney, wherein the following facts are stated: "That the defendant's place of business is outside of the corporate limits of the city of Winston-Salem, N. C., and within one mile of said corporate limits. That he ran and operated, and had license to do, a cafe business, serving food and lunches; ran and operated, and had license to run and operate, a cigar stand, and sell tobacco products; that he ran a soft drink stand and sold coca-cola and other soft drinks during the week days. That on Sunday, 9 July, 1922, between 11 and 12 o'clock a. m., the defendant was running his cafe and selling food and ice-cream to his guests. That he was selling ice-cream on the porch in front of his cafe or store to any person who chose to buy. The store was open and there were groceries on his counter, and soft drinks in cases exposed to view of his customers. That said groceries and soft drinks were in the same place in said building on said Sunday as on other days of the week, all of said business being in the same room.

There is no proof that he sold or offered to sell on said Sunday anything but food and ice-cream to his customers."

The defendant was convicted in the Superior Court, but without a jury, the judge alone passing upon the facts, and adjudging therein that he pay a fine of $15 and the costs, from which judgment he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Raymond G. Parker for defendant.

WALKER, J. This was a criminal action heard on appeal from the municipal court of the city of Winston-Salem, by Brock, J., at the July Term, 1922, of the Superior Court of Forsyth County. The warrant in the municipal court, upon which the criminal action in that court was founded, charges an offense against chapter 320 of the Public-Local Laws of 1919, as amended by chapter 200 of the Public-Local Laws of the Extra Session of 1920. The act is commonly known as the "Forsyth County Sunday-closing law," and was considered by this Court, before the amendment of 1920, in *S. v. Shoaf,* 179 N. C., 744. The original act is C. S., 3957.

Without waiving expressly or specifically a jury trial, the solicitor and the attorney for defendant submitted the question involved herein to Judge Brock for his decision upon a case agreed, without either a general or special verdict of a jury.

We have been unable, after a careful search, to find any case in this Court which permits a defendant to waive a trial by jury in a criminal action in the Superior Court, but several to the contrary. *S. v. Stewart,* 89 N. C., 563; *S. v. Holt,* 90 N. C., 753; *S. v. Scruggs,* 115 N. C., 807; *S. v. Wells,* 142 N. C., 596.

Section 13 of Article I of the Constitution is as follows: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."

The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial, in the Superior Court, and therefore cannot justly complain that he has been deprived of his constitutional right.

The act of the General Assembly, under which the municipal court of Winston-Salem was established, expressly provides that "any person

convicted in said court shall have the right of appeal to the Superior Court of Forsyth County, and upon such appeal the trial in the Superior Court shall be *de novo.*"

The offense here, of course, is a petty misdemeanor, but this Court has held that the expression used in the Constitution "with right of appeal" confers upon the defendant, when the appeal is taken, the right of trial by jury in the Superior Court, as will appear from these cases: *S. v. Lytle,* 138 N. C., 738; *S. v. Brittain,* 143 N. C., 668; *S. v. Hyman,* 164 N. C., 411; *S. v. Tate,* 169 N. C., 373; *S. v. Pasley,* 180 N. C., 695. See, also, *S. v. Rogers,* 162 N. C., 656.

Construing section 12 of Article I with section 13, the Court has held that on these appeals from subordinate courts having jurisdiction of the subject-matter of a criminal action, a bill of indictment need not be sent in the court above against the defendant. When, however, a case reaches the Superior Court on appeal, it is heard *de novo,* as we have said, and, as a consequence, the right of a jury trial is secured thereby, according to the cases we have just cited.

Justice Hoke said, in *S. v. Wells,* 142 N. C., at p. 595, 596: "While we have expressed our opinion on the main question, the right of the defendant to enter on the land, because the parties desired to present it, and in the hope that this opinion will end the controversy, we must not be understood as approving the method of procedure by which the guilt of the defendant was determined upon in the court below—a trial by a judge without the aid of a jury. Two decisions of this Court—*S. v. Stewart,* 89 N. C., 564; *S. v. Holt,* 90 N. C., 749—have held that in the Superior Court, on indictment originating therein, trials by jury in a criminal action could not be waived by the accused. We do not decide whether this principle applies in the present case, but, for the error pointed out, we direct that a new trial be granted, to the end that the facts found by the judge be set aside as insufficient to present the question of defendant's guilt or innocence, and defendant be tried in accordance with the law."

And in another case (*S. v. Holt,* 90 N. C., at p. 753) involving the right of trial by jury, upon facts substantially similar to those appearing in the present record, *Justice Merrimon* commented at large upon the constitutional right of trial by jury, with special reference to its waiver expressly or impliedly by the defendant. We reproduce what he said, but not literally, though we will give the substance of it fully, as it is stated with great clearness and force, and its strong bearing upon the question we now have before us will instantly be seen. He said, among other things, it is the province, and the duty, of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never

forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which, in their accumulated power may, in some emergency, overturn principle and subvert the rights of many people. A distinguished judge and law-writer, in commenting upon the great excellence of trial by jury, thus points out the evil to which we advert: "So that the liberties of the people cannot but subsist so long as this palladium remains sacred and inviolable, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the form of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the Nation are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedents may gradually increase and spread, to the utter disuse of justice, in questions of the most momentous concern." And proceeding, *Justice Merrimon* further said: "These observations are not made so much with reference to this particular case as for counteracting what seems to be a tendency in this State to ignore, sometime in matters of moment, trial by jury, in cases where, under the Constitution a trial must be had in that way. The case of *S. v. Stewart,* 89 N. C., 563, was like this in its material features, except that in that case a trial by jury was expressly waived, and the court was requested to find and did find the facts. Cooley on Const. Law., 239; *Cancemi v. People,* 18 N. Y., 128. There was not the remotest purpose in that case, we are sure, to infringe the right of trial by jury in a criminal action, but for convenience sake, and to save time (because the facts were not disputed), the facts of the case were agreed upon by the State and the defendant, and submitted to the judge, instead of letting a jury hear the evidence, and render a verdict upon the issue, or find a special verdict. In our judgment this was not only irregular, but wholly without the sanction of law. There is no statute that authorizes such procedure, and the Constitution forbids it, for it declares that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. No jury was empaneled to try the issue; and there was, consequently, no verdict of a jury, and there was no conviction. The judgment of the court had nothing to warrant it, and there was nothing upon which it could properly rest. The defendant could not consent to a conviction by the court. It had no authority to try the issue of fact raised by the pleadings. The defendant did not plead

guilty; he did not enter the plea of *nolo contendere*, or submit; he pleaded *autrefois convict*, and a jury must try the issue raised by that plea. *S. v. Stewart, supra; S. v. Moss*, 47 N. C., 66; L. Bish. Cr. Pl., 759, and cases cited; *Cancemi v. People*, 18 N. Y., 128. The Legislature has not provided a means for the trial of cases like this, different from the ordinary method provided by law. The court erred in passing upon the facts agreed upon and submitted to it without the finding of a jury, and for such error the judgment must be reversed and the court must proceed to dispose of the case according to law."

This Court said, in *S. v. Pasley*, 180 N. C., 695, 696: "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 of the peace 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.' *S. v. Cannady*, 78 N. C., 539, and *S. v. Hicks*, 124 N. C., 829. . . . 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." The defendant was granted a new trial for the error.

But we will pursue the course which was adopted in *S. v. Wells, supra*, and for the reason assigned therein, and consider the question intended to be raised in this case, viz., whether the defendant would be guilty of

a violation of the statute set forth in the case, upon the facts also stated therein, had they been properly and regularly found by a jury.

The statute (C. S., 3957, relating to Forsyth County), in its first clause makes the exposing for sale, selling, or offering for sale on a Sunday any goods, etc., within four miles of the corporate limits of any incorporated city or town a crime. Then there is a semicolon, and the act in the next clause absolutely prohibits the keeping open of any store, shop, or place of business in which such goods, etc., are kept for sale, between 12 o'clock Saturday night and 12 o'clock Sunday night. The defendant here was conducting a grocery store in the same room in which he ran a cafe. There were groceries on his counter and soft drinks in cases exposed to the view of his customers. There was no proof, however, that he sold or offered to sell on the Sunday in question anything but food and ice-cream to his customers. So, the only question in this case is, as it seems to us, whether or not the defendant, by keeping open this place where he ran a grocery store on Sunday has offended against the law, though in the same room he conducted a cafe. The amendment to the act, ch. 200, Public-Local Laws of the Extra Session, may lend some color to the view suggested, that the exposing of the coca-cola bottles and groceries for sale in the same room is an offense against the act, whether it is so or not. The amendment is as follows: "The exemption that this act shall not be construed to apply to hotels, to boarding-houses, or to restaurants or cafes, or furnishing meals to actual guests, shall not authorize such hotels, boarding-houses, restaurants, or cafes to expose for sale, sell, or offer for sale, or serve with food on Sunday any soft drinks of any kind, except coffee, tea, and milk."

The State contended that with this incorporated in the act, in connection with its subsequent provisions, specifically defining what may be sold by drug stores and cigar stands, may result in the prohibition against conducting a cafe or restaurant in a room in which groceries and soft drinks are exposed for sale. The defendant's counsel attacks the constitutionality of the act thus interpreted. Our Court, however, had considered such Sunday legislation in numerous cases and has sustained it. *S. v. Williams,* 26 N. C., 400; *S. v. Brooksbank,* 28 N. C., 74; *Rodman v. Robinson,* 134 N. C., 507; *S. v. Medlin,* 170 N. C., 682; *S. v. Davis,* 171 N. C., 809; *S. v. Burbage,* 172 N. C., 876. See, also, note 12 Ann. Cas., 1096, and *Hennington v. Georgia,* 163 U. S., 299.

But to consider more definitely the statute, which the defendant is charged with having violated, we are unable to see why there has not been such a distinct violation within the meaning of the clear and explicit words of that statute. It forbids "the keeping open of any store, shop, or place of business in which the enumerated goods, etc., are

kept for sale" between 12 o'clock Saturday night until 12 o'clock Sunday night. The mere fact that he ran a cafe in the same room with his grocery store did not prevent the application of the statute. If this were otherwise, the law could be easily evaded or made nugatory. The particular language is that "no store, shop, or other place of business in which goods, wares, or merchandise of any kind are kept for sale shall keep open doors from 12 o'clock Saturday night until 12 o'clock Sunday night." The statute not only embraces stores and shops, but any other place of business of the kind described therein. The defendant kept open his store or shop or place of business on Sunday between the forbidden hours, and it does not follow, because he had a cafe or restaurant in the same room, that his offense was not within the denunciation of the statute. His act was prohibited both by the letter and the spirit of the statute, however strictly we may construe it. This case differs in this respect from *S. v. Shoaf,* 179 N. C., 744.

As to the procedure in the Superior Court, we may further refer to *S. v. Stewart,* 89 N. C., 563, where it was said that a jury trial cannot be waived, and where, in the trial of an indictment for an assault and battery, a jury trial was waived and the court, by request, found the facts and declared the law arising therein, this Court held that such a procedure is not warranted by law and the case will be remanded for trial according to the course and practice of the court.

We follow that procedure here, as we can perceive no substantial or legal difference between the two cases.

It is therefore ordered that the case be remanded to the Superior Court of Forsyth County, to be proceeded with according to law.

Error.

STATE v. JOHN FLOWERS.

(Filed 1 November, 1922.)

Criminal Law—Prosecution in Good Faith—Evidence—Appeal and Error—Prejudice—Reversible Error.

In an action for embezzlement it was competent to ask the prosecutor, on cross-examination, if he was acting therein in behalf of another in attempting to obtain from the defendant a deed to land involved in a civil action, upon the question of the prosecutor's good faith, etc., and a refusal to allow such examination constitutes reversible error.

CLARK, C. J., dissenting.

APPEAL by defendant from *Cranmer, J.,* at July Term, 1922, of DUPLIN.

STATE *v.* FLOWERS.

Criminal prosecution, tried upon an indictment charging the defendant with embezzling $350 and a Studebaker automobile on 27 February, 1918, alleged to be the property of one Willie Waters, denominated in the record as "nominal prosecutor."

The State's evidence, if believed, showed that the defendant Flowers, in 1918, sold to the prosecuting witness, Willie Waters, an automobile for $475. Waters paid $350 cash and gave a note and mortgage on the car for $125. A few days later Waters, being a shoemaker, and finding that he could not operate the car, applied to the defendant to take it back. The defendant agreed to do so upon Waters appointing him, the defendant, his agent to sell the car. The oral agreement was that the proceeds of the sale of the car should first be applied to the payment of the $125 note, then the remainder of it, to the extent of $350 paid in cash by Waters, was to be returned to Waters.

This alleged agreement was denied by the defendant, and he offered in evidence the following written contract, which Waters admitted he signed at the time the machine was returned to the defendant:

"This paper made this 4 March, 1918, by Willie Waters of Duplin County and State of North Carolina, party of the first part, and John Flowers of Duplin County and State of North Carolina, of the second part:

"Witnesseth, that in consideration of the party of the second part releasing the party of the first part of notes held on an automobile which the party of the second part sold to the party of the first, the party of the first part does hereby transfer the said automobile back to the party of the second part, and the party of the second part does this day release party of the first part of said notes.

"Witness my hand and seal the day and date first above written.

"Witness: JAMES POWERS. W. S. WATERS. [SEAL.]"

The defendant then took the car and returned it to one J. E. Clayton, from whom he had purchased it, and who held a purchase-money mortgage upon the automobile, amounting to $400, taking from Clayton in payment of the same his canceled notes and mortgage.

Under these circumstances, and after the lapse of nearly four years, the defendant was convicted of having embezzled the automobile and the sum of $350, and was sentenced to jail for a period of two years, to be assigned to work on the public roads. Defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Ward & Ward and H. D. Williams for defendant.

STACY, J., after stating the case: At the trial, defendant sought to show that this prosecution was instituted at the instance of one Eugene Boney, against whom the defendant had filed suit in the early part of 1920, to recover from him a valuable tract of land.

As bearing upon the weight and credibility of the testimony of the prosecuting witness, he was asked the following questions on cross-examination:

"Q. Is not Mr. Boney furnishing you with money to prosecute this case?"

Objection by the State sustained; defendant excepted. Defendant expected the witness to answer in the affirmative.

"Q. Has Mr. Boney employed any of counsel in this case?"

Objection by the State sustained; defendant excepted. There were four lawyers appearing with the solicitor for the State, and defendant expected an affirmative answer.

"Q. At the time prosecution started, did you not know that Eugene Boney had a lawsuit with defendant about a piece of land?"

Objection by the State sustained; defendant excepted. Defendant expected an affirmative answer.

Defendant further sought to show on cross-examination of this witness that, upon the preliminary hearing, defendant was discharged for want of probable cause, and Waters was taxed with the costs; that immediately after the preliminary trial, counsel for defendant was assaulted by Eugene Boney, with a knife, because his name had been mentioned in the trial. This evidence was excluded upon objection, and defendant excepted.

The defendant further sought to show, by his own evidence, that at the time of his arrest the officer presented to him for execution a deed from himself and wife to Eugene Boney for the land in controversy in the civil action, stating that he had been instructed not to serve the warrant if the deed were executed. This evidence was excluded.

The witness was not permitted to answer the following questions:

"Q. At the preliminary hearing of this matter, Esquire Powers discharged you and taxed Waters with the costs?"

Objection by the State sustained; defendant excepted. Witness would have answered "Yes."

"Q. Did Mr. Eugene Boney assault Mr. Ward, your counsel, after the preliminary trial, and violently curse him for having mentioned his name?"

Objection by the State sustained; defendant excepted. Witness would have answered "Yes."

"Q. Did Eugene Boney talk to you here at term of court at which this bill was found?"

Objection by the State sustained; defendant excepted. Witness would have answered "Yes; Boney said they were going to indict me and if I would sign the deed to him there would be no more of it. I didn't sign the deed, and I was arrested on a *capias* under this bill of indictment."

There was other evidence offered and excluded, tending to show that Boney was the real prosecutor in the case, and that Waters was acting in his behalf and at his request. While some of this evidence may have been excluded, and rightly so, by reason of the form and manner in which it was presented, yet, in the main, it was pertinent and clearly competent as bearing upon the good faith of the prosecution and the weight and credibility of the evidence of the nominal prosecutor, Willie Waters. It should be observed that Waters' testimony, upon whose evidence alone the defendant was convicted, is in direct conflict with the terms of the written bill of sale which he signed on 4 March, 1918.

The defendant was entitled to have the jury consider the real facts in the case; and, if the above excluded testimony be worthy of belief, there can be no doubt as to who was the real prosecutor. This is so plain "that he may run that readeth it." Habakkuk, 2:2.

Again, there is no evidence on the record tending to show any embezzlement of the $350. This sum was paid to the defendant by the prosecuting witness at the time he purchased the car, and in no view of the evidence could he have been convicted on this count.

For the error, as indicated, there must be a new trial, or a *venire de novo*.

New trial.

CLARK, C. J., dissenting: The uncontradicted evidence was that the defendant, in October, 1917, bought the car in question from J. E. Clayton for $600, paying $100 cash and giving his notes for the balance. In 1918 the defendant sold the automobile to Willie Waters, the prosecuting witness, for $475. Waters paid $350 cash, and gave a note and mortgage on the car for $125. A few days afterwards, Waters being a shoemaker and finding that he could not operate the car, applied to the defendant to take it back. This he agreed to do upon Waters appointing him, the defendant, his agent to sell the car. The agreement was that the proceeds of the sale of the car by the defendant should first be applied to the payment of the $125 note, then the remainder of it not to exceed $350, which was the amount of the cash paid by Waters, was to be returned to him.

As soon as the defendant had secured possession of the car under this agreement, he returned it to Clayton, who took the car for the balance due him upon the notes. Clayton turned over to Flowers $400 in notes

of Flowers, marking them paid. Clayton testified that at this time the car was worth $300. The defendant at no time after the settlement with Clayton accounted for any part of the proceeds of the sale.

In order to convict the defendant of embezzlement, four facts must be established: (1) That the accused was the agent of the person alleged, and that by the terms of his employment he was charged with receiving the money or property of his principal; (2) that he did in fact receive such money; (3) that he received it in the course of his employment; and (4) that he, knowing that it was not his own, converted it to his own use. All of the elements of the crime, as shown upon the evidence, are set out in this case and justified the verdict. *S. v. Gulledge,* 173 N. C., 746; *S. v. Long,* 143 N. C., 674; *S. v. Connor,* 142 N. C., 708; *S. v. Summers,* 141 N. C., 843; *S. v. Blackley,* 138 N. C., 620.

The written agreement signed by Waters that he released and transferred back to Flowers the automobile merely placed the title back in Flowers to make sale of the same. The testimony of Waters that Flowers, as agent, was to sell the car and bring him the proceeds after paying the $125 he owed Flowers was a valid verbal agreement.

The written part of the contract was not in contradiction of the verbal conditions on which Flowers was to dispose of the property and was competent. *Nissen v. Mining Co.,* 104 N. C., 309, and numerous citations thereto in Anno. Ed. Otherwise, the written agreement would have been a gift by Waters of the property without consideration, when the only reasonable construction is, as Waters testified, that it was to be sold by Flowers and accounted for. Flowers not having done this, was guilty of embezzlement.

The defendant further contended that because of the condition that the proceeds of the car, when sold by Flowers, should be applied to the payment of the $125 note due by Waters, then the remainder of it to the extent of $350 cash, which had been paid by Waters, was to be returned to Waters, and all above should be divided equally between them (but there was nothing in excess) amounted to a joint ownership, and hence the appropriation of the entire proceeds by Flowers was not an embezzlement.

This subject, however, was fully discussed and decided in *S. v. Blackley,* 138 N. C., 620, which held, upon these identical facts, that in such case the failure of the agent who converted the property to his own use and failed to pay his part of the proceeds of the sale to the owner was an act of embezzlement. Such contract as this did not constitute the defendant and Flowers partners, but the defendant was the agent of the prosecutor and by the terms of his employment, having received property of his principal in the course of his employment, and knowing it was not his own, converted it to his own use, he was guilty of embezzlement.

In *S. v. Blackley, supra,* the Court affirmed the following charge by the judge: "If the jury shall be satisfied from the evidence that Blackley was to sell the horses and mules for McAdow and pay the expenses, and then pay to McAdow the cost price of the horses and mules before any division of profits, he had no right to mix the cost price of the horses and mules with his own money," and the Court sustained the conviction.

On the trial the defendant asked the prosecuting witness several questions in an attempt to show that one Eugene Boney was hostile to the defendant, and had instigated this proceeding. These questions were entirely irrelevant and were properly excluded. They did not tend to impeach the character of the prosecuting witness, but were merely to show a motive, which was unnecessary, for he was a prosecutor.

Eugene Boney was in no way connected with any of the dealings as to the automobile or its disposal in any way, and was not a witness on the trial. It was an attempt to divert attention from the question at issue, which was the embezzlement by the defendant of the property of Waters, and the only effect of the cross-examination of the prosecuting witness, if allowed, would have been to make an issue as to the relationship between Eugene Boney (who was in no wise connected with the matter) and the prosecuting witness. It needs no citation of authorities to sustain the ruling of the judge excluding these questions as irrelevant.

Though the defendant went upon the stand himself and put on witnesses, he did not deny the essential elements of the offense charged. He contents himself with the attempt to prove by the cross-examination of witnesses that Boney had *animus* against him, and had caused Waters to bring this prosecution, but there is no contradiction that he took the machine back from Waters; Clayton testified that defendant resold it to him for $400, and defendant does not deny he has paid Waters no part of the proceeds of the resale of the property, although Waters had it only a few days and had paid the defendant for it $475 ($350 in cash). He rests his case upon the purely irrelevant allegation that, as he claims, Waters was prompted to this prosecution by an enemy of his.

The cross-examination excluded did not tend to show bias of Waters, who was the prosecuting witness, but merely to impeach Boney, who was not a witness at all, and was therefore irrelevant.

As Waters received nothing in return for the machine for which the defendant admits Waters had paid him $350 in money and given him a note for $125, the indictment charges in two counts the embezzlement of the machine and of $350 in cash. As the verdict is a general one, it is immaterial whether the embezzlement was of the machine or of any part of the value thereof.

It is noticeable that the defendant's brief does not deny these facts, but it is taken up entirely with the charge of bad feeling by Boney (who had no connection with this matter for which the defendant is indicted), and the allegation that Boney threatened to assault defendant's counsel. The real issue—the embezzlement charge—and the failure of the defendant to account to Waters for any part of the proceeds of the machine (which he does not deny Clayton paid him) is not controverted or even mentioned in defendant's brief.

STATE v. A. A. MILLS.

(Filed 8 November, 1922.)

Witnesses — Character — Knowledge — Intoxicating Liquor— Spirituous Liquor—Evidence—Hearsay Evidence.

Before a witness may testify to the bad character of the defendant on trial for the unlawful sale of liquor, he must qualify himself by first saying under oath that he knows what such character is, before giving the information he has received thereon from others, and thus prevent a conviction by rumors that were mere hearsay declarations on the principal question of guilt or innocence; and an admission of testimony, in behalf of the State, that all the witness could say was what people had said to him, that the defendant was a man who handled liquor, is reversible error, when unsupported by the sworn testimony by the witness of his own knowledge of the defendant's bad character.

CLARK, C. J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at February Term, 1922, of GREENE.

Criminal action for the unlawful sale of intoxicating liquors. There was evidence on the part of the State tending to show that in September, 1921, E. H. Sugg *et al.*, officers in the Revenue Department of the State, under a proper warrant, made search of defendant's premises at and in said county, and found there several empty jugs and bottles, all having the odor of corn whiskey, and they also found between the kitchen and smoke-house, hidden in some weeds, a two-gallon jug with about one gallon of corn whiskey in it, etc.

For the defendant the evidence tended to show that defendant was not on the premises at the time, having gone to Kinston to sell his tobacco crop. Defendant himself testifying as a witness denied that he had any whiskey on his premises, or that he had any interest therein. He further testified that he had several hands working his farm, and one of these, Jones Forbes, had a room in defendant's house. That on

the Saturday night before Forbes had procured a gallon of whiskey, which he had on the premises, and witness having found this out, remonstrated with Forbes. There was a quarrel between them about it, and witness discharged Forbes. There were no bottles or other vessels on witness's place having the odor of whiskey that witness knew anything about. Several witnesses testified to the good character of the defendant.

In reply, the State introduced, as a witness, Sheriff Herring, who testified as follows:

Sheriff Herring, for the State: "I know the defendant Mills.

"Q. What is his general reputation? A. All I can tell you is the report to me what people said to me.

"To the foregoing answer defendant objects; objection overruled; defendant duly excepted. Exception No. 6.

"Q. Prior to the time he was arrested? A. He was reported to me as a man handling liquor."

Objected to and exception taken. There was verdict of guilty, judgment, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. Paul Frizzelle and H. L. Swain for defendant.

HOKE, J. It is fully recognized that in the trial of causes the testimony of a witness may be impeached by evidence of his bad character, and it is equally well established that before this is allowed the impeaching witness must qualify himself by saying under oath that he knows what such character is. This is not at all a meaningless position, but under some of the more recent rulings as to the examination of witnesses its proper enforcement is at times necessary to prevent a conviction by rumors that are mere hearsay declarations on the principal question of guilt or innocence.

In *S. v. Parks,* 25 N. C., 296, *Judge Gaston* speaks most impressively on the subject as follows: "It is essential to the uniform administration of justice, which is one of the best securities for its faithful administration, that the rules of evidence should be steadily observed. Among these, the rule which regulates the admission of testimony offered to impeach the character of a witness is now so well established and so clearly defined that a departure from it must be regarded as a violation of law. The witness is not to be discredited, because of the opinions which any person or any number of persons may have expressed to his disadvantage, unless such opinions have created or indicate a *general reputation* of his want of moral principle. The impeaching witness

must, therefore, profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinion or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness."

And in *S. v. Coley,* 114 N. C., 879, *Avery, J.,* delivering the opinion, said: "No principle of evidence is more clearly settled in North Carolina, nor by a longer line of decisions than that a witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the reputation of the person in question." And many other decisions on the subject are to the same effect. *S. v. Ussery,* 118 N. C., 1177; *S. v. Gee,* 92 N. C., 756; *S. v. Speight,* 69 N. C., 72; *S. v. Perkins,* 66 N. C., 126.

Recurring to the record, we do not think that the exceptions noted can be brought within the principle or meaning of these decisions. Sheriff Herring at no time professes to know the character of the impeached witness. "All I can tell you is the report to me, what people said to me"; and further, "He was reported to me as a man handling liquor." Whether these reports were from few or many people, and whether from one or the other, they had had the effect of creating a settled and general estimate adverse to the character of the witness in no way appears. The entire statement creates the impression rather that the witness is giving the effect of rumors born of the present charge, and not the general reputation of the impeached witness in the community, the only kind of evidence that is competent in such an inquiry.

The cases of *S. v. Butler,* 177 N. C., 585, and *S. v. Cathey,* 170 N. C., 794, are not in contravention of this decision. In both, the witnesses had first qualified himself by saying that he knew the general character of the impeached witness, and was then allowed to say what it was, thus bringing themselves within the rules of well ordered procedure, as approved in the cases referred to.

There are other objections to the validity of this conviction that are worthy of grave consideration, but as they may not appear on a second trial, they are not more fully adverted to.

For the error indicated, defendant, in our opinion, is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C. J., dissenting: The defendant was convicted in the county court of Lenoir of having in possession liquor for the purpose of sale, and on appeal was again convicted by a jury in the Superior Court. It was in evidence for the State that in September, 1921, in consequence of information received, the four officers named were sent with a search warrant to the premises of the defendant, a colored man living out in

the country. When they arrived, he was absent, and they read the search warrant to his wife, who was in charge of the premises during her husband's absence, and who told them to go ahead and search. Between the kitchen and the smoke-house they found a two-gallon jug with over one gallon of corn whiskey. This was hid in dog fennel. Besides this, they found other jugs and bottles empty, but smelling of whiskey. Upon the officers finding the whiskey, the wife of the defendant ran into the house for a gun. The officer told her if she picked up a gun she would never lay it down. He says she stayed there, and mouthed and called him a right ugly name; she came outside and got a cart-round and waved it around like she was going to hit him; he told her he would slap her down and she dropped that and ran and got a pitchfork; he told her she had better not try to hit him with that pitchfork, and while he was there keeping her down, the other officers were searching the premises. The defendant on his cross-examination was asked about the resistance to the officers by his wife, "What was your wife raising such a storm about, if there was no liquor there?" to which he replied, "She did not raise as much as Mr. Sugg says she did; she tells me she did not, and others say so." Again he was asked, "She got the gun, and then went and got a pitchfork?" This was objected to, but it does not appear what the answer would have been. The defendant's counsel claims that her actions and statements, under the circumstances, in the absence of her husband, were *res inter alios acta* as to him, and consequently inadmissible.

The defendant also excepted that in reply to evidence introduced by the defendant as to his good character the sheriff was asked by the State, "What is the defendant's general reputation?" he answered, "All I can tell you is the report to me; he was reported to me as a man handling liquor." To the foregoing answer the defendant objected. The sheriff was then asked, "Prior to the time he was arrested?" and replied, "He was reported to me as a man handling liquor." To the foregoing question and answer the defendant excepted.

The defendant excepted to the evidence as to the conduct of his wife, who was left in sole charge of the house during the defendant's absence. The charge is not against the wife, but against the husband, and her conduct was a circumstance to be taken in connection with the liquor found upon her premises, as it proves *prima facie* that it was in his possession, and in the defendant's evidence; he did not deny she was there as his representative. The quantity of liquor found, more than one gallon, was *prima facie* evidence of its possession for the purpose of sale, which presumption is strengthened by the fact that seven other jugs were found hidden about the premises. She was in possession of the premises, for when the officers arrived she welcomed them and told

them they were welcome to search the premises. She said, "Go ahead, there is no whiskey here," but when the officers started to search the premises she ran and got a gun and threatened to shoot one of the officers. As long as the officers stayed in the house she was very quiet, but when they went back of the house and found the two-gallon jug with whiskey in it, she became excited and began to threaten the officers. The gallon of whiskey and 7 jugs were found in the weeds, and the officers also found "about a cart-load" of empty coca-cola bottles which smelt of whiskey. This conduct was certainly competent upon many precedents in this Court.

The wife here was not testifying against the husband, nor can her statements be excluded on the ground of confidential communications from her husband. The acts of the agent of the husband in possession of the premises where the whiskey was found do not present the case of a wife testifying against her husband, but were simply a part of the *res gestæ.*

The wife admitted that she was in charge of the premises for her husband by first telling the officers that they could go through and examine for any liquor, denying that there was any. Her consequent conduct was simply a part of the *res gestæ.* In *S. v. Crouse,* 182 N. C., 836, *Adams, J.,* recites as one of the pregnant evidences of guilt, and which was pressed in the brief for the State, that "After the two officers had gone to the defendant's house, they saw the defendant's wife go into her room and put under the bed a fruit jar which contained more than a quart of whiskey, while another found a small quantity in the cellar." In that case, as in this, the defendant himself was absent from home, and in that case, as in this, as the opinion states: "There was evidence tending to show that the defendant's character was bad as to the manufacture of liquor, and there are various other circumstances tending to show his guilt." In this case there was conclusive evidence, irrespective of these circumstances, by actually finding more than a gallon of liquor and the empty jugs and bottles smelling of liquor.

In *S. v. Simons,* 178 N. C., 679, there was evidence that the defendant on another occasion when arrested had first denied having whiskey, and then had resisted the officer. The evidence here is simply a part of the *res gestæ,* and competent. The conduct of those in charge on such search is not only competent against the owners, but would justify an indictment against them individually as accessories. *S. v. Killian,* 178 N. C., 753, 758.

The only other exception is because the sheriff in testifying to the character of the defendant, having said in reply to a question as to his general reputation: "All I can tell you is the report to me; what people said to me" (which is evidence of general character), adding, of

his own motion, "He was reported to me as a man handling liquor." This was not in reply to the question asked him, but a voluntary addition to his testimony. It has often been held that this would not vitiate the trial.

While a witness cannot be asked as to any particular trait of character on a matter of general reputation, it is competent for him to add, as in this case, of his own motion, a qualification to a general statement. In *S. v. Butler,* 177 N. C., 585, the subject is fully discussed, and it is thus said: "Where the character of the defendant, on trial for violating the statute against the sale of spirituous liquor, is in evidence a witness, who has testified that he knows the general character of the defendant, may voluntarily, and in order to speak the truth, testify in answer to a proper question that the defendant's character for selling whiskey is bad." In that case, quoting *Hoke, J.,* in *S. v. Summers,* 173 N. C., 780, it is said: "Objection is also made that the court refused to strike out the answer of certain other witnesses as to the character, who, after saying they knew the character of defendant, qualified their further answer by saying in what respect it was bad. It is the accepted rule that a witness may do this of his own volition, and these exceptions also must be disallowed. *Edwards v. Price,* 162 N. C., 245; *S. v. Hairston,* 121 N. C., 582."

The Court, in *S. v. Butler, supra,* also cited *S. v. Cathey,* 170 N. C., 794, where the sheriff, in replying to the question as to the general reputation of the defendant, said exactly as in this case, "It is bad for dealing in liquor." The Court held, *Allen, J.,* that this was no error.

The defendant put his character in evidence, both by going on the witness stand himself and by putting up six witnesses who testified to his good character. The State put up only one witness to character, the sheriff, who qualified himself by saying he knew what was reported to him, adding of his own volition, "He was reported to me as a man handling liquor." This was not error, *Hoke, J.,* in *S. v. Summers,* 173 N. C., at p. 780, citing *Edwards v. Price,* 162 N. C., 245; *S. v. Hairston,* 121 N. C., 582, which have been approved since by *Allen, J.,* in *S. v. Cathey,* 170 N. C., 794, and in *S. v. Butler,* 177 N. C., 586.

The issue in this case is not the character of the defendant, but the charge in the bill of indictment. The evidence was unquestionably sufficient to be submitted to a jury, *Walker, J.,* in *S. v. Alston,* 183 N. C., 735, and it convinced them. In *Edwards v. Price,* 162 N. C., 245, and other cases, this Court has deprecated giving too much stress to minute debates as to examinations as to character, both as tending to divert the attention of the jury from the real issue and because of the needless lengthening of trials. Here the defendant put on six character witnesses, and he was certainly not prejudiced by the witness for the

State who, instead of saying the defendant's character was bad, conscientiously restricted his testimony (as he had a right to do according to all the authorities) by saying it was bad "for handling liquor"—as in *S. v. Crouse, Adams, J.*, 182 N. C., at p. 836.

Upon the argument here, and on the evidence in the record, the real objection it seems was not that the defendant was not legally tried and properly convicted—indeed, could the jury have possibly done otherwise if they believed the evidence of the four officers, of which the jury were the sole judges—of finding the whiskey. The real complaint of the defendant, who was twice convicted, both in the county court and in the Superior Court on appeal, seems to be that the judge sentenced him to 15 months on the county roads.

Apparently the defendant was a serious offender, for four officers (one of them a detective sent down from the State Capital) were sent out to arrest him, and they found not only over a gallon of whiskey, but ample evidence, if believed, in numerous jugs and bottles, of long-continued violation of the law; he was convicted both in the county court and on appeal in the Superior Court, and the presumption is that the learned judge, in fixing the sentence, had, as usually is the case with judges in fixing the sentence, in considering the record of the defendant as a law-breaker. But if (of which there is neither presumption nor evidence) the judge was too severe, the remedy of the defendant is by application to the executive department.

Besides, the presiding judge had probably read the public policy of the courts, calculated to suppress this crime, as stated in *S. v. Butler,* 177 N. C., at p. 586, as follows: "The ruling of the judge is so well sustained upon reason and the authorities that doubtless the real ground of the appeal was objection to undergoing the sentence upon the public roads for eight months. The violation of law in selling intoxicating liquors is deliberate, not impulsive, as is the case in regard to many offenses, and the motive is the large profits accruing from the contemptuous violation of the law. The imposition of fines in such cases in practice amounts to granting license by the courts upon payment by the culprit of a very small part of the illegal profits obtained. The law authorized the sentence imposed of imprisonment with leave to work upon the public roads.

"Certainly the taking back by the State of a part of the profits made by violation of its laws can never repress the evil which is the object of the trial and punishment. In fact, it puts the State in the more than questionable attitude of sharing with the criminal the profits derived from the deliberate violation of its own laws, and it is thus in effect a partner suing for a share in the proceeds of the illegal business. The fines imposed always give the State a very minor share in the illicit

receipts. This is not the object to be sought by the courts. Such sentences should be imposed as will prevent the repetition of the offense by the defendant, and all others offending in like manner."

It is true that the orthodox technical examination of a character witness should be: "Do you know the character of A. B.?" to which he should answer "Yes" or "No," as the case may be. If he answers "No," that ends it, but in 9 cases out of 10 the untechnical witness, if he knows the character, will answer, as the sheriff did in this case, stating that he knows what people say of him and what that is. The defendant certainly, in this case, was not prejudiced thereby, and in view of the evidence by the four officers of their finding the liquor, and the defendant having his character testified to by six witnesses in his own behalf, there has been no such error committed that the verdict of two juries should be set aside upon such technicality.

STATE v. J. E. C. BELL.

(Filed 8 November, 1922.)

1. **Criminal Law—General Verdict—Counts in the Indictment.**

A general verdict of guilty upon several counts in a bill of indictment will be interpreted to apply to the one alone, if only one, that is supported by the evidence, and to which the charge of the court was directed, and to which the case has been confined upon the trial; and not to such others that would violate the theory upon which the criminal action was tried, and was unsupported by the evidence and ignored by the charge.

2. **Statutes—Interpretation—Courts.**

The courts will observe the separation of the legislative and supreme judicial powers of the Government by the State Constitution, and will only interpret a statute to ascertain and give effect to the intention of the Legislature, or, if such intention cannot be discovered, to give the statute such reasonable constructions as may be consistent with the general rules of interpretation, which the Legislature will be presumed to have recognized in connection with and as a part of the statute being construed; and to ascertain this legislative purpose, the spirit and reason of the law will prevail over its letter, especially where a literal construction would work an obvious injustice.

3. **Same—Wife—Children—Divorce.**

Within the intent and meaning of C. S., 4447, the willful abandonment by the father of his children of the marriage is made a separate offense of like degree with that of his willful abandonment of his wife; and his duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law.

4. Same—Punctuation.

Punctuation may now be considered as an aid in construing the purpose or intent of the Legislature in enacting a statute, especially when brought forward from time to time by legislative reënactment; and *it is held* that the placing of a comma after the words "such wife," in C. S., 4447, with regard to the husband's abandonment, evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with C. S., 4460, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her."

5. Statutes—Interpretation—Captions—Reënactment.

While the caption may not be considered in the interpretation of a statute when in conflict with the terms expressed in the body of the act, it will be given greater significance in its interpretation when the original act has been amended and the caption accordingly changed, and thus recognized by the Legislature in bringing the act with its amendment forward in the codified law; and this rule applies to the interpretation of C. S., 4447, as to the offense of the willful abandonment by the husband of his wife or children, fortified by C. S., 4449, authorizing the trial judge to provide for the support of the deserted wife, or children, or both.

6. Same—Husband and Wife—Descriptio Personæ—Parent and Child.

C. S., 4449, uses the word "husband" as *descriptio personæ*, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorcement has been entered; and does not confine the offense to the willful abandonment of the wife.

7. Statutes—Abandonment of Children—Statute of Limitations—Support—Subsequent Promise.

The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the same home with them or otherwise, in proceedings under our criminal statute for his willfully abandoning them. C. S., 4447.

CLARK, C. J., concurring; STACY, J., dissenting; WALKER, J., concurs in dissenting opinion of STACY, J.

APPEAL by defendant from *Allen, J.*, at March Term, 1922, of VANCE.

On 20 December, 1921, Mabel K. Bell made an affidavit before a justice of the peace of Vance County that the defendant, her divorced husband, had willfully abandoned and failed and refused to support his four children, of the age of four, six, eight, and eleven years, respectively; and thereupon she obtained a warrant under which the defendant was arrested and afterward bound to the Superior Court. At the March Term, 1922, the grand jury returned a true bill containing three counts charging the defendant (1) with the willful abandonment of his children without providing for them adequate support; (2) with the willful abandonment of his wife without providing ade-

quate support for her and the children; and (3) with willfully failing to provide adequate support for her and the children while he was living with his wife. The bill is endorsed "Abandonment of Children." At the same term the case was called for trial, and the State's witnesses were examined; the defendant declined to offer any evidence, and relied upon the statute of limitations. Following is a recapitulation of so much of the evidence as is necessary to an understanding of the controversy. At the March Term, 1921, Mabel Bell was granted a decree divorcing her from the defendant. On or about 1 June, 1919, the defendant, without just cause, abandoned her and the children without providing for them an adequate support, and afterward admitted that he had not taken care of the children, and would not care for them. The wife inherited an estate worth about $20,000, on which she had placed a $10,000 mortgage to secure two bonding companies who were prosecuting the defendant; a part of it she had spent for the children. At the time of the trial she was getting practically nothing from the estate, and her income was not sufficient for the support of the children. On 1 December, 1920, the defendant and his wife executed to R. S. McCoin a deed of trust on her real and personal property for the purpose of paying her debts and taxes, and collecting dividends, etc., and turning over to her a stated sum every month for the support of herself and the children.

In the fall of 1921 one of the children was sick in the hospital and the defendant told the trustee that he would do what he could for the children, and promised to send $200 and certain tax money claimed to be due him, but that he would not contribute to the support of his divorced wife. At the Christmas of 1920 the defendant gave the children a pony, and at the Christmas of 1921 he sent the oldest a book, the youngest a doll, and a basket to each of the others.

The defendant's motion for nonsuit was denied, and his Honor instructed the jury to return a verdict of guilty if they believed all the evidence, and were satisfied beyond a reasonable doubt that the defendant furnished the children with presents testified to and offered or agreed with the trustee to furnish means for supporting them, and after so doing and agreeing, if it was within two years, he willfully failed to furnish them adequate support. There was a general verdict of guilty, and thereupon his Honor adjudged that the defendant should pay into the court $50 a month for the support of his children. The defendant appealed.

Attorney-General Manning, Assistant Attorney-General Nash, and T. M. Pittman for the State.

T. T. Hicks & Son for defendant.

ADAMS, J. The statutes making abandonment a misdemeanor were enacted in 1869. Public Laws 1868-69, ch. 209. The first section of the original act is now section 4447 of the Consolidated Statutes, the second is section 4450, and the third, section 4448. Section 4449 was enacted in 1917. The State contends that the defendant is guilty of a breach of the section first named above (4447), and concedes that if he is not, he should be discharged. The prosecution further admits that the defendant cannot be convicted if his guilt is legally dependent on his abandonment of his wife, because he abandoned her in June, 1919, more than two years before the warrant was issued or the bill of indictment was returned, and has not renewed as to her his marital obligation. Indeed, at the March Term, 1921, of the Superior Court, she obtained a decree dissolving the bonds of matrimony. The appeal, therefore, presents these two questions:

1. Is a former husband, from whom his wife (now living) has procured an absolute divorce, subject to prosecution under section 4447 for the subsequent abandonment of their children without providing such children an adequate support?

2. If so, is the prosecution barred by the statute of limitations?

With respect to the first interrogatory, the defendant's contention, concisely stated, is this: The statute (section 4447) contemplates the husband's abandonment of the wife without providing adequate support for her and their children, if any, and excludes the interpretation that the word "abandonment" applies equally to the children. In other words, the defendant contends that he is not guilty of a breach of this statute, even if it be granted that he willfully abandoned the children begotten of his wife without providing for their adequate support. There is, in our opinion, no sound reason for this limited construction. Since conditions growing out of the domestic relation exact of the wife the more immediate association, care, nurture, and tuition of the child, it has popularly been conceived that the abandonment of the wife involves the abandonment of the children. Doubtless the decisions are in part responsible for this conception—for in all the cases in which the husband was convicted of abandonment without providing support for the wife and the child they were ostensibly living together; and, in fact, he abandoned his child when he abandoned his wife. Not so here. The husband and the wife are divorced.

The jury returned a general verdict of guilty. It has repeatedly been held that where there are several counts in an indictment, and the evidence applies to one count only, a general verdict will be presumed to have been rendered on the count to which the evidence applies. *S. v. Long,* 52 N. C., 24; *S. v. May,* 132 N. C., 1021; *S. v. Gregory,* 153 N. C., 646; *S. v. Strange,* 183 N. C., 775. From his Honor's instruc-

tion to the jury, and from the judgment, which makes provision for the children only, we may legitimately infer that the prosecution was confined to the count which charges the defendant with the willful abandonment of the children, or, at any rate, that his Honor concluded that the willful abandonment of the children without providing adequate support for them—regardless of the legal status of the wife—was a breach of the statute. The question first stated above, then, may be reduced to this: Does the first count in the indictment charge a criminal offense? The statute is as follows: "If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

We have decided, in several cases in which the husband was indicted for abandonment and failure to provide support, that both these elements must be established, and we adhere to these precedents. But the former decisions of the Court do not determine the controversy, for the question in this appeal has not heretofore been presented for consideration. We must resort, therefore, to the established principles of statutory construction. Scrupulously observing the constitutional separation of the legislative and the supreme judicial powers of the government, we adhere to the fundamental principle that it is the duty of the Court, not to make the law, but to expound it, and to that end to ascertain and give effect to the intention of the Legislature, or if the legislative intent cannot be discovered, to give the statute such reasonable construction as may be consistent with the general principles of law. This is reasonable, for the courts impute to the Legislature, as a coordinate branch of the government, knowledge of the settled principles and maxims of statutory construction, and assume that statutes are enacted with a view to their interpretation according to such maxims and principles as an effective means of assuring certainty and uniformity in the administration of the law. In our endeavor to ascertain the purpose of the statute, we should also have due regard to the rule that the spirit and reason of the law shall prevail over its letter, especially where a literal construction would work an obvious injustice. *Herring v. Dixon,* 122 N. C., 425; *Wilson v. Markley,* 133 N. C., 616; *Fortune v. Comrs.,* 140 N. C., 322; *McLeod v. Comrs.,* 148 N. C., 79; 25 R. C. L., 955 *et seq.;* 36 Cyc., 1102 *et seq.*

What, then, was the intention of the Legislature in enacting this statute? The obvious purpose was to punish the husband for a willful failure to perform certain duties enjoined by the marriage contract—the duty to live with and to provide support for his wife and their children. Accordingly, his willful abandonment of his children without providing for them adequate support is no less a misdemeanor than his

willful abandonment of his wife without providing adequate support for her. If there be no children, his willful desertion and neglect of his wife is punishable under the statute. *S. v. Toney,* 162 N. C., 635. If there be children and no wife—if she be dead or divorced—his willful abandonment of them without providing for their support is none the less criminal. This, we think, is the rational interpretation. It is in accord not only with the spirit and reason of the law, but with the phraseology and punctuation. Punctuation, we admit, is not an infallible standard of construction; indeed, some courts have held that it should be disregarded; but we apprehend that their conclusion was based upon the old English doctrine which was announced as a necessary consequence of the custom of enacting and enrolling laws with no punctuation whatever. But this is not the prevailing doctrine. In *Taylor v. Town,* 10 A. & E. Anno. Cas., 1082, it is said: "There is no reason why punctuation, which is intended to and does assist in making clear and plain all things else in the English language, should be rejected in the case of the interpretation of statutes. *Cessante ratione legis cessat ipsa lex." Ewing v. Burnet,* 11 Pet. (U. S.), 41; *Albright v. Payne,* 43 Ohio St., 8; *Savings Ins. v. Newark,* 63 N. J. L., 547; *Comrs. v. Ellwood,* 193 Ill., 304; *Tyrrell v. New York,* 159 N. Y., 239. Regard should be given to the difference, which, no doubt, was intentional, between the punctuation in the first and the punctuation in the second section of the original act. Section 2 (C. S., 4450) was as follows: "That if any husband, while living with his wife, shall willfully neglect to provide adequate support for such wife and the child or children which he has begotten upon her, he shall be guilty of a misdemeanor." It is important to note the absence of a comma after the words "for such wife." In consequence, the section was deemed to denounce only one offense, namely, the willful neglect of the wife *and* the child. Section 1 (C. S., 4447) of the original act provides: "That if any husband shall willfully abandon his wife without providing adequate support for such wife, and the child and children which he has begotten upon her (such wife), he shall be deemed guilty of a misdemeanor." Note the comma after the words "wife" and "her." We regard it manifest that the first section of the original act (4447) was intended to create two offenses (willful abandonment of the wife and failure to support her, and willful abandonment of their children and failure to support them), and the second (4450) was subsequently amended and coördinated with the former by substituting "or" for "and," and thereby likewise creating two offenses. The Code, sec. 972. The words "while living with his wife" are significant chiefly as repelling the notion of a complete or partial severance of the marriage relation, and for the reason before stated, imply that the derelict hus-

band is living also with his children. So the two sections, construed together, are intended to punish the husband for willful failure to support the wife or children, if living with them, and for his willful abandonment of the wife or children and failure to provide adequate support.

The punctuation in section 4447 has been preserved in Battle's Revisal, in The Code, the Revisal of 1905, and in the Consolidated Statutes. If the phrase relating to the wife and children had not been set apart by commas as a separate and distinct provision, this section, like section two, might reasonably have been construed as creating one offense, and would have required an amendment similar to that of section two. It is hardly conceivable that the Legislature intended by the amendment to create two offenses in the second section if in the first there is only one—to subject the husband to prosecution if, while living with his wife, he willfully neglects to provide for their children, and to declare him exempt if he willfully abandons them and neglects to provide for their support. In our opinion, if the rule of strict construction be applied, the statute means just this: If any husband shall willfully abandon his wife without providing adequate support for such wife, he shall be guilty of a misdemeanor, and if he shall willfully abandon the children which he may have begotten upon her without providing adequate support for such children, he shall be guilty of a misdemeanor. This construction harmonizes the two statutes and credits the Legislature with the righteous intention of preserving, so far as practicable, the unity of the domestic relation.

True, the caption of the act of 1868-69 is "An act to protect married women from the willful abandonment or neglect of their husbands"; but to the suggestion that the caption may be invoked in explanation of the language of the statute, there is in this case more than one answer. In the first place, the language of the title is not permitted to control expressions in the body of a statute that conflict with it. *Blue v. McDuffie,* 44 N. C., 132; *Randall v. R. R.,* 104 N. C., 413; *S. c.,* 107 N. C., 750; *S. v. Patterson,* 134 N. C., 614. In the next place, if it be granted that the title of the original act should be considered, why is it not equally clear that the title of the reënacted statute should be considered? We readily admit that the compiler's preparation of a heading for a statute in no way affects the construction of the language "when its meaning is perfectly obvious." *Cram v. Cram,* 116 N. C., 293. But where in the course of half a century a statute has been reënacted time after time, and the first title is changed and the reënacted statute thereafter bears substantially the amended caption throughout, we are not at liberty to assume that such caption indicates merely the compiler's construction and excludes that of the Legislature. The first reënactment

was in 1874 (Battle's Rev., ch. 32, sec. 119, and ch. 121, sec. 1), under the title, "Husband guilty of a misdemeanor for abandoning family"; the second was in 1883 (The Code, vol. 1, ch. 25, sec. 790, and vol. 2, ch. 67, sec. 3866 *et seq.*), under the title, "Abandonment of wife and children by husband"; the third was in 1905 (Revisal of 1905, vol. 2, ch. 81, sec. 3355, and ch. 121, sec. 5463), under the title, "Abandonment of family by husband"; and the fourth, in 1919 (C. S., vol. 1, ch. 82, sec. 4447, and vol. 2, ch. 135, sec. 8107), under the title, "Abandonment of family by husband." If it be conceded that each of these titles was prepared by those who compiled the statutes and represented their personal interpretation, it is hardly reasonable to inhibit the conclusion that such interpretation has received the repeated approval of the Legislature. This deduction is fortified by the fact that the Legislature of 1917 seems to have approved it in authorizing the trial judge to provide for the support of the *deserted* wife *or* children, *or* both. C. S., 4449.

We are not disposed to adopt the argument that the offense is directed against the "husband" and not against the father. The husband and the father is one, and the word used in the statute is intended simply to identify the person—*descriptio personæ*—and not to restrict its significance to the relation between the husband and the wife to the exclusion of that between the father and the child. The "husband," if there be children, sustains toward his family the dual relation of husband and father; he may be referred to as the one, but he is also the other. When the marriage relation is severed, whether by death or divorce, the husband is released from his previous obligation to his wife, but not from his obligation to his children. Here the decree dissolving the marriage contract left intact and unimpaired the defendant's legal obligation to maintain his children. If he was subject to prosecution before the divorce, the decree does not cover him with the mantle of immunity. *Walker v. Crowder,* 37 N. C., 487; *Haglar v. McCombs,* 66 N. C., 351; *Sanders v. Sanders,* 167 N. C., 319; 19 C. J., 353 (813). Even after the death or the divorce of the wife the husband is usually referred to as the surviving husband or the divorced husband, just as the "husband of a daughter" includes the husband of a deceased daughter. *In re Ray's Estate,* 35 N. Y. Sup., 481.

The next question is whether the prosecution is barred by the statute of limitations. More than two years elapsed between the abandonment in June, 1919, and the institution of the action in December, 1921. If there were nothing else in the record, we should be compelled to hold that the prosecution could not be maintained. C. S., 4512. But the evidence shows that within two years next preceding the commencement of the prosecution the defendant recognized as to his children the restored

relation, and voluntarily reassumed his obligation to maintain them (his civil liability was never suspended) by bestowing gifts, not of food or clothing, it is true, and by his promise to the trustee appointed by him and his wife (supported by the consideration of a legal duty) to provide for them a substantial amount of money. Thereafter, and within two years prior to the prosecution he again abandoned his children and withheld all support. In *S. v. Hannon,* 168 N. C., 215, the trial judge instructed the jury that a new promise to provide support would repel the bar of the statute and the instruction was sustained. In that case, besides making the promise, defendant paid his wife the sum of $5; and while this circumstance is referred to in the opinion, it is not referred to in the judge's instruction to the jury. However, in the present case the value of the defendant's gifts, regardless of his promise, far exceeded this amount. In *S. v. Davis,* 79 N. C., 604, the Court said: "The parties [husband and wife] were together treating as to what should be their future relations. The wife proposed a complete restoration of their marriage relations, which the husband declined, but he agreed to support her, and did support her for two weeks, when he refused to support her any longer. *Being already separated,* this refusal completed the second offense." The test of a legal restoration of the severed marital relation is not necessarily whether the delinquent husband and the abandoned child actually lived together after the abandonment, because the relation may be restored although they do not live in the same home. Here, as in the *Davis case, supra,* the father being still separated from his children, his refusal to support them after voluntarily reassuming the obligation that he had previously disowned, completes the second offense.

After a deliberate investigation of the record, we find no error. It is not our province to determine the culpable cause of the unfortunate separation of the wife and children from the husband and father. Ours should be the calm, judicial opinion, and our concern, the proper construction of the statute under consideration when tested by the approved canons of interpretation. With our conception of the purpose and intention of the Legislature, we cannot approve a construction of this statute which would make is possible for a man who is both husband and father willfully to abandon his wife, and after her death or divorce willfully to relinquish all concern for his children born of the marriage and commit them to the charity of the State without providing raiment for their comfort, food for their sustenance, training for their welfare, or shelter for their refuge and protection, and yet to retain immunity from guilt.

No error.

CLARK, C. J., concurring: C. S., 4447, provides: *"Abandonment of family by husband.* If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor"; and C. S., 4449, provides: *"Order of support from husband's property or earnings.* Upon any conviction for abandonment, any judge or any recorder having jurisdiction thereof may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife *or children, or both,* from the property or labor of the defendant." In this case the evidence was uncontradicted that the defendant "abandoned, refused, and failed to support in any way his children, Josephine Bell, aged 4 years; Mabel Bell, aged 6 years; Ellen Bell, aged 8 years; and Mary Baxter Bell, aged 10 years, and has not contributed anything to their support since said date" (July, 1920). This was so expressed in the warrant which was sued out 30 December, 1921, and in the indictment, and the jury found the charge to be true.

The warrant sets out that on 30 December, 1921, Thomas L. Jones, justice of the peace of Vance County, issued his warrant as follows: "State v. J. E. C. Bell. Mabel K. Bell, being duly sworn, complains and says that at and in said county of Vance, in Henderson Township, on or about .... July, 1920, J. E. C. Bell, affiant's divorced husband, did unlawfully, willfully, and feloniously abandon, refuse, and fail to support in any way his children, Mary Baxter Bell, age 10 years; Ellen Bell, age 8 years; Mabel Bell, age 6 years, and Josephine Bell, age 4 years; and has not contributed anything to their said support since said date, contrary to the form of statute and against the peace and dignity of the State."

On 5 January, 1922, the defendant was arrested upon that warrant and was bound over to the Superior Court of Vance on 6 March, 1922. The indictment then found recites that on .... July, 1920, the defendant, J. E. C. Bell, "Unlawfully and willfully did abandon his children, viz.: Mary Baxter Bell, Ellen Bell, Mabel Bell, and Josephine Bell, without providing adequate support for said children, against the form of the statute in such case made and provided, and against the peace and dignity of the State." It is true there was a second count in the bill that the defendant had abandoned his wife without providing adequate support for such wife and children, but he was not tried or convicted on this count, and it appears from the warrant, and from the first count of the indictment, on which he was tried, that the defendant's wife had been divorced from him at the time the warrant and indictment were found.

The judge, in accordance with the provisions of section 4449, adjudged that "the defendant pay to the clerk of Vance Superior Court

the sum of $50 per month, beginning 1 April, 1922, until the further order of the court, to be applied to the maintenance of his infant children," and the costs.

It does not appear that the defendant was without means, and presumably he was not, for it appears in the record that he has been sheriff of his county, but if he had been, it would have been (C. S., 4449) in the discretion of the judge to make such order for the support of the children "from the property or labor of the defendant," as it was imperatively the duty of the defendant to provide for them.

This statute does not prohibit this proceeding in favor of the children unless his wife has been included, especially is this so when he has no wife. The language of the statute is, "without providing adequate support for the wife and the children." When such proceedings have been taken out for nonsupport of a wife it has never been thought a defense that she had no children. Nor can it be reasonably construed that this proceeding cannot compel the defendant to aid in the support of his children because he has no wife. The rule should work both ways. The object is to enforce adequate support for the wife and children, and if there is no wife, the proceeding none the less will lie in favor of the children, and if there are no children, it still lies in favor of the wife. It is an immaterial circumstance whether the defendant has lost his wife by death, or by divorce, as in this case. The object of the statute is to secure support for the wife and children, or *for either*. The abandonment is only an aggravation of the offense. Any other construction would make the statute a nullity except in cases where the defendant has both wife and children.

In *S. v. Kerby,* 110 N. C., 558, it was held that it was intended to procure the support of the children as well as for the wife, and that the offense was complete when there was a failure to support the children only, though in that case the defendant had a wife at the time the offense was committed.

It was contended for the defendant that the offense of leaving these children without adequate support was barred by the statute of limitations; as if a statute could run against these four helpless little beings, for whose protection, with all others in like condition, the statute was provided. It is true it has been held in some decisions that abandonment was the act to be punished, and, therefore, the statute began to run from that time, and the defendant was protected by the lapse of two years. If there was any validity in that defense as to the wife, who was presumably of age, and whose acquiescence for two years might be a waiver, this certainly could not avail as against these four little girls from 2 to 8 years of age when first abandoned. The statute could not run against them.

But with all respect to the precedent, *S. v. Davis,* 79 N. C., 603, that held that the statute runs from the abandonment, it would seem that a reasonable construction of the intent of the Legislature, as evidenced by C. S., 4449, was not to punish the act of abandonment, for which no punishment is prescribed, but the intent was a judgment requiring the husband, or father, as the case might be, to furnish adequate support out of his estate, if he had any, and if not, by his labor, and that where there has been a failure to support, as in this case, within two years prior to the institution of this proceeding, the action is not barred, certainly not against minor children. They have had no day in court, and have had no opportunity.

In *S. v. Davis, supra,* it was held that this was not a continuing offense. But that was a case where the abandonment was of the wife only who might be presumed possibly to have waived prosecution by delay for two years; but even in that case the court was quick to say that if the husband subsequently made a promise within the two years to support the wife, the failure to perform such promise constituted a fresh abandonment and sustained the indictment found within two years after such failure. If that case is a precedent for the first proposition, it is equally so for the second.

In *S. v. Hannon,* 168 N. C., 216, where the husband had abandoned his wife something over three years before the bill found, but within two years he gave her $5 for her support and promised to return and to furnish a house for her, which he did not do, it was held sufficient breach of his marital duty to support an indictment upon the second promise. The Court said that "the promise of renewal of association on the part of the husband and payment of $5 towards her support would amount to a renewal of the obligation, and on a subsequent failure within the two years an indictment would lie," citing with approval *S. v. Davis,* 79 N. C., 603. In *S. v. Beam,* 181 N. C., 597, where there was a second abandonment, the Court held that the husband leaving the wife the second time without furnishing any support within two years was not barred by the statute of limitations.

If the statute of limitations could run against these little children (for the mother is not a party to this proceeding, and, indeed, the defendant had no wife when the warrant was sworn out or the indictment found), still, even in that view, this defendant cannot avail himself of the bar of the statute, for in this case the abandonment of the wife took place about 1 June, 1919, but afterwards, and within two years of the swearing out of the warrant in this case, on 30 December, 1921, the defendant executed a deed on 1 December, 1920, to R. S. McCoin, as trustee, jointly with his divorced wife, in which they both conveyed their interest in certain property to the trustee with authority to manage

the same, keep it in good condition, and out of the proceeds of said trust fund should pay $200 a month for the support of the divorced wife and the necessary expenses of the children and their schooling. This fund proved inadequate, and the children have been left without any support whatever.

The trustee, Mr. McCoin, also testified that in the fall of 1921, after he had been made trustee and found the fund insufficient, he met the defendant on the street and asked him to contribute something to the expenses of one of the children in the hospital. The defendant said he would do what he could for his children, adding that he was going to Raleigh and would see about a $200 over-payment which he had made in settling as sheriff his taxes with the State; that he would send that, and also would send him a list of parties whose taxes he had paid but had not collected, and that the trustee (McCoin) might collect that for the children. He also, within the two years, on Christmas, 1920, sent the children a pony for riding and several small presents.

The deed in trust, the promise to McCoin, trustee, and the sending of the pony and other articles were all done within two years prior to the beginning of this action and his subsequent total abandonment of his children without any support constitutes an offense, and in any view prevents the bar of the statute of limitations. *S. v. Davis, supra; S. v. Hannon, supra.*

His legal and moral duty was a sufficient consideration for the promise he made, within the two years, to McCoin to send check and other aid for the support of his little girls.

This Court held, in *Sanders v. Sanders,* 167 N. C., 319: "There can be no controversy that the father is under the legal as well as a moral duty to support his infant children. *Walker v. Crowder,* 37 N. C., 487," and whether they have property or not. *Haglar v. McCombs,* 66 N. C., 345.

The defendant did not put on any evidence to deny that he had left his four little girls, aged from 4 to 10, without any support whatever, neither for food, clothing, shelter, or schooling. But his counsel insists that he is protected from liability because when these children were still younger, *i. e.,* 2 to 8 years of age, they had allowed two years to elapse without taking any steps to force him to provide for them. I do not think that this can be the law in North Carolina.

In 20 R. C. L., 622, sec. 30, it is said: "Correlative to the father's right to the custody, control, and earnings of his minor child is his duty to support such child. *This duty is recognized and discharged even by the higher orders of the animal world,* and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as of law. It was held in some early American

cases, supported by eminent English authority, that 'there is no legal obligation on a parent to maintain his child,' unless by force of some statute. But this doctrine, admitted to seem startling and opposed to the innate sense of justice by the court which gave to it its first American support, has been repudiated by the great majority of American courts"; and here follows a long list of decisions, the only case cited to the contrary being an early New Hampshire case.

The law is thus stated, 8 R. C. L., 307, sec. 332: *"The crime of nonsupport is a continuing one, as the duty to support is continuing,* and the breach of it may be stated as having occurred at the moment of desertion or *at any time during the continuance* of the willful neglect to support." Certainly where the failure to support is only as to the children, who at its commencement were from 2 to 8 years of age, and the husband, as in this case, renewed his promise to support them within the two years and has failed to comply, the statute of limitations cannot be a bar as to these children.

The verdict of the jury and the judgment of the court that the defendant pay $50 per month for the support of his four children was just and righteous altogether, and in accordance with the language as well as the clear intent of our statute.

Indeed, the single case that holds that neglect to support the children is "not a continuing duty," and hence acquiescence for 2 years by them is a bar to any liability, should be overruled. In its very nature support is a "continuing duty." 8 R. C. L., 307. It is violated the very first day that the father fails to discharge it, and each succeeding day thereafter is an aggravation and not a defense. Under our rule as to the statute of limitations in misdemeanors, the defendant cannot be held guilty for acts of abandonment and nonsupport committed more than two years before proceedings began, but for those committed within two years. But if this is to be reversed, and by calling it "not a continuing offense" (for which there is no intimation in the statute), still the promise to McCoin and the gifts to the children, made within two years before this action was begun, deprives the defendant of relying upon the defense that he had also been guilty before the two years.

STACY, J., dissenting: I should be content with the judgment of the majority in this case if I did not feel that the present decision is violative of the rule of strict construction, as it relates to the interpretation of criminal statutes, and further, that it is in conflict with a number of our previous decisions. The duties of a husband are quite different from those of a father, and it would seem that a penal statute directed against the one ought not to be held to include the other, unless the

Legislature so declare. A man may be a husband and yet not a father; or, like J. E. C. Bell, he may be a father and not now a husband.

But it is stated in the opinion of the Court that the statute should be construed as if it contained other words than those incorporated therein, and then the observation is made that the conclusion reached is the rational and reasonable one. Maybe so; but to my mind this conviction cannot be sustained without giving a strained construction to a criminal statute, and further, by adding additional words thereto, by way of "judicial legislation." Both of these methods, however, seem to have been employed, in the instant case, in a manner and fashion satisfactory to a majority of the Court.

The present prosecution is based upon an indictment charging the defendant with willfully abandoning his wife without providing adequately for her support, and for the support of their four minor children, as condemned by C. S., 4447. There is also a count in the bill charging the defendant with a violation of C. S., 4450, in that, while living with his wife, he willfully neglected to provide adequate support for the children which he had begotten upon her. But as the evidence was not sufficient to support this latter charge, it need not be considered. *S. v. Kerby,* 110 N. C., 558. He was convicted under the first count.

In addition to the above, there was a third count in the bill to the effect that in July, 1920, the defendant "unlawfully and willfully did abandon his children, viz.: Mary Baxter Bell, Ellen Bell, Mabel Bell, and Josephine Bell, without providing adequate support for said children, against the form of the statute in such cases made and provided, and against the peace and dignity of the State." With respect to this charge, I am unable to find any statute in North Carolina making the alleged offense criminal, unless C. S., 4447, was intended to do so. The language of this statute is as follows: "If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor." Here, it will be observed, two things are necessary to be shown, and they must concur in order to render the husband liable to indictment, to wit: (1) a willful abandonment of the wife; and (2) a failure to provide "adequate support for such wife, and the children which he may have begotten upon her." *S. v. Toney,* 162 N. C., 635. Of course, the offense may be committed where there are no children, but it would seem to be otherwise where there is no wife. The abandonment of the wife is the act of abandonment here condemned, and not that of the children. The statute provides that the charge may be preferred against any offending *husband,* not father. "If any husband shall willfully abandon his wife," etc., is the language used.

But it is said that a contrary meaning was intended, as appears from the caption of this section, which is as follows: "Abandonment of family by husband." Where the meaning of a statute is doubtful, its title may be called in aid of construction (*Freight Discrimination Cases,* 95 N. C., 434); but the caption cannot control when the meaning of the text is clear. *In re Chisholm's Will,* 176 N. C., 211, and cases there cited. Especially is this true where the headings of sections have been prepared by compilers and not by the Legislature itself. *Cram v. Cram,* 116 N. C., 288. Moreover, it does not appear that the instant caption imports a meaning contrary to the body of the text. The abandonment mentioned is to be by the "husband"; and a husband is a man who has a wife.

It was not an indictable offense at common law for a father to abandon his children, nor was it a crime for a husband to desert his wife. The basis of the entire prosecution we are now considering is purely statutory. 13 R. C. L., 1191. It was not known or recognized at the common law, and hence we must look to the enactments of the Legislature to determine the lawfulness or unlawfulness of the offense charged. 21 Cyc., 1611. A careful reading of the above section convinces me that this third count is not included within its terms. Furthermore, it is quite evident that such was not the purpose and intent of the law-making body. The provisions of C. S., 4450, would seem to indicate a different policy, or a contrary legislative intent. This section reads as follows: "If any husband, while living with his wife, shall willfully neglect to provide adequate support for such wife, or the children which he has begotten upon her, he shall be guilty of a misdemeanor."

It will be noted that, in one section, the willful abandonment of the wife without providing adequate support for such wife, and the children begotten upon her, is the offense condemned; while in the other, the willful neglect, while living with the wife, to provide adequate support for such wife *or* the children begotten upon her is made a misdemeanor. The two statutes are quite different, and, on a proper perusal, I think it is apparent that both were drawn with studied care and precision. Note, also, that C. S., 4449, by express terms, has no application unless and until there has been a conviction under the prior statute, and the same may be said of Public Laws 1921, ch. 103.

It may be stated, however, that the defendant was not prosecuted on this third count in the court below. The case was tried on another theory. The State offered evidence tending to show that in June, 1919, the defendant abandoned his wife without providing adequate support for her and their four minor children. The defendant offered no evidence, but contented himself with the plea that the prosecution was barred by the statute of limitations. This was the only question con-

sidered on the trial; and, of course, if the defendant had been tried on the third count in the bill, and it were valid, the plea of the statute of limitations could have availed him nothing under the facts of the instant case.

The offense charged under C. S., 4447, and of which the defendant was convicted, is a misdemeanor. It occurred on or about 1 June, 1919, according to the State's evidence. The defendant was arrested 5 January, 1922, and tried at the March Term, 1922, of Vance Superior Court. The only question presented for our consideration on this appeal is the validity of the defendant's plea of the two-year statute of limitations, C. S., 4512.

As early as 1878, in the case of *S. v. Davis,* 79 N. C., 603, the following was declared to be the law of this jurisdiction: "It is the act of abandonment and failure to support that constitute the offense. The first offense was in 1873, and is barred by the statute of limitations. It is not a continuing offense by reason of the continued separation; so that the question is whether there was a second offense in the latter part of the year 1877." To like effect were the decisions in *S. v. Dunston,* 78 N. C., 420, and *S. v. Deaton,* 65 N. C., 496. And such was recognized to be the law, as it obtains with us, in a well considered opinion by *Associate Justice Walker* in the recent case of *S. v. Beam,* 181 N. C., 597.

In order to repel the plea of the statute of limitations, the State offered evidence tending to show: (1) that the defendant sent his children a pony for a Christmas present in December, 1920; (2) that the following Christmas, 1921, he sent his oldest girl a book, two of his other children a basket, and the smallest one a doll; (3) that on 1 December, 1920, the prosecutrix, Mrs. Bell, who had inherited some property from her father and mother, executed a deed of trust conveying her said inheritance to R. S. McCoin, trustee, for the use and benefit of herself and her four minor children, in which said deed of trust the defendant joined on 9 December, 1920, the same having been sent to him for his signature in Beaufort County, N. C., where he then resided; (4) that in the fall of 1921 the defendant promised R. S. McCoin, who was then acting as trustee of Mrs. Bell's property, to send him a check of $200 to be used in paying the hospital bill of one of his children. This he never did; and at the time of his conversation and promise to McCoin, he expressly stated that "he wouldn't contribute anything to Mabel (Mrs. Bell), but he wanted to do what he could for the children."

It is contended by the State that the foregoing acts of the defendant, committed, as they were, within two years of the finding of the bill of indictment, take the case from under the bar of the statute, and, for this position, the decision in *S. v. Davis, supra,* is cited as an authority. It

will be noted, however, that in *Davis's case, supra,* there was a promise to provide for the wife's support, which amounted to a recognition of the marital obligations, and this promise was actually carried out for a period of two weeks. A refusal then on the part of the defendant to continue to support his wife and child was held to be a second offense, or a fresh act of abandonment and failure to support within the meaning of the statute.

But in the case at bar Mrs. Bell had obtained an absolute divorce from the defendant in the spring of 1921, long before the defendant's conversation with McCoin, and before his Christmas gift to the children in 1921. Hence, the only acts done by the defendant within the period of the statute, and while the bonds of matrimony were still subsisting between the prosecutrix and himself, were the giving of the pony as a Christmas present to the children in 1920, and the consenting to the placing of his wife's property in trust by joining in the deed which had been sent to him for his signature. This was not sufficient to take the case out of the statute and start it to running anew. Neither of these acts, nor the two combined, under the circumstances of the instant case, could hardly be said to partake of the substance of adequate support. The former was intended only as an act of kindness, being a Christmas gift to the children, and the latter was a mere legal formality. Furthermore, two elements are necessary to constitute the offense here charged, namely, willful abandonment of the wife and failure to provide adequate support. Such has been the direct holding in at least three cases: *S. v. Smith,* 164 N. C., 479; *S. v. Toney,* 162 N. C., 635, and *S. v. May,* 132 N. C., 1021.

The State also relies upon the decision in *S. v. Hannon,* 168 N. C., 215. But in that case there was not only a promise made to the wife to provide support within the statutory period, but an actual resumption of the marital relations; and what is said in an opinion should always be considered in connection with the facts of the case in which it is delivered. "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered." *Marshall, C. J.,* in *U. S. v. Burr,* 4 Cr., 470.

The civil liability or obligation devolving upon the defendant to support his minor children is not before us for consideration. *Sanders v. Sanders,* 167 N. C., 319. Nor are we called upon to say whether such conduct as here disclosed should be made criminal. We can only declare the law as we find it, and the courts are not at liberty to extend the terms of a penal statute, by implication or otherwise, to include cases not clearly within its meaning. In other words, the rule of strict construction prevails. *S. v. Falkner,* 182 N. C., 795. There is nothing on the present record to show what order, if any, was made with respect

to the care and custody of the defendant's minor children in the divorce proceedings, brought by his wife in the spring of 1921; but from what is now apparent it would seem that the civil right of these children to call upon the defendant for support is still subsisting, and certainly it is not impaired by the lapse of time. *Sanders v. Sanders, supra.* They are evidently living with their mother, but it does not appear that she has been awarded their custody by order of court, or otherwise.

The unfortunate and pathetic circumstances here disclosed, especially in the absence of any exculpating testimony, may have a strong tendency to excite sympathy for the minor children, on the one hand, and to elicit criticism of the defendant on the other, but it behooves us to bear in mind the fact that neither partisan advocacy nor sharp invective should find a place, or even support, in a calm, judicial opinion; and further, it should be remembered that we are engaged in "running the base line" here, with square and plumb, or needle and compass, as it were, and hence it is not permissible for us to "stretch" the criminal law, by equitable construction or otherwise, to include cases not expressly covered by the statute. We must hew to the line and let the chips fall wherever they may. And though we may think the law ought to be otherwise, this should not blind our judgment to what it really is. The duty of legislation rests with another department of the Government. It is ours only to declare the law, not to make it. *Moore v. Jones,* 76 N. C., 187. The people of North Carolina have ordained in their Constitution (Art. I, sec. 8) that the legislative, executive, and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. Such is their expressed will, and from the earliest period in our history they have endeavored with sedulous care to guard this great principle of the separation of the powers. In this country those who make the laws determine their expediency and wisdom, but they do not administer them. The chief magistrate who executes them is not allowed to judge them. To another tribunal is given the authority to pass upon their validity and constitutionality, "to the end that it be a government of laws and not of men." From this unique political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; and the judiciary—the department of trial and judgment—of all others, without hesitation or turning, should hold fast to the basic principle upon which this Government is founded. The courts are vested with judicial powers only, and it is no part of their function to change or to amend the criminal statutes enacted by the Legislature. On the other hand, the universal rule is that such statutes are to be construed strictly.

In recognition and support of this well established formula, there must be some uniformity in judicial decisions, when dealing with a given subject, or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea—a condition which, all must agree, would be intolerable and destructive of the only enduring foundation upon which the present and future hope of this Government of laws and not of men must be builded and sustained.

The identical law which this Court has heretofore declared to be applicable in such cases is now invoked by the defendant for his protection. He relies upon a statute of repose and the stability of our decisions. With assured confidence, he stands at the bar and asks that the same law which is administered to others shall be administered to him. The righteousness of this position can hardly be denied by a great State which has vouchsafed to every person within its borders even-handed justice and the equal protection of the laws.

It is not every abandonment that is made criminal by the statute as enacted by the Legislature. In the first place, the act of abandonment must be willful, or without just cause, excuse, or justification, which is more than a mere separation (*S. v. Falkner,* 182 N. C., 793); and this must be accompanied by a failure to provide adequate support for such abandoned wife and the children which the defendant may have begotten upon her, whether born in lawful wedlock or not. But this would not include the children of any other marriage or cohabitation. The children are referred to only in connection with the adequacy of support for the abandoned wife, and then only those which the defendant may have begotten upon her. But it is stated in the opinion of the Court that the statute should be construed as if it were framed in the following language: "If any husband shall willfully abandon his wife without providing adequate support for such wife, he shall be guilty of a misdemeanor, and if he shall willfully abandon the children which he may have begotten upon her without providing adequate support for such children, he shall be guilty of a misdemeanor." Here, it will be observed, in the revised statement of the statute, as rewritten by the Court, the words "which he may have begotten upon her" are meaningless unless they refer to the children which the defendant may have begotten upon his abandoned wife. Manifestly, if there be no abandoned wife, there can be no such children. On the other hand, if these words, as here used by the Court, are to be interpreted as meaning legitimate children—and they could be construed to mean illegitimate children just as well, for "her," a pronoun, without an antecedent noun to represent, would be a prodigal term—then the act of the Legislature has

been entirely changed. The courts are treading on dangerous ground when they begin the practice of rewriting criminal statutes.

If this defendant were indicted and stood convicted of a capital felony, it could hardly be conceived that the present interpretation of the statute would be permitted to stand for a moment, and yet the same rule of strict construction which is to be observed in interpreting statutes dealing with the more serious offenses applies equally to those having to do with crimes of a lesser magnitude. It were better that the Legislature should be given an opportunity to declare the law more explicitly than that we should depart from the settled rule in matters of this kind, which has been approved by the wisdom of the ages.

Let there be no misunderstanding. I am not defending or offering any excuse for the conduct of the defendant here. It may have been highly reprehensible, and doubtless it was, but my concern is with a far more serious question, and one which involves the policy of the Court in dealing with the rights and liberties of our citizens. If we are to amend this statute, where is such practice to end or to be stopped? I can find no authority or license for its use in this instance.

My position is simply this: The only wife mentioned in the statute is the wife which the defendant husband has willfully abandoned. The only children mentioned in the statute are those which the defendant husband may have begotten upon his abandoned wife, and none other. Clearly, if no wife has been abandoned, there can be no children of "such wife." Furthermore, the children are mentioned only in connection with the adequacy of support for the abandoned wife. This interpretation is supported and fortified by the language used in C. S., 4450, a cognate statute. In reply to this, I am met with the statement that the law ought to be otherwise. Possibly so, but that is a matter for the Legislature. With all due deference, I think the punitory judgment pronounced herein should be withheld and the parties allowed to proceed in a civil action, as already suggested, if so advised.

WALKER, J., concurs in dissent.

STATE v. CLARENCE AND CLAUDE SCHOOLFIELD.

(Filed 15 November, 1922.)

1. Instructions—Criminal Law—Reasonable Doubt—Appeal and Error.

It is not reversible error for the trial judge, in his instructions in a criminal action, to charge the jury, in several parts thereof, to convict the defendant if certain phases of the evidence satisfies them as to certain facts, leaving out the requirement of the State's showing guilt beyond a

reasonable doubt, when construing the charge as a connected whole it appears that he has clearly and unmistakably charged them elsewhere that the State must satisfy them of the defendant's guilt beyond a reasonable doubt, and upon its failure to have done so, to give the defendant the benefit thereof and acquit him.

2. Criminal Law—Reasonable Doubt Defined.

The reasonable doubt of defendant's guilt in a criminal action beyond which the State must satisfy the jury is not a vain, imaginary, or fanciful doubt; and it is required that the jury be entirely satisfied or convinced of the defendant's guilt, before convicting him, or that they be satisfied thereof to a moral certainty, after considering, comparing, and weighing all the evidence; and if then there should be a reasonable doubt existing in their minds, as to his guilt of the offense charged, their verdict should acquit him.

APPEAL by defendant Claude Schoolfield from *Harding, J.*, at August Term, 1922, of GUILFORD.

Criminal prosecution, tried upon an indictment charging the defendants with the forgery of a check, and also with uttering the same with intent to defraud, knowing it to have been falsely forged. C. S., 4293 and 4294.

Clarence Schoolfield was acquitted. His codefendant, Claude Schoolfield, was convicted, and from the judgment pronounced he appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

S. B. Adams and R. C. Strudwick for defendant.

STACY, J. The only serious exception appearing on the record is the one directed to the following portion of his Honor's charge:

"Reasonable doubt, gentlemen, however, does not mean any and all possible doubt. It does not mean that you are to sit in the jury box and refuse to convict any man of a charge of violating the law until your mind has been disabused of all possible peradventure of a doubt. That is not what the law contemplates by a reasonable doubt; but a reasonable doubt means that when you have heard all of the evidence in the case, when you have heard the arguments and contentions of the State and of the defendants, when you have heard the instructions of the court as it endeavors to apply the rules of law in the case to the evidence for your consideration, does that satisfy you—does the evidence in this case, or the lack of evidence in this case, raise in your mind that sort of a doubt which would be raised in the mind of a man possessed of his reasonable and normal faculties when considering it all? If the State has satisfied you that the defendants are guilty beyond a reason-

able doubt, it would be your duty to convict them. If it has failed to so satisfy you, then it is your duty to give them the benefit of the doubt and acquit them."

It is the contention of the defendant that the use of the words "Does that satisfy you?" in the above charge was insufficient, and should be held for reversible error. This interrogatory expression, taken in connection with the context and the manner in which it was used, could hardly have left an erroneous impression with the jury. His Honor immediately added: "If the State has satisfied you that the defendants are guilty beyond a reasonable doubt, it would be your duty to convict them. If it has failed to so satisfy you, then it is your duty to give them the benefit of the doubt and acquit them."

Nor do we think the instruction is subject to the criticism that the defendants were required to satisfy the jury of any fact. His Honor repeated the statement several times in the charge that the burden was on the State to satisfy the jury of the defendant's guilt beyond a reasonable doubt before a verdict could be rendered against them.

A reasonable doubt is not a vain, imaginary, or fanciful doubt, but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be "fully satisfied" (*S. v. Sears,* 61 N. C., 146), or "entirely convinced" (*S. v. Parker,* 61 N. C., 473), or "satisfied to a moral certainty" (*S. v. Wilcox,* 132 N. C., 1137), of the truth of the charge, *S. v. Charles,* 161 N. C., 287. If after considering, comparing, and weighing all the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith, to a moral certainty, in the defendant's guilt, then they have a reasonable doubt; otherwise not. *Commonwealth v. Webster,* 5 Cushing (Mass.), 295; 52 Am. Dec., p. 730; 12 Cyc., 625; 16 C. J., 988; 4 Words and Phrases, 155.

After a careful consideration of the record, we have found no error, and this will be certified.

No error.

STATE v. ARTHUR GRIER.

(Filed 22 November, 1922.)

Spirituous Liquor—Intoxicating Liquor—Indictment—Manufacturing—Aiding and Abetting—Issues—Verdict—Evidence—Nonsuit—Trials.

Where there is circumstantial evidence tending to show that the defendant had free access to the cellar in a house in the country where spirituous liquor was unlawfully manufactured, and was present at the time, and that he carried whiskey in cans from thence to a place of business he had in a nearby city, and had brought several persons out from the city,

etc., it is sufficient for conviction under a count in the indictment charging the unlawful manufacture of intoxicants; and where the jury have rendered a verdict of guilty upon an issue as to aiding and abetting therein, though no such offense was specifically charged, he would be equally guilty with those who had actually done the illicit manufacturing, and a motion as of nonsuit was properly disallowed. C. S., 3409.

APPEAL by defendant from *Webb, J.*, at the July Term, 1922, of MECKLENBURG.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Stewart & McRae and William H. Bobbitt for defendant.

WALKER, J. The defendant was convicted at the July Term, 1922, of Mecklenburg Superior Court, of aiding and abetting in the manufacture of spirituous liquors, and from the judgment upon such conviction appealed to this Court.

In the bill of indictment there were several counts, one of which charged the defendant with manufacturing, distilling, and making spirituous and intoxicating liquors. There was no count in the bill which charged him with aiding and abetting in the manufacture of liquor.

The defendant's first exception and exception two were taken to the refusal of the judge to nonsuit at the end of the State's evidence and again at the end of all the evidence.

The State's evidence tended to show that in March, 1922, deputy sheriffs Vesperman and Moser found a large steel still in the basement of Monroe Johnson's house, which house was directly opposite Steel Creek Presbyterian Church, about nine miles from Charlotte. They found there the necessary equipment for operating the still and five hundred gallons of beer. At the time they searched the house, Viry Johnson, wife of Monroe Johnson, was the only person there. The defendant ran a restaurant and kept an automobile for hire, and it was in consequence of information given by Viry Johnson that the officers arrested the defendant Grier, in May, 1922. The defendant was a nephew of Viry. In the early part of the week, before the still was found, he brought cans to her house. On Friday prior to the time the still was found by the officers, he came out to the still in his car and brought two other persons with him. He went into the house where she (Viry) lay sick in bed. At that time he told her that he had nothing to do with the still, but had been hired to bring the other two persons out there. She could hear the voices of bystanders outside the window, and could smell the fumes coming up from the basement, where the still

was. The next night (Saturday night) the defendant came out again, bringing only one person with him. Her husband, Monroe Johnson, was not at home at the time, he being then in the jail at Charlotte. The defendant drove up the roadway leading to the house, and in circling the house to go back out his car stuck in a ditch near the rear of the house. She (Viry) was sick in bed, but got up, went to the window, and saw them put some cans in the car. Tuesday after the still was found by the officers, she (Viry) sent for Harvey Grier, defendant's father, to see him about moving. Harvey was sick at the time, and defendant himself came, finding her lying in bed. She told him that the officers had found the still and beer, and he said, "Oh, Lordy," and fell back on the bed where he was sitting.

It appears from this testimony that Monroe Johnson was not present at either of the times about which his wife testified, when the defendant was present. The defendant himself had free access to the still, and it was being operated while he was there. The witness could smell the fumes coming up from the basement where the still was. Again, when he came back, she saw the defendant put in his car the cans which he had brought out on his former trip. This is sufficient evidence to carry the case to the jury, as to the defendant's guilt upon the charge of manufacturing liquor. The jury, however, convicted him of aiding and abetting in the manufacture of the liquor. The defendant certainly cannot complain that the jury acquitted him of actively engaging in the alleged manufacture of liquor, but convicted him of aiding and abetting others in doing so. *S. v. Smith,* 183 N. C., at p. 729; notwithstanding that in law the fact that he was aiding and abetting the unlawful manufacture of liquor rendered him equally guilty with those who actually operated the still. *S. v. Clark,* 183 N. C., 733. The defendant here was not simply hauling people to this still that they might obtain liquor themselves from it, but there was reason to infer from the circumstances that he evidently, according to Viry Johnson's testimony, brought them there in order that the liquor might be manufactured and carried back to Charlotte. It is a fair inference from this testimony that the place of manufacture of this liquor was at Monroe Johnson's house, but the place of its distribution or sale was at the restaurant of the defendant in Charlotte.

The defendant assigned several errors, based upon the exceptions duly taken by him, as follows:

The first assignment of error is based on the court's refusal to nonsuit at the conclusion of the State's evidence, and at the conclusion of the entire evidence.

The second assignment of error was taken to this instruction to the jury: "Or if they find that the still was not the property of the defend-

ant, but if they are satisfied beyond a reasonable doubt that the defendant was present, aiding and abetting some one else in the unlawful manufacture of the liquor, the defendant would be guilty, and if they so find beyond a reasonable doubt, it would be their duty to convict the defendant." The question (as defendant's counsel contend) raised in this assignment is whether the common-law rule that aiders and abettors in misdemeanors are guilty as principals applies to statutory misdemeanors.

The third assignment of error is to the refusal of defendant's motion in arrest of judgment, and to judgment upon the verdict, namely, "Guilty of aiding and abetting in the manufacture of liquor."

The nonsuit was properly denied, as there was ample evidence of defendant's guilt. If we should concede that it was not shown that he had any connection with the operation of the still, or in any way participated therein, we close our minds to manifest inference which the jury were at liberty to draw from the testimony. It did not require that the witness, Viry Johnson, should have actually seen, or caught, the defendant in the act of operating the still. They had the right to form their conclusion as to his guilt from the facts and circumstances within her knowledge, and which came under her observation, or from what she saw and heard, at the time of the transaction, as related by her while on the witness stand. The acts and conduct of the defendant, generally speaking and without entering into details, were those which usually accompany guilt. They do not have the appearance of lawful or legitimate conduct. The basement, the still, in active operation, and the cans which were brought there and taken away by the defendant, the fumes which arose from below Viry's room, are clearly indicative of unlawful dealings by him, and conjointly with others who came with him and engaged in the illegal manufacture of the liquor, which was carried to Charlotte and placed in his restaurant. The purpose in doing all these things is so apparent that the jury could scarcely have rendered a contrary verdict. The conclusion reached by them was well warranted.

The second and third assignments of error seem to involve substantially the same question; that is, whether the defendant could be convicted of aiding and abetting in the commission of the crime under a bill charging only the principal offense of manufacturing liquor. In order to completely answer this contention it is necessary merely to refer to the statute, which is as follows: "It is unlawful for any person to distil, manufacture, or in any manner make, or for any person to aid, assist, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the State of North Carolina; but this shall not be understood as

prohibiting the manufacture of wines and cider in the manner and under the conditions which are now or may hereafter be provided by law. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor, and, upon conviction or confession of guilt, punished in the discretion of the court," etc. C. S., 3409.

It is hardly necessary that we should discuss the principle of the common law as to aiders and abettors in misdemeanors, and we simply state the general rule that aiders and abettors in misdemeanors are to be considered as principals. This Court has often held that one who aids and abets in a misdemeanor can be convicted of the principal offense charged in the bill, and we said in *S. v. Horner,* 174 N. C., 792, which was an indictment for an offense similar to the one described in this case, that "It makes no difference whether defendant was a principal in the first degree or in the second degree as aider and abettor. The latter is but a lower grade of the principal offense, viz., the distilling and manufacturing of liquor. An aider and abetter is denominated in the books as principal in the second degree," and in *S. v. Ogleston,* 177 N. C., 542, *Allen, J.,* charged the jury: "Under this act, notwithstanding the charge is for the manufacture of spirituous liquors, you can convict either of the defendants for aiding and abetting the manufacturing of spirituous liquors as principals." This charge was sustained. See, also, *S. v. Killian,* 178 N. C., 753.

There are many cases in which we have upheld convictions upon similar indictments for aiding and abetting, when the evidence was of far less convincing force than the proof upon which this verdict rests, and where it showed no more participation in the principal crime than that of aiding and abetting.

The defendant, however, moved in arrest of judgment, because the indictment charged the manufacture of liquor without any count therein for aiding and abetting in the manufacture, yet the jury convicted him of aiding and abetting. The legal effect of this verdict, as we have shown, was to declare him guilty of manufacturing. *S. v. Killian, supra; S. v. Ogleston, supra; S. v. Clark,* 183 N. C., 733; *S. v. Smith,* 183 N. C., 729.

We find no error in the case that would warrant us in disturbing the verdict or the judgment.

No error.

STATE v. WILEY BUD SMITH.

(Filed 29 November, 1922.)

Costs — Criminal Law — Submission — Statutes—Civil Actions—Jury—Trials.

The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of C. S., 1229, requiring in criminal cases a tax of $4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of $5 in civil actions should be imposed, as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, being immaterial in construing the meaning of the statute.

APPEAL by defendant from judgment, at October Special Term, 1922, of ANSON, *Ferguson, J.*, presiding.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John T. Bennett for defendant.

WALKER, J. This is an appeal from a special term of Anson Superior Court, held in October, 1922. The defendant came into court and tendered a plea of guilty, which plea was accepted by the solicitor, and therefore no jury was required or impaneled. It being an indictment under the Revenue Act for failing to list taxes, his Honor suspended the judgment upon payment of costs. In the bill of costs, as made out by the clerk, was an item of $4 for jury tax. The defendant, through his counsel, made a motion to retax the costs and strike therefrom the said sum of $4. The judge intimated that he would grant the motion but for section 1229 of the Consolidated Statutes, which he construed as requiring that the item of $4 should be included in the bill of costs. The motion, therefore, was denied, and the defendant, through his counsel, excepted and appealed to this Court, the appeal being allowed in *forma pauperis* upon affidavit and certificate of counsel. This, in substance, constitutes the case on appeal, as agreed upon by the solicitor for the State and the attorney for the defendant.

Whether or not the jury tax of $4 is a legal charge against the defendant, under the circumstances stated, is the sole question presented to the Court.

The statute, C. S., 1229, declares: "On every indictment or criminal proceeding tried or otherwise disposed of in the Superior or criminal courts, the party convicted, or adjudged to pay the costs, shall pay a tax of $4." It is clear, we think, that the Legislature intended that

this $4 (jury fee) shall be taxed under all circumstances in every criminal proceeding. The terms "the party convicted" means a verdict of a jury. But the statute goes further and inserts an alternative, "or adjudged to pay the costs." In the same section it is declared that, in every civil action, the party adjudged to pay the costs shall pay a tax of $5; but this tax shall not be charged unless a jury shall be impaneled. In other words, in criminal proceedings the party adjudged to pay the costs shall also pay, as a part thereof, this jury tax fee, whereas, in civil actions he shall not pay it unless the jury is impaneled. Thus, the Legislature had in its mind at the time the distinction which appears upon the face of the act.

What was the reason for the discrimination in this legislation is not, perhaps, very important, and not essential to be stated, except as indicating what we deem to be the clear and undoubted meaning of the statute. The reason was this, as we see it, that many criminal actions are settled without a jury, and this has been so for many years. Defendants sometimes plead *nolo contendere,* or consent, in open court, to a judgment, upon the condition that the enforcement or execution thereof be suspended upon terms fixed by the court, either with or without a previous understanding as to them. But whatever may be the manner or form of the defendant's submission, it all implies that he is really convicted in law, though the conviction may not be formally expressed in the submission, but is unmistakably implied in the fact that the defendant is adjudged to pay the costs of the case, for our Constitution provides, among other things not relevant to this discussion, that in all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. Const., Art. I (Bill of Rights), sec. 11. Therefore, it was, if not also for other good reasons, the Legislature declared, by C. S., 1229, that in criminal prosecutions the jury fee of $4 should be taxed in the costs which the defendant is adjudged to pay, because of his confession of guilt implied in his submission. The reason for not imposing a similar charge in a civil action was, no doubt, that only individual rights are involved, which may be settled by the parties by private agreement or contract, and generally do not require the intervention of a jury, or anything more than the assent of the court that it may become a part of its record. But whether this is the reason, or some other purpose inspired the enactment, it was manifestly within the competency of the Legislature to declare that the law shall be as written in a statute. It would be useless and of no benefit in any way to prolong the discussion. Even

if the Legislature had no special reason, other than that such a distinction between civil and criminal cases should exist, is not material, as we do not inquire into its motive or policy, but only into the existence of its power to legislate as it did.

There is no constitutional objection to the statute, and none, we believe, was urged. It is merely a question as to its meaning.

The ruling of his Honor, Judge Ferguson, was without error, and is affirmed accordingly.

Affirmed.

STATE v. M. L. BEAM.

(Filed 6 December, 1922.)

1. Intoxicating Liquors — Spirituous Liquors — Possession—Evidence—Questions for Jury—Criminal Law.

Held, the evidence in this case was sufficient to sustain a conviction of the defendant for having in his possession spirituous liquors for the purpose of sale, and of receiving more than one quart thereof within fifteen days time.

2. Intoxicating Liquors — Spirituous Liquors—Evidence—Declarations—Hearsay Evidence.

Upon the trial of defendant for having spirituous liquor in his possession for the purpose of sale, the defendant may not show, on cross-examination of the officer who had made the arrest, what the son of the defendant had said as to the ownership of the whiskey, at that time, it being objectionable as a mere declaration of a third party, and hearsay.

3. Intoxicating Liquors — Spirituous Liquors—Evidence—Instructions—Harmless Error.

Where there is evidence tending to show that the defendant's son was the real culprit, though the defendant was on trial for having the possession of spirituous liquor for the purpose of sale, etc., the exclusion of the defendant's testimony that he was not implicated in the unlawful act, and had forbidden his son to do it, is harmless error when it appears that the same evidence had been introduced at the trial, and had been submitted to the jury under a correct and clear instruction of the trial judge.

4. Constitutional Law — Federal Constitution—Limitation of Powers—Courts—Procedure—Indictment—Grand Jury.

Article V of the Federal Constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" is a limitation imposed on the powers of the Federal Government, and applies to the procedure in the Federal courts, and not to trials for the violation of our State statutes relating to our liquor laws in the State courts. *S. v. Pulliam, ante*, 681, and other like cases, cited and applied.

STATE *v.* BEAM.

5. Criminal Law—Evidence—Other Offenses—Scienter—Guilty Knowledge—Related Criminal Acts.

The principle upon which other offenses may be shown to have been committed against our criminal law by the defendant, though not charged therewith in the indictment, should be strictly construed, and applies only when they are so related with the unlawful act charged as to show *scienter* or guilty knowledge, if such is relevant to the inquiry in the particular case, and not too remote in point of time; and where the defendant is on trial for having possession of spirituous liquor for the purpose of sale, evidence that he had committed a like offense eleven years previous to the time of the offense charged is incompetent, and its admission at the trial constitutes reversible error when there is no evidence tending to show that the previous offense was related to or in any way connected with the one for which he was being tried. *S. v. Beam*, 179 N. C., 768, and other cases, cited and applied, and the competency and relevancy of such testimony discussed by WALKER, J.

CLARK, C. J., dissenting.

APPEAL by defendant from *McElroy, J.*, at Spring Term, 1922, of CLEVELAND.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Ryburn & Hoey and O. Max Gardner for defendant.

The defendant was convicted, at March Term, 1922, of Cleveland Superior Court, of having in his possession spirituous liquors for the purpose of sale, and of receiving more than one quart thereof within fifteen days time, and from the judgment upon such conviction appealed to this Court.

Defendant's exceptions 2 and 7 were taken to the judge's refusal of a judgment as of nonsuit against the State at the conclusion of its testimony, and again at the conclusion of all the testimony. The State's evidence, if believed, showed that in consequence of information received by them, officers E. W. Dixon, J. F. Dixon, and M. N. Moore, after obtaining a proper search warrant, went out on Thursday before Christmas, 1921 (22 December), to Beam's residence, about one mile and a half from Grover, in Cleveland County. The search was made about 3 p. m. of that day. As the officers drove slowly along in front of defendant's house, they noticed three men coming out of a little shop building, and one of those men was putting something in each hip pocket as he came out. This man went out behind the house to the railroad, going in the direction of Kings Mountain. What he was putting in his pocket appeared to be bottles. Officer Moore stopped the man with the bottles on the railroad and found that they contained two pints of liquor, and looked like the bottles that were found on the premises of the defendant.

The defendant Beam was one of the three men coming out of this shop building at the time that the officer Moore got the two pints of whiskey. This shop building was about fifty yards from the defendant's house. The son of the defendant Audie Beam, on seeing the officers, ran back in the shop and they heard something smashing in there. Officer E. W. Dixon then went to the shop, and when he reached the door Audie Beam was breaking bottles out of the window against the side of the house. The bottles were filled with whiskey. "I ran in after him and he jumped out of the window and ran across a big field. As he ran he had his arms full and would throw the bottles against the ground and break them," Dixon testified. Young Beam also had bottles in his pocket.

The officers, continuing the search, found something like eighteen to twenty gallons of liquor, apparently concealed, on the premises. Besides the bottles that were broken, as above stated, they found in the barn, which was nearer the house than the shop, some jars, one of which had liquor in it. In the shop there were bottles covered up and hid. The ground nearby had been hollowed out into a trench and a plank was over it; that is, the ground had been turned back and a hollow place thus made, and in it were some of the bottles. Just above the shop they found a keg, lying beside a stump, with a few briers over it, that contained about fifteen gallons. At the defendant's sawmill, about two hundred yards from the house, they found some large empty kegs which had had whiskey in them. They also found two five-gallon demijohns. There had been liquor in them and tracks about them appeared to have been made the night before.

WALKER, J. It is manifest, we think, that there was sufficient evidence to be submitted to the jury, as to the defendant's guilt upon the charge contained in the indictment or warrant.

Exception 1 was to the exclusion of an answer to a question put by defendant's counsel to officer E. W. Dixon on his cross-examination: "Did Audie Beam tell you whose whiskey that was right at the time that you arrested him?" The State objected and the objection was sustained. If Audie Beam himself had been on trial, the exclusion of the answer to this question would have been error, but Audie Beam was not on trial; consequently, this was a mere declaration of a third party, and hearsay.

Exceptions three, four, and five are untenable. They relate to testimony offered by the defendant that he had forbidden his son, Audie Beam, who was the real culprit, to deal in liquor on his, defendant's, premises, and that instead of selling liquor there himself, or keeping it for sale, he had protested against such illegal traffic and very positively

forbidden it. These exceptions do not appear very clearly in the part of the record where they are first noticed, and especially as to what evidence of this kind was permitted by the court to be heard by the jury, but upon a close examination of the charge of Judge McElroy, it appears that the evidence was submitted to the jury for their consideration and a proper and quite a full instruction given in connection with it. It was admitted, at least, substantially by the court, although rejected at first. No harm or prejudice has therefore been suffered by the defendant in connection with this testimony.

The exceptions to the verdict and judgment, because there was no presentment or indictment, are, as we have shown, without any force, as Article V of the Federal Constitution does not apply. It reads as follows: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." It applies only to the Federal courts and their procedure, as will appear by the authorities hereinafter cited when this question will be further considered."

Exception 6 was taken to the admission of evidence that J. P. Hambright had bought whiskey from the defendant about eleven years before and had paid him $1 for a quart. The State contended that evidence of sales previous to the two-year limit of the statute is admissible as a circumstance sustaining the allegation of the State that defendant had liquor in his possession for the purpose of sale within the two years limit. This may be true, and yet the evidence be incompetent, as it is, upon another alleged ground, which is, that the testimony of the witness J. P. Hambright related to a transaction too remote in point of time and not so connected with the transaction now in question for it to be any evidence of the knowledge of the defendant that the liquor was kept for sale, or to show his motive or intent in disposing of it, if he did so, and further, as having no relevancy because the alleged sale which is referred to in Hambright's testimony was totally unconnected with the offense for which the defendant is indicted in this case. *S. v. Beam,* 179 N. C., 768, and authorities *infra.*

The case of *S. v. Murphy,* 84 N. C., 742, is, upon this question, a very instructive and illuminating one, the opinion being by *Justice Ashe,* who had for many years large experience in the trial of criminal cases when at the bar, and was profoundly learned in that branch of legal science. In the *Murphy case, supra,* after reviewing several of the leading cases decided in this country and in England, he said: "It is a fundamental principle of law that evidence of one offense cannot be given in evidence against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well established rule, except in those cases where evidence of independent offenses

have been admitted to explain or illustrate the facts upon which certain indictments are founded, as where in the investigation of an offense it becomes necessary to prove the *quo animo,* the intent, design, or guilty knowledge, etc. In such cases it has been held admissible to prove other offenses of like character, as for instance, in indictments for passing counterfeit money, the fact that the defendant, *about the same time,* had passed other counterfeit money of like kind, has been uniformly held to be admissible to show the *scienter* or guilty knowledge. So, on a charge for sending a threatening letter, prior and subsequent letters from the defendant to the person threatened have been received in evidence, explanatory of the meaning and intent of the particular letter, upon which the indictment is found. *Rex v. Boucher,* 4 C. & P., 562." And as illustrating the principle involved in that case, he further stated that on indictments for receiving stolen goods, knowing them to be stolen, the prosecutor has been allowed to prove several acts of like character, with the view of showing therefrom a guilty knowledge on the part of the defendant. Whar. Cr. Law, sec. 639. "But as was suggested by the author," said *Justice Ashe,* "there should be some evidence showing a link or connection between them."

In *Rex v. Davis,* 6 C. & P., 117, also approved by this Court in the *Murphy case, supra,* it appeared that, on the trial of an indictment for receiving stolen goods, evidence was admitted for the purpose of showing guilty knowledge of the defendant that other goods found, *at the same time, in the house of the defendant,* were stolen, although they were the subject of an indictment then pending. The judge before whom it was tried said: "A particular line is not fixed upon. All is evidence with a view to the *scienter.* There is no excluding the other articles found. But I do not think you should go further." That is, that the evidence was admissible to show the *guilty knowledge* of the defendant, but for no other purpose. "It is important not to confound the principles upon which the two classes of cases rest. On the one hand it is admissible to produce evidence of a distinct crime to prove *scienter,* or make out the *res gestæ,* or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged. On the other, it is necessary strictly to limit the evidence to these exceptions, and to exclude it, when it does not legitimately fall within their scope." Whar. Cr. Law, sec. 650.

One who commits a crime may be more likely to commit another; yet, logically, one crime does not prove another, nor tend to prove another, unless there is such a relation between them that proof of one tends to prove the other. Unless such a relation exists, it is illegal and manifestly unfair to require a man who is charged with a specific crime in the indictment to prepare a defense against other crimes that the State

may attempt to prove against him, but which are not charged in the bill. The general rule should, therefore, be strictly enforced in all cases where applicable. However, there are exceptions. The rule only applies to cases where the offense charged and that offered to be proved are distinct. It does not apply where the subject-matter under investigation is of such a nature that it may consist of several stages or continuous acts, all constituting one transaction. Evidence which is relevant to the issue raised by the plea to the indictment is not made inadmissible by reason of the fact that it tends to prove the defendant guilty of another crime than that charged in the indictment. Such evidence is received, not because it is proof of the other crime, but because of its relevancy to the charge upon trial. While the prosecution cannot show separate and isolated crimes, or facts having no bearing upon the crime under investigation, it may show all the circumstances connected with the particular crime, even if in so doing it has to bring to light other offenses. 10 R. C. L., p. 940, sec. 110.

As this is an important question, we may just as well state the principal rule with some of its exceptions or qualifications which are pertinent here. The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime, wholly unconnected with that for which he is put upon his trial, must be excluded. It is deemed to be not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. It may be easier to believe a person guilty of one crime if it is known that he has committed one of similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It might lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one. Again, evidence of other crimes compels the defendant to meet the charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. According to a broader rule, in all cases, civil or criminal, the evidence must be confined to the point in issue; and it is said that in criminal cases the necessity is even stronger than in civil cases of strictly enforcing the rule, for where a prisoner is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of

the indictment and matters relating thereto, which alone he can be expected to come prepared to answer. What has been said relates, of course, to the common-law system; under the civil law a somewhat different method is pursued, and much is claimed for it as a mode of achieving justice. The rule against admitting proof of extraneous crimes is subject, however, to certain qualifications or exceptions. In making proof against a defendant it is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime of which the defendant is accused in the case on trial, even though such facts and circumstances may tend to prove that the defendant has committed other crimes. So evidence covering the commission of other offenses is admissible when two or more crimes are so linked in point of time or circumstances that one cannot be fully shown without proving the other. Thus, for the purpose of proving a defendant guilty of the larceny of one article it is proper to prove that he stole other articles on the same expedition, but it is not proper to prove what he stole on an independent occasion. It is often difficult to determine the degree of relevancy which entitles the prosecution to introduce evidence showing the commission of other crimes, but much of the difficulty with reference to such evidence disappears if the evidence is considered strictly upon the ground of its relevancy to the purpose for which it is sought to be introduced, regardless of the fact that it may incidentally show the commission of some other offense. In other words, there ought not to be any more difficulty in deciding the relevancy of such evidence than there is when the circumstance of some other offense appearing is not involved. The mere proximity of time within which two offenses may be committed does not necessarily make one a part of the other. Immediateness is not the true test, but relevancy. There must be a causal relation or logical and natural connection between the two acts, or they must form parts of but one transaction. Where one offense constitutes a necessary element of another, proof may be made thereof. 8 R. C. L., p. 198, sec. 197.

Whenever mental state, *scienter,* or *quo animo* constitutes an ingredient of the offense charged, evidence is admissible of acts, conduct, or declarations of the accused which tend to establish such knowledge, intention, or motive notwithstanding the fact that it may disclose a different crime in law, but this is also subject to the qualifications already noted. 8 R. C. L., p. 201, sec. 197.

A very good exposition of the principle will be found in 16 Corpus Juris, 589, 590, 591, which corresponds, in the main, with that of Cyclopedia of Law and Procedure just cited, though not in all particulars. It is as follows: "Where the nature of the crime is such that guilty knowledge must be proved, evidence is admissible to show that, at

another time and place not too remote, accused committed, or attempted to commit, a crime similar to that charged. In other words, where guilt cannot be predicated on the mere commission of an act, guilty knowledge may be proved by evidence of complicity in similar offenses; but where a guilty knowledge is presumed from the character of the criminal act, evidence of other crimes should not be received. Evidence of other crimes similar to that charged is relevant and admissible when it shows, or tends to show, a particular criminal intent which is necessary to constitute the crime charged. Any fact which proves, or tends to prove, the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime. Where the question is whether a certain act was intentional or was done by accident or mistake, evidence to show that accused intentionally had committed similar acts is relevant to show the intent. On the other hand, where the nature of the offense is such that proof of its commission as charged carries with it an implication or presumption of criminal intent, evidence of the perpetration or attempted perpetration of other like offenses is inadmissible. While, for evidence thereof to be admissible to show intent, the similar offenses must be related in kind to the one in question as to illustrate the question of intent, and must have been done sufficiently near, in point of time, to the act charged as to fairly throw some light on the question of intent." And in *Prettyman v. U. S.*, 180 Federal Reporter, 30 *(S. c.,* 10 Ct. Court of Appeals, 384); the Court stated very fully the rule, with the exception or qualification, applicable in cases of this kind, where knowledge, motive, or intent is an ingredient. It was said there: "The court below, over the objection of the defendants, permitted the introduction of testimony as to many acts other than those alleged in the indictment in order to prove the intent of the accused in doing the things which are charged to be criminal. The thoroughly established rule is that acts not charged in an indictment cannot be proved, among other reasons, because no testimony is pertinent unless it relate to the matters charged in the indictment, and as to which an issue is formed by the plea of not guilty, and because the accused, having no notice that testimony as to any other act would be offered, could not be prepared to meet it. But to this general rule there is at least one important exception, and where the intent with which an act charged to be criminal has been done becomes important, as it necessarily is in this case, then, within certain limits, proof of similar acts of the accused is admissible in order to show the intent with which the act charged in the indictment was done. We think, however, that such similar acts can be proved only when they were done sufficiently near, in point of time, to the act charged as fairly to throw some light upon the question of intent; when the similar acts are so related in kind to

the one charged as to illustrate the question of intent; when the similar acts are in fact acts of the same general nature, or closely related to the transactions out of which the alleged criminal act arose; and when, in fact, the similar acts are acts of the person accused against whom that particular proof is directed. *People v. Molineux,* 168 N. Y., 264; 61 N. E., 286; 62 L. R. A., 193; *Penn. Mut. Life Ins. Co. v. Mechanics, etc., Bank,* 72 Fed., 422; 19 C. C. A., 286; 38 L. R. A., 33, 70; 3 Greenleaf on Evidence, chs. 15, 16; 1 Jones on Evidence, ch. 142; 1 Wigmore on Evidence, ch. 302; *Moore v. United States,* 150 U. S., 57; 14 Sup. Ct., 26; 37 L. Ed., 996; *Wood v. United States,* 16 Pet., 360; 10 L. Ed., 987."

The principles we have stated, with their limitations, were considered in *Gray v. Cartwright,* 174 N. C., 49, it being an action for malicious prosecution, the defendant having charged the plaintiff with stealing his cow, to which case we also refer as authority applicable here, and also to *S. v. Beam,* 179 N. C., 768.

This question is also fully considered in 12 Cyc., 408, where it is said: "Where the nature of the crime is such that guilty knowledge must be proved, evidence is admissible to prove that at another time and place *not too remote* the accused committed or attempted to commit a crime similar to that charged. Evidence of other crimes similar to that charged is relevant and admissible when it shows, or tends to show, a particular criminal intent which is necessary to constitute the crime charged. Any fact which proves, or tends to prove, the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime. Where the question is whether a certain act was intentional or accidental, evidence to show that the accused intentionally committed similar acts before is relevant to show the intent. So, also, where malice is an element in the crime charged, as in murder, assault with intent to kill, arson, malicious mischief, and the like, evidence of another similar act by the accused is admitted to show malice. Evidence to show the motive prompting the commission of the crime is relevant and admissible notwithstanding it also shows the commission by the accused of another crime of a similar or dissimilar character. Thus it may be shown that the crime charged was committed for the purpose of concealing another crime, or to prevent the accused from being convicted of another crime. But evidence of another crime, *which has no connection with that for which the accused is on trial,* and which therefore is not relevant to prove motive, cannot be introduced under the guise of proving motive. Where the crime charged is part of a plan or system of criminal action, *evidence of other crimes near to it or similar in character* is relevant and admissible to show the knowledge and intent of the accused, and that the act charged was not

the result of accident or inadvertence. This rule is often applied where the crime charged is one of a series of swindles, or other crimes involving a fraudulent intent, for the purpose of showing this intent."

The question is not, as seems to be supposed, that the testimony of Hambright was harmless, as all the authorities stated that this kind of evidence is, on the contrary, very harmful to the defendant, and is often calculated to secure a conviction, when defendant may be innocent, and for this reason, if for no other, the rule admitting it, in some cases, should be strictly enforced, and the evidence should be excluded where it does not relate to a transaction near to the commission of the offense in point of time, or so related to it as to throw light upon the question of guilt.

The defendant's counsel in this Court moved to arrest the judgment because the defendant was tried on a warrant from the recorder's court without any bill having been sent to and returned by the grand jury. They cite a case from the United States Supreme Court, which they claim is authority for their position. The first ten amendments to the Federal Constitution, however, are limitations upon the power of the Federal Government only. They do not, and were never intended to, limit the power of the individual states. With us the law has been settled adversely to the present contention of the defendant in a number of cases. *S. v. Hyman,* 164 N. C., 411; *S. v. Lytle,* 138 N. C., 738; *S. v. Publishing Co.,* 179 N. C., at 724, and the recent case of *S. v. Pulliam, ante,* 681, from Forsyth County.

It is not necessary, in view of what has already been said, to consider exceptions to the charge of the court, as they may not again be presented, nor will we discuss the other exceptions, it being useless to do so for the same reason.

There was error in admitting Hambright's testimony which entitles defendant to another trial.

New trial.

CLARK, C. J., dissenting: The evidence in this case was such that if believed the jury could not have found a verdict other than guilty, as the opinion-in-chief intimates. When the officers went up to the defendant's house they found the defendant and two others running out of the shop building 50 yards from defendant's house. His son ran back and they found him smashing bottles on the side of the house. These bottles were filled with whiskey. When the officers approached he jumped out of the window and ran with his arms full of bottles which he threw on the ground to break them. He also had bottles in his pockets. The officers continued the search and found 18 to 20 gallons of liquor concealed on the defendant's premises behind the shop. They also found

in the barn, which was nearer the house than the shop, some jars, one of which had liquor in it. In the shop there were found bottles covered up and hid. The ground nearby had been hollowed out into a trench and a plank put over it; that is, the ground had been turned back and a hollow place thus made, and in it were found other bottles of whiskey. Just above the shop the officers found a keg lying beside a stump with a few briars over it that contained about 15 gallons. At the defendant's sawmill, about 200 yards from the house, they also found 2 large empty kegs which had whiskey in them, and two 5 gallon demijohns in which there had been liquor, and tracks appearing to have been made the night before.

On this evidence the jury could not do otherwise than convict the defendant. There were several exceptions, but the distinguished counsel for the defendant frankly stated that the only ground on which he could ask for a new trial was the following: On examination of witnesses by the State as to the defendant's general character, the sheriff testified that the general reputation of the defendant was that he was a liquor handler. To this the defendant objected, but did not except. The deputy sheriff, J. F. Dixon, testified that he was deputy sheriff in that community; that he knew M. L. Beam's reputation, but knew "nothing against him except that he dealt in whiskey. That is his reputation." To this there was no objection or exception. When asked if he knew any one who had bought liquor from the defendant, he stated that J. P. Hambright had, who was present. Hambright being put on the stand, testified that he lived a little over two miles from the defendant, and that he got liquor there one time from him and paid him $1. That was about 8 years ago. The record stated that the defendant objected to that testimony and excepted. On the argument here the Attorney-General filed a letter from the solicitor that this was not excepted to; that the case was not settled by the judge, but by the prisoner's counsel and himself, and he had signed it inadvertent to the statement therein that exception was made, but that in fact no exception has been entered. The case was not settled by the judge, and as the defendant's counsel stated that as a matter of fact the exception was taken, the Court must take it to be correct. *S. v. Chaffin,* 125 N. C., 665. The defendant's counsel contends strenuously that such testimony was error, but it was error only because too remote and irrelevant, and tended to prove nothing.

It has long been settled by this and all other courts that an error is not sufficient to grant a new trial when it is apparent that it could not have contributed to the verdict.

The evidence is so complete and overwhelming that the defendant was largely engaged in the continuous violation of the statute that it could not possibly have affected the result that the witness stated that he had

bought a quart of liquor from the defendant 8 years before. The sheriff had just testified that he knew the reputation of the defendant, and that he was a handler of liquor, and the deputy sheriff had testified to the same. To neither of these statements was any exception taken. The fact that Hambright stated that he had gotten a quart of liquor from the defendant some 8 years before in no conceivable way could have affected the verdict upon the evidence above stated. It was incompetent and irrelevant because too remote. Its admission was harmless, for if he had testified that he had bought no liquor from the defendant it could not have procured his acquittal in face of the overwhelming proof, and the fact that he had bought a quart 8 years before could not have added in any way to the force of the uncontradicted testimony of defendant's guilt.

If the witness had been asked and stated that the defendant was born in that county, or that he was over fifty years of age, or any other similar matter, it would have been equally incompetent and would have had no more effect upon the verdict than the statement that the witness had bought a quart of liquor from the defendant 8 years before. The admission of such testimony as that would not have vitiated the verdict, neither should this evidence of a matter equally irrelevant and harmless.

The prohibition law was enacted in this State upon a referendum to the people 15 years ago, and has been in full force here ever since. So convinced were the people of the whole country that the traffic in liquor was to the public detriment that an amendment to the Constitution of the United States was adopted by both houses of Congress and ratified by 46 out of the 48 states of this Union. A law which has been so solemnly enacted after so long a discussion, and which so clearly expresses the will of the people, should be enforced in an effective manner. The sole function of the courts is to so construe and execute the law that it may effectuate the remedy desired.

It is universally known that the beneficial result of the statute has been demonstrated not only by the reduction in the volume of crime; in the increased efficiency of a sober population, but billions of dollars worth of real estate once devoted to drinking purposes is paying a larger return under its new uses. The great decrease in the number arrested for drunkenness and other misdemeanors and in the population of the jails and workhouses; the fewer demands made for relief to charitable organizations; the smaller number of alcoholic patients entered in public hospitals, and a thousand other results demonstrate the wisdom of this enactment which has been placed by so overwhelming a majority in the organic law. Indeed, but for this act the operation of automobiles would not be feasible. The universal popularity of prohibition among retail tradesmen, who have profited from increased business in furnish-

ing the necessities of existence to those formerly deprived of them, is further testimony as to the advantages of the statute.

Every consideration, therefore, requires a frank enforcement of the law when the evidence plainly requires it, and that no mere formal error which cannot affect the result should be permitted to nullify a serious trial for such crime in violation of the fundamental law of the land.

When there occurs an error in the trial which it is apparent could not have affected the result, it has been uniformly held by this and all other courts that it will be disregarded. "Where a case is tried in substantial accordance with law, technical errors not prejudicial do not entitle the losing party to a reversal." *Alexander v. Savings Bank,* 155 N. C., 124; *Hulse v. Brantley,* 110 N. C., 134.

"Technical errors will be considered harmless where a reversal would not result in a different verdict." *McKeel v. Holloman,* 163 N. C., 132. Where all the essential facts upon which the result depends have been passed upon by the jury, the appellate court will not for formal error grant a new trial. *Rich v. Morisey,* 149 N. C., 37.

"Error to warrant reversal must be prejudicial." *Penland v. Barnard,* 146 N. C., 378; *Ratliff v. Huntly,* 27 N. C., 545; *Butts v. Screws,* 95 N. C., 215; *Hosiery Mills v. Cotton Mills,* 140 N. C., 458; *Harvell v. Lumber Co.,* 154 N. C., 258; *Holt v. Wellons,* 163 N. C., 124; *Steeley v. Lumber Co.,* 165 N. C., 27; *Brogden v. Gibson, ibid.,* 16.

"Error alone is not sufficient to reverse, but there must be harm to the party who excepts, and if it appears there is none, his exception fails." *Carter v. R. R.,* 165 N. C., 249; *Young v. Mfg. Co.,* 151 N. C., 272; *Barker v. Ins. Co.,* 163 N. C., 175.

"It is well settled that the Supreme Court will not review a ruling of its own, or of the court below, which does not injuriously affect the complaining party, even if the ruling was erroneous." *Nissen v. Mining Co.,* 104 N. C., 309.

Indeed, the decisions in this Court are uniform and numerous, and based upon the sound principle that the object of a trial is the ascertainment of the truth of the issue, which in this case was whether the party charged was guilty of dealing in spirituous liquors contrary to law, and on this question there can be no two opinions upon this evidence.

The decisions in other courts are uniform to the same effect. In *S. v. Hessenius,* 165 Iowa, 415, it was held that the admission of irrelevant and incompetent testimony, which could not affect the result and which should have been excluded as immaterial, does not justify a new trial.

In *S. v. Chipman,* 40 Utah, 549, it was held that the Court, on appeal, will give judgment without regard to defects not affecting substantial rights.

In *Woody v. State,* 10 Okla. Cr., 322, it was held: "Where the legal evidence in a case conclusively shows that a defendant is guilty, and where the jury could not rationally arrive at any other conclusion, ordinary errors committed by the trial court in the introduction or rejection of evidence are immaterial, and will not justify a reversal." In that case the court laid down the principle which should govern in all such trials as follows: "Where it is clearly proved that a defendant is guilty as charged, a conviction should not be reversed unless it affirmatively appears from the record that the defendant was deprived of some substantial right, to his injury, upon the trial."

In *S. v. Pruett,* 22 N. M., 223, it is held: "The admission of an item of evidence which is immaterial, and which technically is inadmissible, where it in no way reflects upon the guilt or innocence of the defendant cannot be prejudicial to him, and is not sufficient cause to reverse a judgment."

In *S. v. Gardner,* 96 Minn., 318, it is held: "Errors in ruling on evidence which do not result in prejudice to the accused, and which can in no reasonable way affect the result of the trial, are not sufficient basis for granting a new trial in criminal prosecution," citing *S. v. Nelson,* 91 Minn., 141, and other cases.

In *People v. Owen,* 154 Mich., 571, the principle which should obtain is thus laid down: "A conviction should not be reversed for error in admitting testimony where a verdict of guilty should have been rendered without its admission." That is exactly the case here.

The universal principle which should obtain is thus laid down as indisputable law in *Hoge v. People,* 117 Ill., 36: "Where the Court can see from the record that the evidence is so overwhelming against the defendant, tried for a criminal offense, that had the jury been instructed correctly they must still have found against him, it will not reverse a judgment of conviction for a mere error of instruction. For the same reason a conviction should not be reversed for admitting testimony *without which it is perfectly evident that a verdict of guilty should have been rendered.*"

This states the uniform ruling of all the courts on this matter, and is entirely applicable to this case where the evidence admitted could not possibly have reversed the overwhelming evidence of the defendant's guilt, and that in a matter of violation of a nation-wide and constitutional provision, which the defendant, beyond all possible question, was proven to have been habitually engaged in violating.

The above cases and principles are especially applicable here, for it must be remembered that the testimony objected to was pertinent except for the fact that it was too remote and had no probative effect. Otherwise it was perfectly competent.

Even in the last two volumes of our Reports there are no less than 9 cases enforcing this wholesome doctrine that an error will not justify a reversal unless it appears that it may have affected the result: *Rankin v. Oates,* 183 N. C., 520; *Ledford v. Lumber Co., ibid.,* 616; *Newton v. Newton,* 182 N. C., 55; *Jordan v. Motor Lines, ibid.,* 561; *Fellows v. Dowd, ibid.,* 777; *S. v. Jones, ibid.,* 787; and especially in point is *In re Edens,* 182 N. C., 400, in which *Stacy, J.,* says: "Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result it *must be made to appear* not only that the ruling was erroneous, but that it was *material and prejudicial,* amounting to a denial of some substantial right," citing *Cotton Mills v. Hosiery Mills,* 181 N. C., 33; *Burris v. Litaker, ibid.,* 376; *S. v. Smith,* 164 N. C., 476, and *Cauble v. Express Co.,* 182 N. C., 448.

In this last case *Walker, J.,* p. 450, lays down the sound principle in unmistakable language, as follows: "When the aid of this Court is invoked to grant a new trial, the motion for the same will be carefully weighed by us, and will be denied unless the merits are made *clearly to appear.* Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be, at least, 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. The motion should be meritorious and not based upon merely trivial errors committed manifestly without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have *long ceased to have that effect and have become obsolete. The law will not now do a vain and useless thing.* The foundation of an 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 injurious, for it wounds the feelings, but this alone is not 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." For this valuable and clear reasoning there is cited numerous authorities, and to which the author of the opinion adds this: "Surely when this rule, which is both sensible and just, is applied to the facts in hand

there is nothing to be gained by granting a new trial for the reason stated by the defendant, and it would, practically considered, be unwise to do so, as a motion, so far as it relates to this ground upon which it is based, is without any genuine merit." This applies to the present case, for upon the same evidence, when the cause is tried again, with the omission of this evidence as to the purchase of a quart of liquor 8 years before, the admission of which is the only error relied on, the result could not be changed.

In *S. v. Hairston,* 182 N. C., 851, it was held that the error in the exclusion of testimony is not ground for a new trial when it appears that it was harmless. To same purport in 181 N. C. are *Cotton Mills v. Hosiery Mills,* 181 N. C., 33; *Smith v. Allen, ibid.,* 56; *Cotton v. Fisheries, ibid.,* 151, and other cases.

When we consider the importance of enforcement of this law, which has been placed in the Constitution, it is doubly necessary that new trials shall not be granted when it is apparent that the error complained of, when not repeated on a new trial, would not change the result.

The defendant has been twice convicted—before the recorder's court and on appeal in the Superior Court. There is nothing that requires that he should have still another trial.

STATE v. SOL SPARKS.

(Filed 6 December, 1922.)

1. Instructions—Expression of Court's Opinion—Statutes—Appeal and Error—Intoxicating Liquors—Spirituous Liquors.

Where the defendant, on trial for violating our prohibition laws, has not admitted his guilt, and the trial judge, in his charge to the jury, has assumed that he was guilty upon the evidence of a State's witness, it is an expression by the judge of his opinion whether a fact has been fully or sufficiently proven, and constitutes reversible error. C. S., 564.

2. Same.

Where the verdict of the jury has acquitted the defendant indicted for violating our prohibition laws under the count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes reversible error.

APPEAL by defendant from *Bryson, J.,* at February Term, 1922, of YADKIN.

Criminal action. The defendant was convicted of a violation of the prohibition law.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Williams & Reavis for defendant.

ADAMS, J. The indictment contains five counts, three of which, in view of the verdict, we need not consider. In the first count the defendant is charged with the unlawful sale of spirituous liquor, and in the second, with having such liquor in his possession for the purpose of sale. The jury acquitted him on the first count and convicted him on the second. In charging the jury, after stating certain contentions arising upon the evidence, his Honor said, "We know that the sale of whiskey was made and was proved by witness who made the purchase, and who identifies the defendant as being the person who committed such act," to which instruction the defendant excepted.

On behalf of the prosecution it is insisted that this language was intended only as a recital of one of the State's contentions, and it is altogether possible that it was so understood; but the record presents it as an independent and detached statement which the jury may reasonably have construed as a conclusion of the court, and not as a mere circumstance on which the State relied for conviction.

Section 564 of the Consolidated Statutes is as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

In *S. v. Horner,* 174 N. C., 792, the defendant, who was charged with the unlawful manufacture of spirituous liquor, did not testify in his own behalf, and the trial judge inadvertently gave this instruction to the jury: "He said himself that he was there for the purpose of hauling it off to assist somebody who had put that beer there. He stated that himself, and he stated that he got into bad luck, or something like that, for undertaking to do that thing." In discussing the defendant's exception, *Walker, J.,* said: "The defendant did not testify in his own behalf, and his Honor manifestly was referring here to what the State's witnesses had testified that the defendant told them at the still at the time of his arrest; but whether he had made those statements to the officers was a question of fact for the jury to decide, depending upon the credibility of the State's witnesses, and the court was deciding that he did make the statements when it charged the jury that 'he said himself

that he was there for the purpose of hauling it off,' etc., and this the court could not do, as the jury must pass upon the credibility of the witnesses and find the facts. *S. v. Davis,* 136 N. C., 568; *S. v. Cook,* 162 N. C., 586. The court, therefore, inadvertently, of course, expressed its opinion upon the weight of the testimony. The credibility of the witnesses always is a question for the jury."

According to the record in this case, his Honor told the jury, in effect, that the defendant had sold whiskey in violation of law. Certainly this was such an expression of opinion as the statute forbids. It is true the defendant was not convicted of the unlawful sale, but if in fact he made such sale the conclusion that he had the whiskey in his possession for the purpose of sale, as charged in the second count, was well nigh unavoidable. For the error indicated there must be a new trial. In addition to the cases cited under C. S., 564, we refer to *Morris v. Kramer,* 182 N. C., 87, and *Greene v. Newsom, ante,* 77.

We take occasion to suggest that care be exercised by the counsel on each side in the preparation of cases on appeal to this Court, especially when, as in this instance, the trial judge has no opportunity to review or to correct the transcript.

New trial.

STATE v. VES WINGLER, ALIAS U. G. WINGLER.

(Filed 13 December, 1922.)

1. Instructions — Evidence — Criminal Law—Homicide—Murder—Manslaughter.

Where the defendant is being tried for homicide and the State has introduced evidence of his admission of the crime and circumstantial evidence tending to show his guilt, a defense solely upon the ground that the deceased was killed by an accident to herself wherein the defendant was not at all involved, does not present any evidence coming within the definition of manslaughter, and the trial judge commits no error in refusing to charge the law relating thereto. *S. v. Myrick,* 171 N. C., 791, cited and distinguished.

2. Trials—Evidence—Questions for Jury.

The weight and credibility of the evidence are matters within the province of the jury to determine, under a proper instruction by the court of the law thereto applicable.

APPEAL by defendant from *McElroy, J.,* at August Term, 1922, of WILKES.

Criminal prosecution, tried upon an indictment charging the defendant with the murder of his wife.

The defendant was convicted of murder in the second degree, and from the judgment pronounced thereon he appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John R. Jones and T. C. Bowie for defendant.

STACY, J. In 1891 the defendant, Ves Wingler, married Candace Miller, the daughter of Nathan Miller, of Wilkes County. These two people lived together as man and wife for two years and seven days. At first they resided with the defendant's mother; and then they moved to themselves and lived in a log cabin, situate on the mountain side about 17 or 18 miles from North Wilkesboro, N. C. At that time the only way of getting in and out of this country was by a wagon road and "by walk-ways which lead across ridges and hollows and creeks." Here a child was born to this union, and apparently they were contented, if not happy, in their poor and humble home.

On 10 May, 1893, Candace Wingler, wife of the defendant, died under rather peculiar and suspicious circumstances. A coroner's inquest was held six days thereafter, and again on 23 May, 1893, the coroner's jury was reassembled, additional evidence was offered for its consideration; the body of the deceased was exhumed and on examination by Dr. J. M. Turner was made in the presence of the jury. The coroner's jury finally rendered a verdict that the deceased met her death by accidentally falling out of the loft of the defendant's cabin and striking her head against the stone hearth and hitting her shoulder and neck against the ear and sharp wire bail of a pot in the fire place. This was the defendant's version, given at the trial, as to how she received her fatal injuries.

In 1894, about ten months after Candace Wingler's death, the defendant married Melvina Wingler, the 16-year-old daughter of John Wingler. With his second wife, the defendant has since lived in the same community and raised another family. The child by his first wife was cared for largely by her grandmother, Mrs. Ann Miller.

In April, 1922, Ves Wingler swore out a warrant against one of John Shepherd's boys, charging him with an assault upon his 9-year-old daughter by striking her in the face and knocking out some of her teeth. He was not arrested, but is now a fugitive from justice. Two days thereafter, John Shepherd made an affidavit before a justice of the peace, upon which the warrant and subsequent indictment of the defendant were based, charging that the defendant had admitted to him, in the presence of others, at the time of his first wife's death, that he, the defendant, had killed her.

The defendant contended that his wife had climbed into the loft of their cabin to put away a pot of soap which she had made, and that she fell through an opening for a distance of eight or ten feet, striking her head against the stone hearth, crushing her skull and causing her death. The defendant further testified that, upon discovering his wife's condition, he ran out of the house and over the hill with a call for help from his neighbors, relatives, and friends.

The State contended, and offered evidence tending to show, by those who responded to the defendant's distress signal and who saw his wife before her death, that the deceased was a strong, vigorous woman; that she had a number of bruises on her body; that her skull was crushed on the back and left side; that her right shoulder showed a deep gash near the neck; that her right arm and the fingers of her right hand were cut; that her tongue was cut about two-thirds in two; that her thighs were bruised in two places, in front and behind, and that she was very bloody. There was evidence also to the effect that blood was found in the yard, on the steps, in the house, and the prints of a woman's bloody hand was seen on the wall; that a bloody mattock lay on the floor, the blade of which was about the size of the gash in her shoulder; that there was no hole or opening in the loft through which her body could have passed; that when this circumstance, among others, was called to the defendant's attention by his mother and sister in the presence of John Shepherd (who gives this evidence), he said: "Yes, I killed her with the mattock; but, in the name of God, don't tell it. Tell that she fell out of the loft and killed herself. . . . For God's sake, open a place and tell she fell through there," and then, turning to John Shepherd, he exclaimed: "John, God damn you, if you ever tell it, I will kill you."

The State's witness, John Shepherd, in explanation of why he withheld this evidence from the officers of the law for so long a period, stated that he was afraid the defendant would kill him, or do him great bodily harm, if he told it; but that, after he had been converted and professed religion, in the spring of 1922, the matter bore upon his mind to such an extent that he felt compelled to give the authorities the information he had, and thus relieve himself of the burden he had been carrying for so many years. This witness further stated that on one occasion, when the defendant was drunk, he told him that he killed his first wife in order to get rid of her and to marry Melvina Wingler, but added: "If you ever tell it I will kill you."

The defendant, on the other hand, contended that the testimony of John Shepherd was false in its entirety; that it was born of a malicious and revengeful spirit, occasioned by the attempted arrest of his boy at the instance of the defendant. There was further evidence on behalf of the defendant tending to impeach the character and reputation of the

principal witnesses for the State, and there was evidence in rebuttal offered by the State, derogatory of the defendant's character and standing in the community.

Upon this circumstantial evidence and alleged confession of guilt, the jury returned a verdict of murder in the second degree, and the court imposed an indeterminate sentence of not less than 25 years nor more than 30 years at hard labor in the State's Prison.

The only material exception presented for our consideration is the one directed to the following portion of his Honor's charge: "In this case, gentlemen of the jury, the court charges you that there is no evidence of manslaughter in the case, and your verdict will be either guilty of murder in the first degree, murder in the second degree, or not guilty, as you may find and be satisfied from the evidence in the case."

The principle here invoked by the defendant, and which he alleges was violated by this instruction of the court, is stated by *Hoke, J.,* in *S. v. Merrick,* 171 N. C., 791, as follows: "It has been held with us in numerous cases, and the position is in accord with authoritative decisions elsewhere, that where in an indictment for murder the law in this State permitting a verdict for a lesser grade of the crime, if 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," citing a number of authorities.

The foregoing, of course, is a correct statement of the law, but a careful perusal of the present record convinces us that this principle is not applicable to the facts of the instant case, and that the defendant's exception must be overruled. There is no evidence upon which a verdict of manslaughter could have been based, hence the rule as stated does not apply. Indeed, the defendant's own testimony positively runs counter to any inference of manslaughter. He testified that the deceased had given him no offense, and that there was no occasion or cause for her murder. *S. v. Johnson,* 161 N. C., 264; *S. v. Bowman,* 152 N. C., 817; *S. v. Teachey,* 138 N. C., 598.

There are several other exceptions relating to the admission and exclusion of evidence, but none apparently of sufficient merit to warrant an extended discussion. The weight and credibility of the testimony was for the jury, and it has found the facts at variance with the defendant's contention. The State's evidence, if believed in its entirety, would have justified a more serious verdict. But the jury, in the discharge of its duty, has acquitted the defendant of the capital offense.

This is a remarkable case in many respects. Its opening scene is one of romance; it then moves on from suggested intrigue to ultimate

tragedy. So far as our records disclose, it is without a parallel in the judicial history of the State. It seems to stand alone and apparently is *sui generis.*

Three decades ago, Ves Wingler, with axe in hand, cut from the virgin forests of Wilkes County the logs and the timbers with which he built upon the mountain side a crude and humble hut for himself and Candace Wingler, his wife. Here this couple started life together in a rough, rugged, mountain home—a log cabin, in fact—but to the deceased it was at least a stable and a manger. The only means of getting in and out of this country at that time was by a wagon road and by walkways which led across ridges and hollows and creeks. In winter there was a scene of leafless branches, snow-covered peaks, and frozen brooks; and that was poverty. But the defendant and his wife were not daunted by the dangers of the inaccessible hills, nor by the frightful stories of the mountain coves. They started life with high hopes and with a faith that knew no fears, waiting and praying for the dawn of a better day.

It matters not on what plane of life one labors, nor how large or small the number of his acquaintances, the man who toils and yet knows that in the circle of his influence there is at least one life in which there is sunshine where but for him there would have been shadow; that there is at least one home in which there is cheer where but for him there would have been gloom; that there is at least one heart in which there is hope where but for him there would have been despair, that man carries with him as he goes one of the richest treasures on this earth. This was the goal for which Ves Wingler was striving thirty years ago. But, alas, another story is told. He soon grew weary of his wife, and for some reason, not clearly disclosed by the record, he took her life in a cruel and heartless manner. Evidence of the crime was concealed at the time; he married again, raised another family, and, after the lapse of twenty-nine years was, arrested, tried, convicted, and sentenced to the State's Prison. Though justice sometimes treads with leaden feet, if need be, she strikes with an iron hand. Verily, the wages of sin is death, and sin pays its wages.

The supreme tragedy of life is the immolation of woman. With a heavy hand, nature exacts from her a high tax of blood and tears. The age of knighthood has passed and is gone, but let us hope that the spirit of chivalry may never die. No civilization can last where women are permitted to be butchered like sheep in the shambles. Surely there is no pleasure to be derived from the punishment of the wicked, but it would seem that this defendant ought to welcome an opportunity to expiate his crime and to make some atonement for it. No doubt, in his own conscience, he has already suffered the agony of remorse. How,

through the many years, has it been possible for him to banish from his mind the vision of the woman who, in the days of her youth, put her hand in his, with a promise to forsake all others and to follow him? At the altar she vowed, in substance, that "whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God." Can the defendant ever forget that momentous hour when this woman, with heroic courage, took immortality by the hand and went down into the valley of the shadow of death that his child might live? And then, can he for a moment cease to hear her screams of terror as she fled from his murderous hand?

The fates decreed for Candace Miller a hard lot and a cruel death, but—

"Oh, can it be the gates ajar
Wait not her humble quest?"

There is no error appearing on the record, except the great error of the defendant in murdering his wife; but this is a mistake which is beyond our province or power to correct.

"Repose upon her soulless face,
Dig the grave and leave her;
But breathe a prayer that, in His grace,
He who so loved this toiling race
To endless rest receive her."

—*McNeill.*

The trial and judgment of the Superior Court will be upheld.
No error.

STATE v. LLOYD BAKER, MANS GASPERSON, AND HARRY GASPERSON.

(Filed 13 December, 1922.)

Intoxicating Liquor—Spirituous Liquor—Evidence—Questions for Jury—Constitutional Law.

The evidence in this case *held* sufficient on appeal to sustain a verdict convicting the defendant of the unlawful manufacture of intoxicating liquor, and our State statute on the subject does not contravene the XVIII Amendment to the Federal Constitution.

APPEAL by defendants from *Shaw, J.*, at March Term, 1922, of BUNCOMBE.

Criminal prosecution, tried upon an indictment charging the defendants with engaging in the manufacture of spirituous liquors in violation of the State statutes.

From an adverse verdict and judgment pronounced thereon, the defendants appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Reynolds, Reynolds & Howell for defendants.

STACY, J. The defendants' first and second exceptions are directed to his Honor's refusal to grant their motions for judgments as of nonsuit, made first at the close of the State's evidence and renewed at the close of all the evidence.

Robert Gilliam, a witness for the State, testified that he had seen all three of the defendants personally engaged in the operation of an illicit distillery in Buncombe County within the past two years; that, to his own knowledge, each and every one of the said defendants had done work and taken a part in the manufacture of said intoxicating liquors. This evidence, while denied by the defendants, was amply sufficient to carry the case to the jury. The defendants, having lost before the jury, doubtless appealed "to see how it might strike the Court."

The remaining exceptions, calling in question the validity of our State statutes since the adoption of the XVIII Amendment to the Constitution of the United States, must be overruled on authority of *S. v. Campbell,* 182 N. C., 911, and cases there cited.

No error.

STATE v. REID SUDDERTH.

(Filed 13 December, 1922.)

1. Assault and Battery — Automobiles — Highways — Statutes — Public Safety—Criminal Law—Evidence.

Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways, among them, C. S., 2617, as to the passing without interference; 2618, amended by Public Laws 1921, ch. 98, Extra Session, as to reckless driving, having regard to the width of the highway, traffic thereon, and the various rates of speed in accordance with location in the country, upon streets of cities, towns, etc.; 2599, making a violation of any of the provisions of ch. 55, C. S., a misdemeanor, are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted.

2. Same.

A battery includes an assault, and to constitute an assault it is not necessary that the defendant should have directly struck the one assaulted, for any unlawful touching of the person alleged to have been assaulted, or the setting in motion of any force that is committed through means which ultimately produce this result, and are likely to produce it, is sufficient, and applies when a person driving an automobile upon the State's highway, in consequence of his violating the statutes on the subject, collides with another person driving an automobile thereon, which results in a physical jarring of such other person, though he may not have been thrown from his automobile, or struck in any part of his body.

3. Criminal Law—Sentence—Discretion of Court—Courts—Inference—Appeal and Error.

A permissible inference that the trial judge increased the sentence of the defendant, convicted of an assault and battery, because the defendant later exercised his right of appeal, on the facts of the record *is held* insufficient to justify the Supreme Court in setting the judgment aside on the ground that the judge has grossly abused the exercise of the legal discretion given him by the law.

APPEAL by defendant from *Ray, J.*, at August Term, 1922, of BURKE. Indictment for assault with deadly weapon.

The evidence on the part of the State tended to show that on the night of 16 July, 1922, as prosecutor was going towards Morganton in his automobile, defendant, also in an automobile, meeting said witness, ran his said machine into that of plaintiff, broke front axle of prosecutor's car in two places, also one wheel, knocked off the fender, running board, and braces, and bent up the running gear. That at time of collision defendant was running his car at thirty to thirty-five miles an hour, and was over on prosecutor's side of the road. Prosecutor was going fifteen or twenty miles per hour, and in the endeavor to avoid a collision, had run his car as far to his own side of the road as he could get with safety, the cars being on a fill. That prosecutor was not struck in any part of his body, nor thrown out of the car by the collision. The testimony of prosecutor was supported by evidence to the effect that after the collision defendant's car was found on wrong side of the road, as claimed and testified to by the prosecutor.

There was evidence for defendant in denial of plaintiff's account of the occurrence, and tending to show that defendant was only going ten or fifteen miles per hour, and was on his own side of the road. That prosecutor had just come around a curve in the road without sounding his horn or giving any signal, and defendant was within twenty-five feet of prosecutor when he first saw him, and too late to avoid the collision.

The court submitted the issue to the jury with a very full statement of the evidence and contentions of the State, and of the defendant, instructing the jury, among other things, that if the facts as testified to

by the State's witnesses were accepted by them, and they were satisfied that they were true beyond a reasonable doubt, then an assault was committed as charged. Verdict, guilty. Judgment, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

S. J. Ervin and S. J. Ervin, Jr., for defendant.

HOKE, J. Our statute on the subject of motor vehicles, C. S., ch. 55, Public Laws, Extra Session 1921, among other things, in section 2617, provides: "That persons operating such machines on the public highway, meeting another, shall reasonably turn to the right of the center of the road so as to pass without interference." And in section 2618, as amended by Public Laws, Extra Session 1921, ch. 98, forbids that persons operating such vehicles shall do so recklessly or at a greater rate of speed than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the life and limb of any person, with a proviso that a rate of speed in excess of twenty miles per hour in the residence portions of any city, town, or village, and a rate in excess of ten miles in any business portion of a city, town, or village, and a rate in excess of thirty miles an hour on any public highway outside of the corporate limits of any incorporated city or town shall be deemed a violation of the section, etc. And in section 2599 of said chapter the violation of any provision of this chapter is made a misdemeanor.

This statute being designed to secure the reasonable safety of persons in and upon the highways of the State, and enacted because a violation of the provisions is likely to result in death or serious bodily harm of such persons, it is the established principle, and has been so directly held with us, that where one upon the highway is killed or injured by reason of the operation of one of these vehicles in violation of the statutory provision, the party in default may be prosecuted for murder or manslaughter if death ensues, and for assault in cases of personal injury. *S. v. Rountree,* 181 N. C., 535; *S. v. McIver,* 175 N. C., 761; *S. v. Leary,* 88 N. C., 615. In this last case it is said: "Where the facts of a case of homicide constitute the crime of manslaughter, the same state of facts will constitute an assault if no killing ensues."

On the facts, as accepted by the jury, a proper application of these principles is in full support of defendant's conviction. It is well understood that a battery always includes an assault. Coke on Littleton, p. 253. And in Clark on Criminal Law, p. 253, it is said "That a battery is an assault whereby any force, however slight, is actually applied to the person of another, directly or indirectly."

In Greenleaf on Evidence, (16 ed.), sec. 84, the author says "That a battery is the actual unlawful infliction of violence on the person of another, and may be proved by evidence of any unlawful touching of plaintiff's person, whether by the defendant himself or by any substance put in motion by him." And in 2d Wharton Criminal Law (11 ed.), sec. 804: "Whether it is an assault and battery on B. to strike a horse driven by B. was at one time doubted, but the better opinion is that a blow is a battery irrespective of the number of mechanical agencies through which it is transmitted." And in section 811: "A battery is an assault in which force is applied by material agencies to the person of another, either mediately or immediately." And by way of illustration: "Thus, to strike the dress of a person assailed or the house in which he resides may be as much a battery as to strike his face."

While in the instant case the prosecutor was not thrown entirely from the car, nor struck in any part of his body, the physical jar necessarily produced by the collision described in evidence, caused by the unlawful use at the time of defendant's car, is clearly sufficient, as stated, to justify a conviction for assault and battery.

It is further objected for error that on the rendition of the verdict defendant was sentenced to twelve months in the common jail, and assigned to work on the roads in Iredell County. And the next day, when a motion for a new trial was made and overruled, and appeal taken, the court struck out the first judgment and imposed a sentence of two years in jail, and assigned to work the roads, etc. In this connection the case on appeal states that the first sentence of twelve months was imposed on the coming in of the verdict, there being no motion for new trial or appeal, the court inferred that no further resistance to the prosecution or conviction was intended, and in consideration of this fact, the sentence of twelve months was imposed, and that the lighter sentence would not have been given but for the fact that defendant had apparently acquiesced in the result and would not prosecute his appeal.

It is the accepted rule with us that within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse. While the reasons for this change of sentence, and such a pronounced change, may not appear adequate or altogether satisfactory, we do not feel justified in holding as a conclusion of law that the judgment is erroneous within the meaning of the principle.

No error.

STATE v. O. G. THOMAS.

(Filed 13 December, 1922.)

1. **Criminal Law — Homicide — Murder — Manslaughter—Instructions—Appeal and Error—Objections and Exceptions.**

Where, upon the trial of one charged with homicide, there is evidence tending to show murder in the first degree, murder in the second degree, manslaughter, and self-defense, it is the duty of the presiding judge, in his charge to the jury, to declare and explain the various phases of the evidence relating to self-defense, and to the various degrees of felonious homicide, and his failure to instruct upon all the essential questions of law properly raised by the evidence constitutes as to each reversible error, which is presented by exception on appeal without specifically raising the question of error complained of by prayers for instruction tendered and refused.

2. **Same—Statutes—Malice.**

Where, upon a trial for a homicide, the prisoner has admitted the killing with a pistol, and relies upon the plea of self-defense, and the evidence presents for the consideration of the jury murder in the first degree, murder in the second degree, and manslaughter, and the prisoner has been convicted of murder in the second degree, it is reversible error for the trial judge to charge the jury as to the law relating to murder in the first degree under the provisions of C. S., 4200, and then to instruct them that all other killings would be murder in the second degree, for this would deprive the prisoner of such of the evidence as tended to repel the inference of malice from the killing with a deadly weapon, which, if established, would, at least, reduce the grade to the offense of manslaughter.

3. **Same.**

A charge which fails to instruct the jury as to the law upon every essential phase of the evidence relating to the degrees of felonious homicide is reversible error, and an exception for failure to charge the jury concerning the various degrees when the evidence presents them takes the question to the Supreme Court on appeal without the necessity of its presentation by defendant's request for special instruction. The necessary elements of the criminal offense of manslaughter arising under the evidence in relation to the charge given in this case discussed by ADAMS, J.

APPEAL by defendant from *Ray, J.*, at January Term, 1922, of CABARRUS.

Indictment for murder. The defendant was convicted of murder in the second degree.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Cansler & Cansler, J. J. Parker, Maness, Armfield & Sherrin, J. Lee Crowell, and John M. Oglesby for defendant.

ADAMS, J. The defendant shot and killed the deceased in Bergerberg, a suburb of Kannapolis, between 8 and 9 o'clock on the night of 25 October, 1921. About 8 o'clock the defendant, according to his statement, accompanied by Mrs. Robert Lowe, left the Cline boarding-house at Kannapolis in a Buick car, intending to go to the home of Oscar Overcash, who lived near the scene of the homicide. After getting into the car he laid his pistol in Mrs. Lowe's lap. About the same time the deceased, traveling in a Ford sedan, carried a woman named Carrie Kimball through a part of the town not far from Overcash's residence, and, leaving her for a few minutes near Lawing's store, went to the Cabarrus Cotton Mill and told P. M. Mangum, a mechanic, that Mrs. Kimball wanted to see him. The deceased, with Mangum, then went back to Mrs. Kimball, and again she got in the car. The sedan was next driven down Leonard Street, thence up the Bethpage road to the mail boxes where the woman and Mangum alighted. The deceased left them there. Mangum said, "He (the deceased) went up the road; he turned around and came back in about five minutes or ten, I don't know exactly, and came back by us about 30 miles an hour, I imagine, and didn't stop, and turned back into this street where they said the shooting was done." A witness for the State testified that when the sedan stopped the first time near Lawing's store he walked up to it and found a man and a woman there, the woman standing on the running board; that the man went on in the car, the woman saying she would remain; that this woman was Mrs. Lowe, not Mrs. Kimball; and that the Buick passed her six or eight minutes before the sedan came back from the Cabarrus Mill.

After leaving his boarding-house, the defendant drove down the National highway to Overcash's garage, found it closed, and turned the car around and started up the Bethpage road towards the residence of Overcash. Just before getting to this road he saw the sedan drive into the highway, turn around, and go up the Bethpage road ahead of him. The cars were going in the same direction, and several turns were made by each. When the defendant got in front of Overcash's house he stopped his car; whether he stopped the engine was disputed. The sedan was standing fifty or sixty yards ahead. As to what next took place the evidence was conflicting. There was evidence for the State tending to show these circumstances: Just before the sedan stopped some one in the Buick "hollered"; then two people got out of the sedan, went back to the other car, and talked with some one there about five minutes; the door of the car was heard to shut; the man who had come from the sedan started back, and when he had gone two steps from the Buick three shots were fired. The deceased went about five steps and fell. One wound was found in the left upper chest and another in the

region of the left kidney. It was not certain whether the one who came with the deceased was a man or a woman.

The theory of the State was that the account of the transaction given by the defendant Thomas and Mrs. Lowe was not true; that before arriving on the scene of the tragedy, Mrs. Lowe had left Thomas's car and had been taken up by Allen; that for this reason Thomas was following Allen's sedan, and when the cars stopped Allen and Mrs. Lowe left the Ford and advanced towards Thomas, who was in the other car; that some words occurred between them, and thereupon Thomas intentionally shot the deceased in a spirit of revenge caused by his association with Mrs. Lowe. To contradict this theory of the State, the defendant introduced as witnesses P. M. Mangum and Mrs. Kimball. Mangum testified that it was Mrs. Kimball who was standing on the side of the road near Lawing's store, and who got in the car with Allen, and not Mrs. Lowe. Mrs. Kimball testified to the same effect.

The defendant admitted that he shot and killed the deceased with a pistol, but contended that he shot in self-defense. The State contended that he was guilty of murder in the first degree, or murder in the second degree, or manslaughter.

When a person charged with homicide is on trial for the capital felony, and there is evidence tending to show murder in the first degree, murder in the second degree, manslaughter, and self-defense, it is the duty of the presiding judge, in his instructions to the jury, to declare and explain the law applicable to the various phases of the evidence relating to self-defense, and to the several degrees of felonious homicide. And such instructions should be given upon all the essential questions of law properly raised by the evidence. In *S. v. Merrick,* 171 N. C., 795, it is said: "The authorities are at one in holding that both in criminal and civil causes a judge, in his charge to the jury, should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds, and made imperative with us by statute law. Revisal, sec. 535: 'He shall state in a plain and correct manner the evidence in the case, and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give a correct

charge concerning it." *Jarrett v. Trunk Co.*, 144 N. C., 301; *Matthews v. Myatt*, 172 N. C., 233; *Lea v. Utilities Co.*, 176 N. C., 514; *Beck v. Tanning Co.*, 179 N. C., 127; *Butler v. Mfg. Co.*, 182 N. C., 552.

We think his Honor lost sight of this requirement in his instruction concerning manslaughter. In his analysis of C. S., 4200, he drew the distinction between murder committed by means of poison, lying in wait, imprisonment, starving, or torture, and murder committed by any other kind of willful, deliberate, and premeditated killing, and then said: "To illustrate, when the State has shown that a deceased came to his death by means of poison administered at the instance of the party charged, or that he came to his death by reason of lying in wait at the instance of the party charged, then the State does not have to prove other facts to show deliberation, because the statute in its execution, in its construction of language, implies that no such killing could be perpetrated except with malice aforethought, with premeditation and deliberation. All other killing, as you will note, if there is an absence of malice, as defined by the statute, shall be deemed murder in the second degree." To this instruction the defendant excepted. The last paragraph is inaccurate. By "malice as defined by the statute" his Honor perhaps meant the malice which exists when the homicide comes expressly within the statutory definition of murder in the first degree; but the error consists in the additional instruction that all other killing (not all other murder), if there is an absence of such malice, shall be deemed to be murder in the second degree, the logical effect of which was to deprive the defendant of the benefit of such evidence as tended to mitigate the offense to manslaughter. The judge, it is true, had previously called attention to the provision that all murder not in the first degree shall be deemed to be murder in the second degree; but nowhere in the charge was this erroneous use of the word "killing" retracted or corrected, and the jury were therefore left to the uncertainty of conjecture in their application to the evidence of these two contradictory or inconsistent instructions. *S. v. Johnson, ante*, 637. They may have concluded, very reasonably, that in the absence of such malice as is essential to make a homicide murder in the first degree, every killing of a human being is murder in the second degree. The error was no doubt an inadvertence on the part of the learned judge, but none the less prejudicial for that reason.

We do not intend to suggest that his Honor did not charge the jury as to manslaughter. He did, but in doing so he failed to instruct them as to one of the substantial and essential features of the case, and the defendant excepted. After defining voluntary manslaughter as an "act committed with a real design, a purpose to kill, or through the violence of sudden passion occasioned by an adequate provocation which the law

does not justify or excuse," he said: "In voluntary manslaughter, the killing is in the heat of passion." And as a part of the instruction on the law of self-defense he used this language: "The law is made to fit the ordinary reasonable man. The condition of the nerves of a normal man should govern in apprehension of danger, not what his nerves were, but what they ought to have been, and must be determined from observation of men of ordinary firmness and courage."

In view of these statements, his Honor should have been more specific in his instructions as to manslaughter. For example, although the jury may have found from the evidence that the defendant at the time he fired the fatal shot actually apprehended death or great bodily harm at the hands of the deceased, but that the circumstances were not calculated to excite in the mind of the defendant in the exercise of ordinary firmness reasonable grounds for such apprehension, in consequence of which he shot too hastily or used excessive force, still there was no instruction covering this phase of the evidence. If these facts were found, as probably they were, the jury were again left to conjecture. Under the decision in *Merrick's case,* the defendant, without submitting a special prayer, was entitled to an explanation of the law applicable to this situation.

Certainly fright or terror will not excuse the unnecessary taking of human life when there is no reasonable ground for apprehending death or enormous bodily harm, but in connection with other circumstances it may serve to repel the inference of malice arising from the intentional killing with a deadly weapon, and to mitigate or reduce the homicide from murder in the second degree or manslaughter. The principle is clearly stated by *Riddick, J.,* in *Allison v. State* (Ark.), 86 S. W., at page 413: "In each case, then, the question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense. In this case there was evidence that tended to show that the defendant shot Baldwin because Baldwin cursed him, and then attempted to draw a pistol upon him in a threatening manner. The presiding judge may have concluded that, if the jury believed this evidence, they should acquit, and that therefore that this evidence did not justify an instruction in reference to manslaughter. But the jury may have accepted a part of this evidence as true and rejected other portions of it as untrue. They may have concluded that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances. It is not always necessary to show that the killing was done in the heat of passion to reduce the crime to

manslaughter, for where the killing is done because the slayer believes that he is in great danger, but the facts do not warrant such belief, it may be murder or manslaughter, according to the circumstances, even though there be no passion. Or when the slayer, though acting in self-defense, was not himself free from blame, the crime may be only manslaughter. *Wallace v. United States,* 162 U. S., 466; 16 Sup. Ct., 859; 40 L. Ed., 1039. The mere fact that a man believes that he is in great and immediate danger of life or great bodily harm does not of itself justify him in taking life. There must be some grounds for such belief, or the law will not excuse him for taking the life of another. But if the slayer acts from an honest belief that it is necessary to protect himself, and not from malice or revenge, even though he formed such conclusion hastily and without due care, and when the facts did not justify it, still, under such a case, although such belief on his part will not fully justify him, it may go in mitigation of the crime, and reduce the homicide from murder to manslaughter. *Stevenson v. United States,* 162 U. S., 313; 16 Sup. Ct., 839; 40 L. Ed., 980." *S. v. Doherty* (Vt.), 82 A. S. R., 957; *Menly v. State* (Texas), 2 S. W., 607; *Johnson v. State* (Wis.), 5 L. R. A. (N. S.), 815 n. His Honor should have instructed the jury in accordance with this principle.

For the reasons assigned, the defendant is entitled to a

New trial.

STATE v. MOSES HARRISON.

(Filed 20 December, 1922.)

Intoxicating Liquor—Spirituous Liquor—Constitutional Law—Statutes—Conviction in Federal Courts—State Courts—Concurrent Authority—Distinct Offenses.

The language of the second paragraph of the XVIII Amendment to the Constitution of the United States delegates to the Federal Government authority over the manufacture, sale, etc., of intoxicating liquor, as being concurrent with the authority reserved in the State upon the subject; and the same act violating an act of Congress and of a state statute is a distinct offense against the two Governments, punishable in the courts of each; and a conviction under the Volstead Act is no bar to a conviction by the state courts for an offense against a state statute on the subject.

CLARK, C. J., concurring.

APPEAL by defendant from *Harding, J.,* at August Term, 1922, of DAVIDSON.

Criminal prosecution, tried upon an indictment charging the defendant with having spirituous liquors in his possession for the purpose of

sale, of receiving more than one quart at any one time, and of receiving more than one quart within fifteen consecutive days, in violation of the State statutes.

From an adverse verdict, and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

P. V. Critcher for defendant.

STACY, J. Prior to the defendant's trial in the Superior Court, he was convicted in the Federal Court, under the Volstead Act, upon identically the same state of facts, as here disclosed, and sentenced to pay a fine of $400. Seasonably and in proper manner he set up, as a plea in bar, his former conviction in the Federal Court. His position in this respect is untenable. He has committed two offenses, one against the Government of the United States and the other against the State of North Carolina.

Congress is given power to enforce the XVIII Amendment by appropriate legislation. *Rhode Island v. Palmer,* 253 U. S., 350. Likewise, the several states, in the exercise of their police power, may enact laws in aid of its enforcement. *Vigliotti v. Commonwealth of Pa.,* 66 L. Ed., (volume not yet published); *S. v. Muse,* 181 N. C., 506. But a conviction in the Federal Court for a violation of the act of Congress, known as the Volstead Act, is no bar to a prosecution in the State courts for a violation of the State laws, because the same act or acts on the part of the defendant may constitute a violation of the laws of both sovereignties at the same time. *Cooley v. The State,* 110 S. E. (Ga.), 451, and cases there cited; *Lanza et al. v. United States,* ..... U. S. (volume not yet published), decided 11 December, 1922.

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" is the language of the second paragraph of the XVIII Amendment. The words "concurrent power" are not used here in the sense of denoting or designating the source of the states' power to legislate on the subject of prohibition, but as indicating that the power of Congress shall not be exclusive. *Commonwealth v. Nickerson,* 236 Mass., 296. The amendment is a grant of power so far as the Congress is concerned, but not so as to the states. They had the power to legislate on the subject prior to the amendment, and they still have concurrent power with the Congress to enact appropriate legislation for its enforcement. This, it is conceded, apparently gives two meanings to the words "concurrent power," at one and the same time; but, if so, it is the result of applying them at once to two different legislative bodies—one exercising delegated powers and the

other reserved powers in the sense the powers of both are spoken of in the Constitution of the United States. If the use of these words were unavoidable in the first instance, then this dual construction follows either naturally or as a practical necessity. *National Prohibition Cases,* 253 U. S., 350.

In *Railroad v. Fuller,* 17 Wall., 560; 21 L. Ed., 710 (opinion by *Mr. Justice Swayne),* it is said:

"In the complex system of polity, which exists in this country, the powers of government may be divided into four classes:

"(1) Those which belong exclusively to the states.

"(2) Those which belong exclusively to the National Government.

"(3) Those which may be exercised concurrently and independently by both.

"(4) And those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the states then retires, and lies in abeyance until the occasion for its exercise shall recur." See, also, *Ex parte McNeill,* 13 Wall., 240.

The power to deal with the subject-matter now in hand would seem to fall in the third class, as stated above. Hence, a conviction under the act of Congress would not preclude a prosecution under the state laws.

No error.

CLARK, C. J., concurring with the opinion of STACY, J., for the Court, that a conviction for violation of the Prohibition Law is not a bar on an indictment upon the same facts under the State law, for the defendant has committed two offenses: one against the United States and the other against the State of North Carolina: Adds, that as held by *Burwell, J.,* in *S. v. Stevens,* 114 N. C., 876, "The selling of a pint of whiskey may be a violation of both the State and Federal laws, and punishable in each jurisdiction"; and, also, there may be a violation of the revenue law of the State and of the statute against selling liquor to a minor, and a violation of a town ordinance for selling without a license." See citations to that case in the Anno. Ed.

In one of those cases, *S. v. Lytle,* 138 N. C., 740, it is said, citing *S. v. Stevens, supra,* that when, as in that case, there were provisions against selling without a license, one and the same act, *i. e.,* "selling the same glass of liquor, may be a violation of the town ordinance, and also a violation of the State law, if license has not been obtained from both; and further, the same act may be punishable by the Federal Government if in violation of its statutes; and, indeed, if the purchaser is a minor, the same single act may constitute a fourth distinct offense of selling spirituous liquor to a minor—and even a fifth if the sale is on Sunday. Although it is a single act, there may be thus a violation of

five statutes, and when in such case each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other." All of these acts, which were indictable under the State statute, might, of course, be joined as counts in the same bill, or be made separate indictments, as the solicitor might elect.

STATE v. W. W. CAMPBELL.

(Filed 20 December, 1922.)

1. **Homicide—Defense—Insanity—Appeal and Error.**

Upon this trial for homicide: *Held*, the verdict of the jury finding adversely to the defendant's plea of insanity will not be disturbed, on appeal. *S. v. Terry*, 173 N. C., 761.

2. **Appeal and Error—Assignments of Error—Rules of Court.**

Assignments of error should be incorporated in the case on appeal, to be considered. Rule 19 (2), 174 N. C., 832.

APPEAL by defendant from *Lane, J.*, at the July Term, 1922, of BUNCOMBE.

Criminal prosecution, charging the defendant with the crime of murder in the first degree.

From an adverse verdict and sentence of death, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wright & Craig and G. Spears Reynolds for defendant.

STACY, J. In the spring of 1922, the defendant was chief orderly and chief of police at the Government Hospital, Oteen, near Asheville, N. C. Mrs. Annie Smathers, a young widow, was one of the telephone operators at Oteen. There is evidence tending to show that Campbell, the defendant, was courting Mrs. Smathers, with a view to marriage. On the morning of the homicide, he stated to the witness, T. R. Parker: "I want to see her one more time and ask her to marry me. If she don't, she can't marry any other man."

In the afternoon of 6 May, 1922, the deceased, Mrs. Smathers, was riding with the defendant in his automobile on the Fairview road, near the village of Fairview, in Buncombe County, when she was seen to

jump from the moving car and run across the road as if she were trying to get away from the defendant. The defendant stopped his car, jumped out himself, pursued the deceased, who was running rapidly, for twelve or fifteen yards, and then opened fire upon her with his pistol. When she fell, he deliberately stood over her prostrate body and fired two or three bullets into her head. Any one of at least three of the shots would have been fatal.

On trial, the defendant set up a plea of insanity; but this was not established to the satisfaction of the jury. *S. v. Terry,* 173 N. C., 761.

There are no assignments of error incorporated in the statement of case on appeal (174 N. C., 832, Rule 19 (2); but, on account of the gravity of the offense, we have examined all of the exceptions with care, and find them to be without sufficient merit to warrant a reversal or an order for a new trial.

The record presents no error in law, and we must affirm the judgment.

No error.

STATE v. PAUL MEHAFFEY.

(Filed 20 December, 1922.)

Suspended Judgment—Sentence—Criminal Law—Inquiry—Court's Jurisdiction.

APPEAL by defendant from *Shaw, J.,* at the July Term, 1922, of HAYWOOD.

From a judgment rendered on a prior suspended judgment, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John M. Queen and Alley & Alley for defendant.

STACY, J. The judgment in this case was entered at the July Term, 1922, before his Honor had had an opportunity to examine our opinion in *S. v. Hardin,* 183 N. C., 815, rendered only a short time prior thereto. After the case had been docketed here, the learned judge of the Superior Court wrote to the Attorney-General, stating that he had "committed an error, and the judgment ought to be reversed." Let an order be entered in accordance with this suggestion, as the conclusion reached is supported by the record.

Reversed.

STATE v. ROY BUCKNER.

(Filed 20 December, 1922.)

Criminal Law—Evidence—Identity—Nonsuit—Trials.

Where the prisoner is being tried for violating the criminal law upon the question of his identity, as one who participated in the commission of the crime charged, but who broke away from the officer, the testimony of the officer, on cross-examination, that he could be mistaken, but the prisoner looked very much like the one, and that to the best of his knowledge and belief he was the same as the one upon whose face he had flashed the searchlight, is sufficient to sustain a verdict of guilty with the other evidences of identity introduced at the trial, unobjected to by the prisoner.

APPEAL by defendant from *Shaw, J.*, at February Term, 1922, of BUNCOMBE.

Criminal prosecution, tried upon an indictment charging the defendant with receiving, keeping in his possession for sale, and transporting spirituous liquors in violation of law.

From an adverse verdict, and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Reynolds, Reynolds & Howell for defendant.

STACY, J. The defendant's first and second exceptions are directed to his Honor's refusal to grant his motion for judgment as of nonsuit, made first at the close of the State's evidence, and again at the close of all the evidence.

J. F. Phipps, a witness for the State, testified that on the night of 13 January, 1922, he and a fellow-officer arrested two men, one named Melton and the other Sneed, in a box car at Hot Springs, N. C., and that a third person, who looked like the defendant, "broke loose from us and was not arrested at that time." The three men had approximately 10 gallons of liquor in their possession, divided into three cans, and the two were arrested between 12:30 and 1 o'clock in the morning. Melton was too drunk to run. On cross-examination, the witness stated that he could be mistaken as to the identity of the defendant, but that he looked very much like the boy, and that to the best of his knowledge and belief Roy Buckner was the one "he had hold of and flashed a light in his face." There was other positive evidence of identification, of a hearsay nature, it is true, but admitted without objection. This was sufficient to carry the case to the jury.

The other exceptions are only formal.

No error.

STATE v. F. R. SPRINGS.

(Filed 20 December, 1922.)

1. Intoxicating Liquor—Spirituous Liquor—Criminal Law—Evidence—Hearsay Evidence—Statutes.

Hearsay evidence, with certain recognized exceptions, is not admissible in the trial of issues determinative of substantial rights, unless coming within certain recognized exceptions or expressly made so by statute, and particularly is this rule applicable in criminal cases, where the life or liberty of the individual is put in jeopardy, such testimony being essentially liable to abuse, and not being the direct testimony of the witness himself upon oath, subject to cross-examination, but the alleged declarations of one who is absent and not subject to these requirements of the law. *S. v. McNeill*, 182 N. C., 853, cited and overruled.

2. Same.

Upon the criminal trial for having in possession spirituous liquor for the purposes of sale, C. S., 3379, and for unlawfully receiving more than one quart within fifteen consecutive days, C. S., 3385, evidence of the reputation of the defendant's place as being bad for selling liquor is unauthorized by statute, C. S., 3383, and it is purely hearsay and incompetent; and testimony of this character, admitted on the trial over the defendant's objection, and submitted in the charge as an independent circumstance to show guilt, under defendant's exception, constitutes reversible error. *S. v. Mills*, *ante*, 694.

CLARK, C. J., dissenting.

APPEAL by defendant from *Long, J.*, at September Term, 1922, of UNION.

Criminal action, tried on appeal from the recorder's court.

The warrants on which defendant was tried, as finally amended, charged an unlawful keeping of spirituous liquors for purposes of sale, C. S., art. 4, sec. 3379, and unlawfully receiving more than one quart within fifteen consecutive days from persons other than common carriers, C. S., art. 5, sec. 3385. There were facts in evidence tending to show that in May, 1921, defendant had rented and occupied a place of business in Monroe, N. C., as undertaker, the house having a front room used as an office and a rear room with a partition made by coffin boxes, and in this rear room there were two beds on opposite sides and with a trunk near each, one of the beds being used by defendant when in Monroe and the other used at time place was raided, in February, 1922, by one Walter Moseley, a lodger, occupying as such by agreement with Springs. That defendant had another place of business of the same kind in Lancaster, S. C., where he spent about one-half of his time. That defendant occupied place in Monroe from May, 1921, to October, 1921, alone, and during that time no complaint was made of place. That in October, Walter Moseley having become dissatisfied with his living place,

applied to Springs to have a bed and sleeping room in defendant's place in Monroe, and after that time some complaints were made of disorders at this place. That these complaints were made known to Springs when he had come to Monroe from Lancaster, and he said he would see that it was stopped. That in February, 1922, the officers, with a warrant, searched Springs' place and found in the rear several empty tin cans along one of the walls, which showed odor of whiskey, and in Moseley's trunk at the foot of his bed, on being opened by the officers, there were found eight bottles of whiskey from one-half pint to a quart in size. That Springs made no resistance to the search, but assisted therein, and on finding the whiskey in Moseley's trunk, Springs said that Moseley must have brought it there.

There was evidence further that when both defendant and Moseley were under arrest, Moseley said to Springs: "You needn't deny it. We were both in it fifty-fifty." Which statement Springs denied, Springs himself testifying to this said he didn't hear Moseley make this statement, but understood the sheriff, Fowler, to make it, and that he immediately denied it.

There were several witnesses who testified to the good character of defendant both in Monroe and Lancaster, several business men, including an alderman of the city, testifying that living near and passing Springs' place of business several times a day, they had not noted any disorder, and others that no complaint was made of the place till after Moseley went to stay with him. Over defendant's objection the State was allowed to prove by several witnesses, and same was received as substantive evidence, that Spring's place had a bad reputation for whiskey selling. A witness, by the name of H. S. Christmas, testified that he had a store opposite the Springs place of business, that Springs spends the greater part of his time in South Carolina, his character was good, and that he had never seen any evidence that whiskey was being handled at Springs' place when he was there.

There was verdict of guilty, judgment, defendant excepted and appealed, assigning for error his exceptions duly noted:

1. To the reception of evidence that the reputation of Springs' place was bad for selling liquor.

2. That his Honor, in the charge, submitted this as substantive evidence of defendant's guilt.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Vann & Milliken for defendant.

HOKE, J. With certain recognized exceptions, applicable chiefly in civil causes, and unless expressly made so by statute, hearsay evidence is

not competent in the trial of issues determinative of substantive rights, a position particularly insistent where such issues involve the life or liberties of the litigant. *King v. Bynum,* 137 N. C., 491; *Hopt v. The People of Utah,* 110 U. S., 574; *Mima Queen v. Hepburn,* 11 U. S. (7th Cranch), 290; 1st Elliott on Evidence, secs. 315-319; 1 Greenleaf (16 ed.), sec. 99 a; Lockhart on Evidence, sec. 138; Wharton's Criminal Evidence (9 ed.), sec. 225.

In testimony of this character, so essentially liable to abuse, the witness is giving, not his own evidence under oath, but what he has heard some other person say, and among many other reasons, the evidence is objectionable because the declarant, who is the real witness, has not spoken under the sanction of an oath, and the party affected has not been afforded the opportunity to cross-examine the witness. Speaking to some of the principle objections to such evidence, Professor Greenleaf, *supra,* says:

"Subject to these qualifications and seeming exceptions (to be later examined), the general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses. The principle of this rule is that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony; namely, that oral testimony should be delivered in the presence of the court or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its true value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary in order to a conviction; for where the declaration or statement is sworn to have been made when no third person was present, or by a person who is since dead, it is hardly possible to punish the witness even if his testimony is an entire fabrication."

And in *Mima Queen v. Hepburn, supra, Chief Justice Marshall,* speaking to the subject, said: "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been

matured by the wisdom of ages and are now revered from their antiquity and the good sense in which they are founded.' "

"One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony, which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

"To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and, in some cases, of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact."

The principle referred to and commended by these authorities applies to prosecutions for offenses against the prohibition laws, and in cases like the present, is held to exclude evidence of general reputation of the place where the specific offense is alleged to have been committed, unless, as stated, it has been made competent by some valid statute on the subject. *Cobleigh v. McBride et al.,* 45 Iowa, 116; 4th Elliott on Evidence, sec. 3170; 23 Cyc., p. 251.

In this last citation it is said: "The character of the place kept by defendant may be shown by circumstantial evidence tending to show the purpose for which it was used or the kind of business carried on there, but evidence of the reputation of the place, or what people say as to its character or uses, should not be admitted, except where a statute makes such reputation a pertinent fact in the prosecution, or declares it to be competent evidence." And there is, too, direct decision with us that where evidence of the kind in question is incompetent because of being hearsay, the infirmity is not removed by terming it or offering it in corroboration. *Holt v. Johnson,* 129 N. C., 138.

In the recent case of *S. v. McNeill,* 182 N. C., 853 and 860, the Court was not properly advertent to the well established and wholesome principle in the laws of evidence excluding hearsay in the trial of causes of this character, and the case in that respect and for that reason must be considered as disapproved.

The case of *S. v. Price,* 175 N. C., 804 and 806, to which we were also cited, in no way militates against our present ruling, for the charge there was for vagrancy in keeping a bawdy house, and in reference to which our statute, C. S., 4347, expressly makes the general reputation of the house admissible and competent. The only statute claimed to have any possible bearing on the question, C. S., 3383, authorizing a conviction on "circumstantial as well as direct evidence," seems to refer exclu-

sively to prosecutions under C. S., 3378, which prohibits engaging in the business of selling, etc., or otherwise handling spirituous liquors for the purpose of gain, while defendant in the present case is indicted under sections 3379 and 3385, which constitute distinct and separate offenses, and if this section 3383 could be given a broader significance, we are of opinion that its purpose and effect is merely to relieve the prosecution of the necessity of offering direct evidence of any specific sale, and did not and was not intended to make any change in the kind and character of the circumstances as heretofore considered pertinent in the issue. A proper illustration of the true meaning of the section appears in *S. v. Ingram,* 180 N. C., 672, where the State was allowed to prove that drinking crowds were in the habit of frequenting defendant's place of business. And to the same effect was the question—answer admitted in *S. v. Mostella,* 159 N. C., 459, to wit: "The character of the people that usually frequented defendant's pool room." Question asked and admitted to show drunkenness about the premises. These were both objective facts given in by sworn witnesses, clearly relevant as tending to show the offense charged, and could in no sense be considered as hearsay.

We have had occasion before during the present term, in *S. v. Mills ante,* 694, to advert to the great importance of adhering to rules and precedents established and recognized as necessary to insure a fair and impartial trial of men accused of crime both in the reception of evidence and otherwise, and we must hold that in permitting over defendant's objection three or four witnesses to testify that the reputation of defendant's place was bad for selling liquor, and in submitting same in the charge as an independent circumstance tending to show guilt, defendant has, in effect, been erroneously convicted by means of hearsay evidence, and is entitled to a new trial of the issue.

New trial.

CLARK, C. J., dissenting: The defendant ran an undertaking establishment in Monroe. There was, besides the storeroom, a room in the rear where the defendant slept. J. W. Spoon, chief of police, upon sworn information that the defendant's bedroom was a place of drinking and carousing at night, procured a search warrant on 4 February, 1922, and in company with two assistants searched defendant's room. The defendant showed surprise when the officer told him his business but told him to go ahead. The defendant jointly with a man named Walter Moseley occupied a large unceiled room at the back of the shop as a bedroom. In this room the officer found ten one-gallon tin cans setting around the wall. These cans smelled of whiskey. The defendant told the officer that Walter Moseley must have brought them in. At the

head of Springs' bed in this room was a trunk, which Springs admitted was his. This the officers searched and found nothing; but there was another trunk at the foot of the other bed in this room which Springs said was Moseley's. Springs told the officer that there was nothing in it, but the officer took the trunk into his confidence, shook it, and heard something rattle in it. He procured a key, unlocked this trunk, and found eight bottles of whiskey, from one-half pint to a quart in size. This whiskey was in court, and was identified by witnesses. This officer further testified that Walter Moseley had been staying with Springs, but he did not know how long; that the reputation of the place got worse after Moseley went there. The defendant told the officer that he went to Lancaster occasionally, but the officer was not able to say how much of his time the defendant spends in Lancaster.

The defendant, in his defense, alleged that Moseley put the whiskey there, or had it there, and he himself knew nothing about it. The defendant's exceptions are that the judge permitted testimony as to the reputation of Springs' place. The judge expressly confined the answer of the various witnesses to the general reputation of the premises, and not of the defendant himself. Each of the five witnesses swore that the reputation of the place was bad.

In *S. v. McNeill,* 182 N. C., 855, the Court held that in a case where jugs and bottles of whiskey were found at the defendant's house, and the defense was the not unusual one that some one else had taken them there in his absence without his knowledge, the general reputation of the defendant's place for unlawfully selling whiskey may be shown as a circumstance in corroboration of other evidence tending to show guilt. The word "place" was improperly omitted in the headnote. In that case it was said: "The illicit sale of liquor being done usually clandestinely, secretly, and by resort to many evasions and ingenious devices, the law-making power found it necessary to enact C. S., 3383, referring to above section 3378 (which made it unlawful to handle liquor for gain), as follows: '3383. *Indictment and proof.* In indictments for violating the first section of this article (C. S., 3378) it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by *circumstantial* evidence as well as by direct evidence.' The evidence introduced by the defendant was an attempt to prove that the liquor found at the place was not the property, or under the control of the defendant. The evidence of the general reputation that it was a notorious place used by him for the purpose was properly admitted as a circumstance tending to corroborate the inference to be drawn from the testimony of the officer that the defendant is responsible." This was a circumstance, and if the statute, C. S., 3383, which provides that the violation of law may be proved by *circumstantial evidence* as well

as by direct evidence was not intended to cure technical objections which are notoriously used by defendants in a matter of this kind, for what purpose could the statute have been enacted?

The fact that ten one-gallon tin cans smelling of whiskey were found in defendant's bedroom, and his untrue statement that the trunk, which the defendant alleged belonged to his room-mate, contained nothing, but on examination the officer found that it had therein eight bottles of whiskey, from a pint to a quart in size, was certainly evidence sufficient to go to the jury, and when the defendant alleged in defense that he knew nothing of the whiskey being on the premises, it was certainly *circumstantial evidence,* in the purview of the statute enacted to secure the enforcement of this statute, to show the reputation of defendant's bedroom as a place of drinking and carousal. How could he have been ignorant, as he said, of the whiskey being there if the jury believed the evidence of five witnesses to this effect. It was a "circumstance" which the statute gave them the right to consider. It was not a conclusive circumstance, but certainly it was evidence which under this statute was properly submitted to the jury.

The opinion of the Court insists that this recent decision in *S. v. McNeill, supra,* should be overruled, but for reason? It is a most potent circumstance where such defense is set up of one in whose room is found whiskey and empty whiskey cans setting around the walls, and the defendant insists that he was ignorant of their being on the premises.

In *S. v. Ingram,* 180 N. C., 672, another recent case, the Court "allowed the State to offer for the consideration of the jury that people frequenting the defendant's place of business were drinking." In that case the Court said that the testimony was competent in corroboration of the direct evidence tending to show the sale of whiskey.

In *S. v. Mostella,* 159 N. C., 459, *Hoke, J.,* the witness was asked: "State the character of the people that usually frequented this pool room." This was asked to show drunkenness upon the premises, and was admitted and affirmed on appeal.

As said in *S. v. McNeill, supra,* "In the present case the whiskey and jugs and other vessels found on the premises were in proof in corroboration of the testimony of the deputy sheriff, and to rebut the defense set up by the defendant's witnesses that the defendant was absent on that day." In this case the defendant was present, was an occupant of the room, the ten empty whiskey cans setting around the room, and the eight bottles of whiskey found in the trunk, which the defendant untruly told the officer contained nothing, were all evidence tending to show the defendant's guilt, and certainly was circumstantial evidence to show that the house, as set out in the search warrant, had a bad reputation for this crime of dealing in whiskey.

In *S. v. Price,* 185 N. C., 807, *Walker, J.,* in a very learned opinion with full citation of authorities, showed that the reputation of a house is competent on indictments for keeping a house of ill fame independent of our statute to that effect, saying: "It is only a circumstance which the jury are permitted to consider in passing upon the defendant's guilt." That case was cited with approval in *S. v. McNeill,* 182 N. C., 859, and the Court says: "The same principle seems to be universally recognized. In 16 Cyc., 1209, it is said 'reputation is relevant when it arises in a community acquainted with the facts upon subjects in which the general community is interested, and concerning which it has no motive to misrepresent. Where these conditions are fulfilled, reputation may be more probative than a mere sworn statement. The fact that the statements on a matter of general interest have been so uniform, reiterated, and dominant against all counter statements as to create a general reputation throughout the community may give rise to an inference, enumerating as "among them" a long list of subjects concerning which reputation has been held admissible.' 'The scope of subjects as to which reputation has been held admissible will certainly embrace the general reputation that a place was known generally as one at which liquor was habitually sold upon the circumstances of this case.' 16 Cyc., 1209, 1210, quotes in the notes authority that 'general reputation is not a form of hearsay, but it is a relevant circumstance in many cases.' On p. 1211 it is pointed out that 'The elements of relevancy and necessity are prerequisites to the admissibility of reputation as evidence, and hence specific acts of limited general interest cannot be established in that way.' "

In McKelway on Evidence (2 ed.), sec. 126, it is stated that while reputation for a particular act is not general reputation, and such evidence not admissible on the question of the truth of the charge, general reputation would be legitimate to establish any matters of public interest or notoriety.

S. v. McNeill, supra, is a recent case, and there is no reason shown why it should be overruled. It is certainly in accord with the general law as quoted above from 16 Cyc., 1209, 1210, 1211, and the authorities quoted therein, and from McKelway on Evidence, *supra;* and is based, moreover, upon C. S., 3383, which was enacted to make more efficient the execution of the law against this crime. In that case it was said: "On the disputed question at issue upon the evidence, as above stated, the general reputation of the defendant's house as a place notorious for the illicit sale of whiskey was a 'circumstance' which, under C. S., 3383, the jury were entitled to consider in corroboration of the State's evidence."

The defendant, in his brief, relies on his exception to this evidence upon the ground that the judge did not restrict it to the matter in cor-

roboration, but the record does not show that the exception was placed upon that ground when made, but was a general exception to the testimony, which cannot be sustained in view of the numerous cases in our Court, a few of which have been cited above, which hold that it was competent at least as corroborative.

Rule 27 of this Court, 174 N. C., 835, was adopted to cure this very practice of excepting to evidence generally, and then on appeal putting it upon the ground that if the evidence was admissible it was as corroborative evidence only, and the jury should have been instructed to consider it only as such. To correct that, the Court, in the above Rule 27, prescribed: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." The record does not show, and it is not even suggested, that at the time it was admitted the court was asked to restrict it to be in corroboration, nor was there any prayer to so instruct the jury. This rule was a wise one, made by the Court within its constitutional power, and it has been frequently recited since as authority. It was adopted by the Court in 1904, and has been repeatedly cited by the Court, and is included in every revision of the rules down to the present.

The authorities above quoted would seem to establish that in our own Court and by general law the reputation of the defendant's place was competent at least as corroborative evidence, independent of our statute, C. S., 3383, which makes circumstantial evidence competent in such cases.

It does not appear in the record, nor even in defendant's exceptions, that the court admitted this as substantive evidence, or so charged the jury. There is no presumption that he did. The presumption is that there was no error, unless it is assigned and appears in the record.

In *Westfelt v. Adams,* 135 N. C., 600, the Court adverted to this Rule 27, stating that the amendment making evidence competent for any purpose not ground for exception for being admitted generally, "unless the appellant asks, at the time of admission, that its purpose should be restricted," had been adopted 16 March, 1904, and applied the rule, in a case which had been tried in the court below at the previous September Term, 1903. This rule was quoted and sustained in *Hill v. Bean,* 150 N. C., 437, and has been approved as authority since in many cases, among them *Tise v. Thomasville,* 151 N. C., 282; and among the later cases, *S. v. McGlammery,* 173 N. C., 750; *Beck v. Tanning Co.,* 179 N. C., 127.

We see no reason why the general law as to the admission of testimony of the general character of a place in matters of this kind, and others, is not competent as corroborative evidence, calculated to throw light upon

the truth of the charge and proper for the jury to consider in coming to their conclusion; nor is there any force in the objection that the judge did not restrict the evidence to be considered as corroborative only when he was not asked to do so, as required by Rule 27, which has been affirmed so often.

This crime is an exceedingly profitable one to those who commit it, and counsel necessarily resort to every technicality, for, as a rule, the evidence either is sufficient to satisfy the jury or insufficient, and in the former case the only possible resort on appeal from a conviction is to some technicality. This crime was of sufficient importance for the people of this State on a *referendum* to forbid the handling of intoxicating liquors many years ago, and to cause the people of the whole Union by a more than two-thirds vote of both houses of Congress to enact a constitutional provision, which was ratified promptly by legislatures in all the states but two. The statute of this State has considered the efficient execution of this law of sufficient importance to provide that circumstantial evidence shall be competent, and that the defendant, convicted on a second offense, shall be guilty of a felony and subject to sentence in the State Prison. C. S., 3409.

The jury, upon this evidence, did not believe the defendant's statement that some one else brought the liquor into his room and used it illegally, all without the defendant's knowledge. There were but two rooms in the building, the store and the room occupied by the defendant and another party, who for some reason was not even put on trial. Indeed, he was not present when the officers, with the search warrant, entered the defendant's bedroom and found the defendant there alone, in company with the empty whiskey cans and a trunk full of whiskey.

The sheriff and others testified that Moseley stated to defendant that they were "fifty-fifty in the matter," and that the defendant did not deny it. The defendant said this statement was made to him by the sheriff and that he did deny it.

Upon the testimony this was a matter for the jury, and they have said that, beyond all reasonable doubt on the part of any one of the jury, the defendant was guilty.

The defense resembles very much the not unusual case of a defendant, who when found in possession of a stolen hog, says that he bought it from a "tall colored man, whom he did not know, along the road." In such cases, as in this, whether he did or not is a matter for the jury.

STATE v. JOHN A. BUSH.

(Filed 20 December, 1922.)

1. **Homicide—Murder—Premeditation—Instructions—Prejudice—Appeal and Error.**

Where, upon the trial of a homicide, there is evidence tending to convict the prisoner of murder in the first degree and of the less degrees of the crime, and that also would sustain his plea of self-defense, an instruction that if the prisoner, at the time, had a spite, or fancied wrong, against the deceased, it would constitute murder in the first degree, is reversible error in leaving out an essential principle of law, that though the prisoner may have had such spite or fancied wrong, premeditation or deliberation was yet necessary to constitute murder in the first degree.

2. **Homicide—Murder—Self-defense—Justification—Instructions—Prejudice—Questions for Jury—Trials—Appeal and Error.**

A person is justified in killing another when the act is committed under circumstances that would justify a man of ordinary firmness in reasonably believing that it was necessary to save his own life, or to save himself from serious bodily harm, this being for the jury to determine from the evidence and the facts and circumstances as they appeared to him at the time, and an instruction that requires the defendant to show an actual necessity for the killing is reversible error.

3. **Same—Manslaughter—Conflicting Instructions—New Trial.**

Where, upon the trial for a homicide, the judge has deprived the prisoner of a charge upon an essential principle in the definition of manslaughter by his erroneous instruction as to the principle that would constitute murder, and the prisoner has been convicted of murder, the error will not be held as cured by a correct charge upon the same principle appearing elsewhere in his charge, the assumption on appeal being that the jury was influenced by the erroneous charge, and a new trial will be ordered.

4. **Homicide — Manslaughter — Instructions — Prejudice — Appeal and Error.**

Where, upon a trial for a homicide, the trial judge has omitted to charge upon the defense of manslaughter separately, where there was evidence of it, and has incorrectly charged the jury upon the degrees of murder, as to what constituted manslaughter, of which there was evidence, it constitutes reversible error.

APPEAL by defendant from *Ray, J.*, at August Term, 1922, of CALDWELL.

The defendant was convicted of murder in the first degree.

The defendant John A. Bush shot the deceased, Will Cline, on the afternoon of 21 August, 1922, and Cline died at 6:30 the evening of 22 August. The State's evidence tended to show both motive and threats. The motive was a disagreement about the discharge of water from deceased's land upon that of the defendant in such way as to

damage the land. There was also some trouble about the deceased encroaching upon the lands of the defendant.

The defendant denied this testimony of the State, and claimed that he had shot Cline (the deceased) as he, Cline, was advancing upon him with a large rock, and that he told him not to advance upon him with it; that he would shoot if he did, and that he shot in self-defense, in protection of his life, or to prevent serious bodily harm from being done him by the deceased.

There are many serious questions involved in the case, but we deem it necessary, in the view we take of it, to consider only two or three of them. There was evidence of murder in the first degree, murder in the second degree, and manslaughter, and there was also evidence that the prisoner killed the deceased in self-defense. The jury returned as their verdict "that the said John A. Bush is guilty of the felony and murder in the manner and form as charged in the bill of indictment," not otherwise finding the degree of murder.

First. The judge charged the jury as follows: "The State contends all the way through that you should convict him of murder in the first degree; that he had a real or fancied grievance against the deceased; that he prepared the weapon, brought it there with a view to kill him, and that he did that from spite and venom by reason of the deceased filling up the ditches and turning water on him. And it is the law, gentlemen, if you find he did that out of spite or revenge, either for a real or fancied wrong, he would be guilty of murder in the first degree; for if one has his rights invaded the law will afford him a peaceable remedy, but if it does not, then he must bear his lot with patience, for any killing done where one undertakes to redress his own grievance is murder *per se,* if it is done upon that ground." To this instruction of the court to the jury the prisoner duly excepted.

Second. The judge further charged the jury: "If you find that the deceased came to his death at the hands of the defendant, and that the defendant shot him under the contentions made by the State, but he did not premeditate over it, did not deliberate over it, but that he killed him with a deadly weapon, and if he has failed to satisfy you—not by the greater weight of the evidence or beyond a reasonable doubt—but failed to satisfy you that it was *necessary* for him to kill the deceased in order to save his life or protect himself against great bodily harm, then it would be your duty to return a verdict of guilty of murder in the second degree, unless he has raised in your minds a reasonable doubt about it." And to this instruction of the court to the jury, the prisoner duly excepted.

Judgment upon the verdict, and the prisoner appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Mark Squires, W. C. Newland, J. H. Burke, and W. F. Scholl for defendant.

WALKER, J., after stating the case: We are of the opinion that both instructions were defective, and that the error in them was material and prejudicial.

The first of the above instructions was erroneous, because it entirely omitted any reference to the element of premeditation and deliberation, and this was done twice in the instruction, for one may kill another "because of spite, or because of a real or a fancied wrong," without having premeditated or deliberated about it, or having formed any definite purpose or intent to kill his enemy, and yet the instruction would warrant a conviction of murder in the first degree, even though the jury should find only that the prisoner had slain the deceased because of spite or a supposed wrong, but without premeditation or deliberation, and even though, in fact, there was no premeditation or deliberation, or they believed or had found that there was none. The fact that the prisoner killed from spite, or even revenge, does not conclusively establish that he did so after premeditation and deliberation, which is to be found by the jury as a fact, before they can convict of the capital felony, and mere malice is not sufficient. *S. v. Ta-cha-na-tah,* 64 N. C., 614; *S. v. Pollard,* 168 N. C., 116.

But the second of the instructions is subject to two valid objections. The first is, that it requires the prisoner to satisfy the jury "that it was *necessary* for him to kill the deceased in order to save his own life, or to protect himself against great bodily harm." Whereas, it was not essential that the prisoner should have satisfied the jury of the actual necessity for killing the deceased before his plea of self-defense can avail him. If the prisoner had a reasonable apprehension, based upon the facts and circumstances, as they appeared to him at the time he committed the homicide, that he would be killed or suffer great bodily harm, unless he took the life of the deceased, he could stand upon his right of self-defense, provided he was not in such fault himself as would deprive him of the principle, and this was for the jury to determine under proper instructions from the court, there being evidence that he was not in such default. *S. v. Barrett,* 132 N. C., 1005; *S. v. Scott,* 26 N. C., 409; *S. v. Nash,* 88 N. C., 618; *Comrs. v. Selfridge,* Herrigan & Thompson's Cases on Self-defense, p. 1. We said in *S. v. Barrett, supra,* at p. 1007: "In some of the early cases expressions may be found which would seem to indicate that a case of self-defense is not made out unless the defendant can satisfy the jury that he killed the

deceased from necessity, but we think the most humane doctrine, and the one which commends itself to us as being more in accordance with the enlightened principles of the law, is to be found in the more recent decisions of this Court. It is better to hold, as we believe, that the defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under the evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken, provided always, as we have said, the jury find that his apprehension was a reasonable one, and that he acted with ordinary firmness. We think the foregoing principle has been clearly stated and adopted by this Court in several cases." In *S. v. Scott,* 26 N. C., 409; 42 Am. Dec., 148, this Court says: "In consultation it seemed to us at one time that the case might have been left to the jury favorably to the prisoner on the principle of *Levet's case,* Cro. Car., 538 (1 Hale, 474), which is, if the prisoner had reasonable grounds for believing that the deceased intended to kill him, and under that belief slew him, it would be excusable, or, at most, manslaughter, though in truth the deceased had no such design at the time." And in *S. v. Nash,* 88 N. C., 618, the Court cites and approves the passage just quoted from *S. v. Scott, supra,* and then makes the following extract from *Com. v. Selfridge, supra:* "A., in the peaceful pursuit of his affairs, sees B. walking towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head before or at the instant the pistol is fired, and of the wound B. dies. It turned out, in fact, that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." The judge inquired, "Will any reasonable man say that A. is more criminal than he would have been if there had been a ball in the pistol?" 2 Whar. Cr. Law, sec. 1026 (*g*), and note; Wharton Law of Homicide, 215 *et seq.* In *S. v. Nash,* 88 N. C., 618, the Court further says: "But it may be

objected that the defendant acted too rashly; before he resorted to the use of his gun, he should have taken the precaution to ascertain the fact whether his child had been actually shot. But that doctrine is inconsistent with the principles we have announced. If the defendant had reason to believe, and did believe, in the danger, he had the right to act as though the danger actually existed and was imminent. Taking, then, the fact to be that the trespassers had fired into defendant's house and shot his child, and the firing continued, there was no time for delay. The case required prompt action. The next shot might strike himself or some other member of his family. Under these circumstances the law would justify the defendant in firing upon his assailants in defense of himself and his family. But, as we have said, the grounds of belief must be reasonable. The defendant must judge at the time of the ground of his apprehension, and he must judge at his peril; for it is the province of the jury on the trial to determine the reasonable ground of his belief. And here the error is in the court's refusing to receive the proposed evidence and submitting that question to the consideration of the jury."

In *S. v. Matthews,* 78 N. C., 534, this Court quotes with approval Foster's Crown Law, as follows: "It is stated in all of the authorities, and cannot be doubted, that if a man who is assailed believes, and has reason to believe, that although his assailant may not intend to take his life, yet he does intend and is about to do him some enormous bodily harm, such as maim, for example, and under this reasonable belief he kills his assailant, it is homicide *se defendo,* and excusable. It will suffice if the assault is felonious."

It is further said in *Barrett's case,* 132 N. C., at p. 1010: "The prisoner requested the court to charge the jury in accordance with this reasonable principle, and the court had given the special instructions, but in the general charge it changed the same materially by omitting therefrom the most important portion, and requiring the prisoner to satisfy the jury that there was, at the time he fired the pistol, an actual necessity for killing the deceased. The jury, therefore, was left in doubt and uncertainty as to what was the true rule of law by which they should be guided in passing upon the prisoner's plea of self-defense, and the last instruction, which we may assume made the greater impression upon the jury, called for more proof from the prisoner than the law required of him. He was, therefore, placed at a disadvantage, and consequently embarrassed and prejudiced in his defense. There is a marked difference between an actual necessity for killing and that reasonable apprehension of losing life or receiving great bodily harm, which the law requires of the prisoner in order to excuse the killing of

his adversary, and it was just this difference that may have caused the jury to decide against the prisoner upon this most important issue in the case."

If there was an instruction given corresponding with this principle, which has often been approved by this Court, the instruction now being considered was certainly at variance with it, and in such a case the law is well established and well defined 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 or when incorrectly. We must assume, in passing upon the motion for a new trial, that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. *S. v. Barrett, supra; Edwards v. R. R.*, 132 N. C., 99; *Williams v. Haid*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 663.

The other objection to the instruction is that, by it, the learned judge virtually excluded from the consideration of the jury the question of manslaughter, and the evidence relating thereto. It will be clearly seen that the judge here submitted only two questions, as to murder in the first degree and murder in the second degree, by charging that if the prisoner did not premeditate or deliberate over it, and had not satisfied the jury that he killed from necessity, they would convict him of murder in the second degree, if he used a deadly weapon, thereby excluding from the consideration of the jury the element of manslaughter, there being some evidence of it.

There was a question raised as to the form of the verdict, but in the view we have taken of the case it is unnecessary to pass upon it, as it may not again be presented to us. We therefore forbear any discussion of it or the other exceptions.

There was error in the respects we have indicated, for which there must be another trial, and it is so ordered.

New trial.

STATE v. GUM BURNETT AND VIRGIL McGWINN.

(Filed 20 December, 1922.)

1. Intoxicating Liquor—Spirituous Liquor—Statutes—Local Law—Repealing Statutes.

Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law, except where otherwise provided by law; and where the local law applicable

makes the offense a misdemeanor, punishable by imprisonment in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder being guilty of a felony, C. S., 4171, the two-year statute of limitations is not a bar to the prosecution. C. S., 4512.

2. Criminal Law—Punishment—State's Prison—"Penitentiary."

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law.

3. Constitutional Law—Criminal Law—Preparation for Trial—Discretion of Court—Courts—Appeal and Error.

The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of Article I, section 17, of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him.

4. Appeal and Error—Evidence—Instructions—Presumptions.

Where the trial judge recites in his charge to the jury the testimony of a witness, which does not appear in the record, and no objection has been made thereto, it will be presumed on appeal that the recitation of the judge was correct.

5. Criminal Law—Several Defendants—Admissions.

Where several defendants are on trial for a criminal offense, the admissions of one are properly confined by the court to the one having made them, and excluded as to the others.

6. Intoxicating Liquor—Spirituous Liquor—Evidence—Admissions—Incrimination—Statutes.

Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of C. S., 3406.

7. Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Motion to Dismiss—Appeal and Error.

Held, the evidence introduced upon this trial for the unlawful manufacture and sale of intoxicating liquors was sufficient to sustain a verdict of conviction, and the defendants' motion to nonsuit, or that the action be dismissed, was properly overruled.

APPEAL by defendants from *Bryson, J.*, at Fall Term, 1922, of POLK.

The defendants were convicted of manufacturing spirituous liquors. The appeal presents a number of unusual questions, but we do not deem it necessary to notice but the two or three main contentions of the defendants, which will sufficiently cover the case and the points pre-

sented by defendants' counsel in their very able and learned brief, which was supplemented by a strong oral argument in this Court.

At the same term of court, the case of *S. v. Andrew Spicer, Sampson Spicer, and J. B. Jackson,* who also were charged with manufacturing liquor, was tried, when the defendant, Gum Burnett, testified that the still which the Spicers and Jackson were charged with operating belonged to him, and that he and Virgil McGwinn had run it. The still was operated about three-fourths of a mile from J. B. Jackson's property, in Cooper Gap Township, and this was the same still which was cut up by a number of officers, including officer West, who was testifying as to what Gum Burnett said. It was cut up on 11 May, 1919. Burnett stated that they worked that still about three weeks in April, three years ago. He did not say what year, but it was the same still that was cut up, and it was before it was cut up. The other defendant, McGwinn, also went on the stand and testified to a like effect. Both of these witnesses were under subpœna to testify in the case, and, of course, were under oath, when they testified as above stated. The officers who cut up the still in 1919 testified to the fact of its having been cut up, and where it was located. This was the material evidence in the case.

Defendants appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris and Solomon Gallert for defendants.

WALKER, J. As the indictment against the defendants was returned a true bill in open court on Tuesday, 5 September, 1922, it is manifest that, if the statute of limitations applies to this offense, the prosecution was barred, it having been committed more than two years before the bill was found, and so it was urged by the defendants.

Laws of 1903, ch. 391, was an act entitled "An act to prohibit the manufacture and sale of spirituous liquors in Polk County." The manufacture of liquor under this special act was prohibited by section 1 thereof, and punished as provided in section 5, which declares that a violation of the act shall be a misdemeanor and the offender shall be imprisoned in the county jail or penitentiary not exceeding two years, or fined not exceeding $500, or both, in the discretion of the court. The defendants contend, however, that this special act has been modified in so far as the manufacture of spirituous liquors is concerned by the provisions of Public Laws of 1905, ch. 339. But this contention is not well founded. Such a public-local law, it seems, has in express terms been saved from repeal by all the general prohibition legislation, and also by the saving clause in the Consolidated Statutes, as the following

statutes will clearly show: "The Watts Law," Laws of 1903, ch. 233, sec. 19; act amending the "Watts Law," Laws of 1905, ch. 339, sec. 7; Revisal of 1905, sec. 5458; C. S., vol. 1, sec. 3411, and vol. 2, sec. 8106.

So far as the question now before us is concerned, those statutes, or rather the sections thereof specially cited, are substantially identical with C. S., 3411, which reads as follows: "Nothing in this chapter shall operate to repeal any of the local or special acts of the General Assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this chapter, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this chapter or under any special or local act relating to the same subject."

These statutes evince the manifest purpose of the Legislature to continue in full force and effect all existing local or special statutes relating to the manufacture and sale of liquor, except where otherwise provided by law.

It is unnecessary to discuss minutely the several statutes above enumerated, as we would be led to the same conclusion with regard to the Public-Local Laws of 1903, ch. 391, relating to the manufacture and sale of liquor in Polk County, which is, that it has not been repealed, and is and was, as amended, in full force and effect when this bill of indictment was returned by the grand jury and when the defendants were convicted thereunder.

As the defendants could have been, and were, indicted for and convicted of, the felony, the statute of limitations is no bar to this prosecution. *S. v. Herring,* 145 N. C., 418; *S. v. Johnson,* 170 N. C., 685; C. S., 4512.

Felony is defined as a crime which is or may be punished by either death or imprisonment in the State's Prison. C. S., 4171. The Polk County act provides that upon conviction for manufacturing liquor, the convicted person may be imprisoned in the penitentiary. The act, of course, uses the term "penitentiary" in accordance with its ordinary signification, which is, "State's Prison." "Penitentiary" is defined in the dictionaries as a prison or place of punishment; the place of punishment provided for convicts sentenced to imprisonment and hard labor by the authority of the law. And in *Miller v. State of Kansas,* 2 Kansas, 174, it was said concerning the use of the word "penitentiary" in the sentence of a court: "The term 'penitentiary' held to be an English word in common use, which signifies a prison or place of punishment, and means the place of punishment in which convicts sentenced to imprisonment and hard labor, are confined by the authority of the law."

It follows that the statute of limitations has not barred this prosecution.

Defendants further contend that they were deprived of and denied the rights guaranteed to them under our Constitution, Art. I, sec. 17, which reads as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." The particular complaint is that defendants were deprived practically of the benefit of counsel, because the latter did not have the time necessary for the preparation of their defense. The judge continued the case for at least one day to allow counsel more time, but the defendants were not then ready for trial. They have presented no such case as would or should induce us to consider this exception with any degree of favor. We are satisfied that the fair, impartial, and just judge allowed defendants all the time that could possibly be spared, and that there was no abuse whatever of his discretion. 6 R. C. L., p. 548 (4). We said in *S. v. Sultan,* 142 N. C., 370: "The defendant's claim, that he was entitled as a matter of right to a continuance, is without foundation. There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had till the next. Whether the case should be tried at that term, which is often done, and, in many cases, is required in the public interest and the orderly and economical administration of justice, or whether the case shall go over to the next term depends upon the nature of each case, of the charge and the evidence, the facility of procuring witnesses and the legal preparation necessary. In short, 'the granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge and not reviewable, certainly in the absence of gross abuse of such discretion.' *S. v. Dewey,* 139 N. C., 560, and many cases there cited. Abuse of discretion is more apt to be shown in granting continuances and in the dilatory administration of justice. His Honor thought this case was one in which there should be a speedy trial. He knew all the attendant circumstances, and what was required by the public interest, more fully than this Court could know them. There is nothing to indicate that the defendant was unduly prejudiced."

The testimony of Virgil McGwinn does not appear in the record except by clear implication. It is referred to in the charge of the court, while stating a contention of the State. No exception was taken to this statement of the judge, and there was no request to change it if it was not correct. The case was prepared and signed by the solicitor and agreed to by counsel, as the case on appeal, no exceptions being reserved because of anything recited in the case. We must presume, therefore, that the judge correctly stated the evidence as to Virgil

McGwinn and his testimony in the case, while being examined as a witness, and, so considered, we find no error in the rulings of the court upon the questions of evidence. The judge properly restricted Gum Burnett's declarations to him alone, and ruled them out as to the defendant McGwinn. This was correct.

The testimony of Burnett was not made incompetent by C. S., 3406, so far as the record discloses and as the question is now presented to us. He did not claim any exemption or immunity when he was called upon to testify at the former trial, upon the ground that his answers would incriminate him, or tend to do so, nor has he otherwise shown himself to be within the terms of the statute (C. S., 3406). The law was certainly not intended to protect him, so far as appears.

These questions, as to the legal exemption of a witness from testifying in a way which will incriminate him, or tend to do so, and as to his immunity from prosecution, where he has testified in a criminal action for violating any law against the sale or manufacture of intoxicating liquors, and also as to defendant's right to a continuance of the case for trial to another time are discussed in 6 R. C. L., p. 548, par. 4, and note 12, and 140 Cyc., pp. 2543, 2544, 2547 (par. *a* and *b*), and pp. 2548, 2549, and 2550; *S. v. Stickney,* 36 Pac., 714, to which we refer.

So far as appears, the statement of the defendants as witnesses were altogether voluntary, and they had waived any right to withhold the testimony if it tended to incriminate them, nor does it appear that they, or either of them, were furnishing evidence in aid of any criminal prosecution by the State. The record is devoid of any such information.

But a sufficient answer to these objections of defendants is that they have not offered sufficient evidence, or any findings of fact by the judge, to show that they were entitled to have the testimony of the witnesses C. C. West and J. A. Feagan excluded as incompetent. The assignments of error relating to the objections do not throw any additional light upon the subject, or cure any defect in the respects we have indicated, and therefore the question discussed here is not sufficiently presented.

The motion for a nonsuit, or that the action be dismissed, was properly overruled. There was ample evidence to support a conviction, and there was no error in the charge of the court, or in the judgment or sentence imposed by it, nor was there any error in refusing to arrest the same.

After carefully reviewing the entire case as shown in the record, and with special reference to the prisoner's numerous exceptions, we have been unable to find any error therein. It will be so certified.

No error.

STATE v. HARLEY BALDWIN.

(Filed 20 December, 1922.)

1. **Homicide — Evidence — Reputation—Character of Deceased—Appeal and Error.**

The evidence upon the material and determinative facts in this trial of a homicide tended to show no self-defense or excuse: *Held*, the trial judge properly excluded the answers to questions on defendant's cross-examination of the State's witness for the purpose of showing the general reputation of the deceased for shooting and cutting men when he was under the influence of whiskey, or his general reputation for gambling, or his reputation for carrying a pistol, under the authority of *S. v. Canup*, 180 N. C., 739.

2. **Instructions—Contentions—Appeal and Error—Objections and Exceptions.**

Where a party objects to the statement of the judge of his contentions as being incorrect, he must do so in time to afford the judge a fair opportunity to correct it, and an exception after verdict is too late to be considered on appeal.

3. **Homicide—Self-defense—Evidence—Appeal and Error.**

An exception is untenable, upon the trial for a homicide, that the judge failed to charge the jury upon the principles of self-defense, when it appears that the prisoner entered willingly and aggressively into the fight that resulted in the death, and thus continued therein until he had killed the deceased, under the decision in the case of *S. v. Evans*, 177 N. C., 564, and other cases, also cited in the opinion of the Court.

4. **Instructions—Requests for Special Instructions—General Charge—Appeal and Error.**

The refusal of the judge to give special requests for instruction is not erroneous when it appears that he has substantially done so in his own language in the general charge to the jury.

5. **Homicide—Manslaughter—Evidence—Verdict—Appeal and Error.**

Where, upon the trial for a homicide, it appears that the prisoner provoked a fight with the deceased, entered willingly, and continued unlawfully therein, if the death had not resulted the prisoner would have been guilty of a misdmeanor, and, where death has resulted, a verdict convicting him of manslaughter will not be disturbed.

APPEAL by defendant from *Brock, J.*, at April Term, 1922, of MACON.

The defendant was convicted of manslaughter. The State's evidence tended to show that on 10 September, 1921, the defendant, Harley Baldwin, the deceased, Aus Wright, Bill Baldwin, father of Harley, and Dick Wright were engaged in a game of cards, about two hundred yards below Nantahala Bridge. There was a dispute between Harley and his father, Bill, on one side, and Aus Wright and Dick on the other, as to which pair had won the game.

After this had continued for some time, Aus Wright, the deceased, said, "I want my money," and Harley, the defendant, told him he would not get his money, and then jumped up and threw his hand in his right breeches front pocket. When Harley did this, the deceased, Aus Wright, told him, "You have the ups on me. You have a gun and I have not one, but we will walk down to the road and let the boys strip us, and I will whip you fair." Harley then told Wright that he would not do it, but Bill Baldwin started up, saying "Let me get him," and went towards Aus opening his knife. The other parties present then interfered. Dick Wright took Harley off and up the hill about eight steps, whereas the witness, Craig Steppe, with Aus Wright, remained standing where the fuss first occurred. Aus Wright, the deceased, then went to the place where his coat was lying, about six feet off, pulled a pistol out of his right coat pocket, and before releasing it with his hand, he broke it down, and then finding it empty, got cartridges out of his pockets and put five shells in the pistol. Then the defendant Harley and the deceased, Aus, both came walking towards each other, when the following occurred:

Aus said: "Harley, I have always treated you right, and I have loaned you money today and will again," and Harley said, "I have always treated you right," and Aus said, "You took my money when you ought not to have done that," and Harley told him that was a damned lie, and they had a few words which the witness did not remember; and then Aus walked around and took his position on this side of the witness (indicating), and said, "You have had the ups on me today, but you have not got them now," and they both began shooting at that instant, and there was not over a second's difference in the shots of the guns. Both men were wounded, Aus Wright fatally, dying soon after receiving the wound.

The prisoner appealed from the judgment of the court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. Frank Ray, R. D. Sisk, and Johnston & Horn for defendant.

WALKER, J. The defendant's counsel in their brief discuss only exceptions 7, 8, 9, 11, 13, 14, and 15.

Exceptions 7, 8, and 9 will be considered together. The State, in rebuttal to evidence that the deceased, Aus Wright, had the reputation of being a dangerous and violent man, introduced witnesses who testified that he had no such reputation. The defendant's counsel, cross-examining these witnesses, asked them if Aus Wright did not have a general reputation for shooting men and cutting them while he was under the

influence of whiskey. Again, if Aus Wright did not have a general reputation of gambling. Again, if he did not have a reputation for carrying a pistol. His Honor excluded the answers to these questions. This ruling of the court, it seems, is supported, upon the facts as they appear in the record, by *S. v. Canup,* 180 N. C., 739. That case, it would seem, sufficiently answers the objections of the defendant covered by these three assignments of error, but we may just as well refer also to *S. v. Holly,* 155 N. C., 485; *S. v. Blackwell,* 162 N. C., 672; *S. v. Turpin,* 77 N. C., 473; *S. v. Hines,* 179 N. C., 758, which also fully answer the objections. The transaction here considered upon the material and determinative facts showed no self-defense or excuse for the homicide, nor was the evidence circumstantial, or the nature of the transaction in doubt. It was a plain and unmistakable case, at least, of manslaughter. The defendant was not only willing to fight, but eager for the fray, and there was some evidence of murder in the second degree, if not in the first, but the State did not ask for a conviction of murder in the first degree, but insisted only upon a verdict of murder in the second degree or on one for manslaughter, and the jury mercifully reduced the grade of the homicide to manslaughter.

Exception 11. His Honor was stating the defendant's contention, in which he included a sentence in parentheses, as follows: "(And that then the first quarrel took place, they both used bad language, calling each other damned liars and other epithets.)" If this was a misconception by his Honor of defendant's contention, the time and place to have called it to his attention was then. The defendant could not lie by and except to this sentence for the first time in making out the case on appeal.

Exception 13 was to the portion of the judge's charge in which he is reciting a contention of the State, and in the condition of the present record, this could not be successfully assigned as error.

We have so often said that the statement of contentions must, if deemed objectionable, be excepted to promptly, or in due and proper time, so that, if erroneously stated, they may be corrected by the court. If this is not done, any objection in that respect will be considered as waived. We refer to a few of the most recent decisions upon this question: *S. v. Kincaid,* 183 N. C., 709; *S. v. Montgomery,* 183 N. C., 747; *S. v. Winder,* 183 N. C., 777; *S. v. Sheffield,* 183 N. C., 783.

Exception 14 was taken to a portion of the judge's charge. This, however, seems to be sustained by the authorities, *S. v. Kennedy,* 169 N. C., 326; *S. v. Crisp,* 170 N. C., 785; *S. v. Evans,* 177 N. C., 564, as to the right of self-defense when the prisoner either unlawfully started the fight or willingly and wrongfully entered into it.

The other assignments, except one, need not be considered, as the rulings upon which they are based, if erroneous, were nothing more than harmless, but we will consider one exception which rests principally upon the charge of the court.

Exception 15 was taken to the alleged refusal of the judge to give certain special instructions asked of him by the defendant's counsel, but his Honor did give them, so far as they were correct, in his general charge.

The prisoner entered into this fight not only willingly, but unlawfully, and it may be further said that he went into it even aggressively, if not with a predetermined and definite purpose to kill his adversary, premeditatedly and deliberately formed beforehand. His was an inexcusable and unlawful act from the beginning. He started in the wrong, and steadily and vigorously prosecuted his evil design.

The facts bring this case within the principle of *S. v. Kennedy,* 169 N. C., 326; *S. v. Crisp,* 170 N. C., 785; *S. v. Garland,* 138 N. C., 675; *S. v. Baldwin,* 155 N. C., 494; *S. v. Pollard,* 168 N. C., 116-119. See, also, *S. v. Robertson,* 166 N. C., 356; *S. v. Yates,* 155 N. C., 450; *S. v. Brittain,* 89 N. C., 481.

It was said in *S. v. Crisp,* 170 N. C., 790-791: "A defendant, prosecuted for homicide in a difficulty which he has himself wrongfully provoked, may not maintain the position of self-defense unless at a time prior to the killing he had quitted the combat within the meaning of the law, as declared and approved by the recent case of *S. v. Kennedy,* 169 N. C., 326, and other like cases. In some of the decisions on the subject it has been stated as a very satisfactory test that this right of perfect self-defense will be denied in cases where, if a homicide had not occurred, a defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he had provoked or entered into a fight. Under our decisions such a position would exist:

"*a.* Whenever one has wrongfully assaulted another or committed a battery upon him.

"*b.* When one has provoked a present difficulty by language or conduct towards another that is calculated and intended to bring it about. *S. v. Shields,* 110 N. C., 497; *S. v. Fanning,* 94 N. C., 940; *S. v. Perry,* 50 N. C., 9. And, in this connection, it is properly held that language may have varying significance from difference of time and circumstances, and the question is very generally for the determination of the jury. *S. v. Rowe,* 155 N. C., 436.

"*c.* Where one had wrongfully committed an affray, an unlawful and mutual fighting together in a public place, the more recent ruling being

to the effect that the 'public place,' formerly considered an essential, need be no longer specified or proved. *S. v. Griffin,* 125 N. C., 692.

"And when there is relevant testimony, it has come to be considered the correct and sufficient definition of an unlawful affray or breach of the peace when one has 'entered into a fight willingly' in the sense of voluntarily and without lawful excuse. *S. v. Harrell,* 107 N. C., 944. Extending and applying these principles to prosecutions for homicide, it has been repeatedly held in this State that where this element of guilt is present, and one has slain another under the circumstances indicated, the offender may not successfully maintain the position of perfect self-defense, unless he is able to show, as stated, that at a time prior to the killing he quitted the combat and signified such fact to his adversary."

It is further said in *S. v. Crisp, supra:* "If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter."

The jury has evidently found, construing the charge of the court in connection with the evidence and the verdict, that the prisoner not only entered into the fight willingly, but that he provoked it by language calculated to cause the difficulty, or an attack upon him, or to bring about an affray. If death had not ensued, he would have been guilty of a misdemeanor for engaging in an unlawful affray or assault and battery. In any reasonable view, therefore, he was guilty of manslaughter.

There is no reversible error to be found in the record, and it will be so certified.

No error.

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PRESENTATION OF THE PORTRAIT

OF THE LATE ASSOCIATE JUSTICE
OF THE SUPREME COURT

WILLIAM REYNOLDS ALLEN

SEPTEMBER 6TH, 1922

BY THE

HONORABLE FRANK A. DANIELS

JUDGE DANIELS said:

May it Please Your Honors: Few men have been more fortunate in their ancestry, the place of their birth, their environment and education, than William Reynolds Allen, late an Associate Justice of this Court, the second son of William A. Allen and his wife, Maria Goodwin Hicks Allen, born at Kenansville, Duplin County, North Carolina, on 26 March, 1860.

The father, William A. Allen, was a native of Wake, a member of the large and influential Allen family of that county, farmers as far back as they can be traced, of intelligence, industry, economy, and character, with an occasional county officer or member of the Legislature among them, having no professional offshoots, except one physician, who settled in Tennessee, until William A. Allen began the practice of the law. He grew up on his father's farm, was educated at Wake Forest, and, beginning the practice, was elected and served as a member of the House of Representatives from Wake at the session of 1852, having as his colleagues Romulus M. Saunders and Gaston M. Wilder.

Soon afterwards he removed to Kenansville, where he was associated with William J. Houston, an able lawyer and eloquent advocate, as junior member of the law firm of Houston & Allen, until the War Between the States called both partners into the service of the Confederacy, in which William J. Houston, with the rank of Captain, was killed in battle in Virginia, and his associate became Lieut.-Colonel of the 51st Regiment. Upon the termination of this service, he returned to Kenansville and resumed the duties of his profession. He was, during the whole of his career, a diligent and discriminating student of the law, and became an able and learned lawyer, having the respect and confidence of a large clientage, and held in high esteem for his upright Christian character and the stern, unbending integrity of his professional, public, and private life.

In the troublous days following the War he was elected a delegate from Duplin to the Convention which met in Raleigh in 1865 to determine the method of restoring the State to the Union, and was an active member of a body composed of many of the ablest and most distinguished statesmen of that period, among whom were B. F. Moore, Judge M. E.

Manly, William P. Bynum, Judge Robert P. Gilliam, Judge George Howard, Thomas J. Jarvis, Judge R. P. Dick, Judge E. J. Warren, Judge D. H. Starbuck, Bedford Brown, and Patrick H. Winston.

The ordinance adopted declared that the ordinance of 21 November, 1789, by virtue of which the State of North Carolina became a member of the Federal Union, "had at all times since its adoption been in full force and effect, notwithstanding the supposed ordinance of 21 May, 1861, which was declared to have been "at all times null and void."

Nine States Rights Democrats, who had always entertained a deep conviction of the right and power of the State to repeal the ordinance of 1789, and withdraw from the Union, willing, in the interest of peace, to adopt an ordinance providing for the simple repeal of the ordinance of 1861, refused to vote for the ordinance adopted, which they regarded as a reflection upon the loyalty and patriotism of the people of the State. They were, among others, William A. Allen, Judge Howard, M. E. Manly, Thomas I. Faison, and A. A. McKoy. The action of the Convention, based upon grounds these members could not approve, began the process which, though tedious and full of peril and suffering, eventually resulted in a large measure of settled government, peace, and order, to the attainment of which these protestants gave their constant and efficient labor and support.

In 1868 the people of Duplin called Colonel Allen to serve them in the Senate, but he and eight other Senators were denied their seats because their political disabilities had not been removed. He afterwards served as Senator at the session of 1870, and again at the sessions of 1872-1873, during which last sessions he was chairman of the Judiciary Committee.

He thereafter continued the practice at Kenansville until 1881, when he removed to Goldsboro and engaged in the practice in Wayne and Duplin until his death in 1884.

Maria Goodwin Hicks Allen, wife of Colonel Allen, a descendant of William Hicks, an ensign in the Continental Army, was a member of the prominent and highly respectable Hicks family of the county of Granville, for generations living upon their farms and engaged in agriculture. She was a woman of unusual intelligence and vivacity, of great kindness of heart, and given to a gracious hospitality of which I have the most grateful recollection. Her devotion to her husband and her children, and her loving ministry to all who came within her sphere of life, endeared her to all who knew her. After the death of Colonel Allen, she blessed the home of her younger son, William R., with her presence until her death in 1900. Two able and distinguished lawyers of the State, Hon. T. T. Hicks of Vance, and Hon. A. A. Hicks of Granville, are members of the same family and near kinsmen of Mrs. Allen.

The home of Colonel and Mrs. Allen, in which two sons, Oliver H. and William R., grew to manhood, and which was brightened by the presence of their only daughter, Elizabeth A., now one of the most useful and accomplished teachers of the State, was typical of the homes of that community, and characterized by "plain living and high thinking."

The population of the county was, as we learn from the interesting and valuable historical sketch of Duplin County, from the pen of L. A. Beasley, Esq., of Kenansville, composed of descendants of a colony of Irish, among whom were the Owens, Kenans, and Walkers, of Presbyterians from Ulster, English brought in by McCulloh, Germans, French, and Swiss who came over with DeGraffenreid, Scotch from the upper, English from the lower Cape Fear, and English and Scotch from other colonies, with little admixture of any character, so fused and assimilated as to become a homogeneous people, scions of the great nations of the earth, who, while not forgetful of their ancestry, had been for more than a century, in thought and deed, thoroughly American. Their patriot soldiers, under Col. James Kenan, took part in the battle of Moore's Creek, John Grady of Duplin being the first North Carolinian to give his life on a contested battlefield for the cause of independence, and were active throughout the Revolution for the patriot cause.

The people of Duplin were early interested in education; and, in 1785, established Grove Academy, which continued its work until after the Civil War, and at which many of the county's most prominent citizens were educated. In the later years, Hon. B. F. Grady, one of the most learned of the educators of the State, Prof. R. W. Millard, an accomplished and thorough teacher, and others, conducted schools of high reputation and great usefulness. In consequence, a large number of educated and intelligent men and women have, in every generation, given tone to social life and furnished leaders in religion, government, and agriculture.

Duplin possessed until recently practically only one industry—that of agriculture. The people lived generally on their farms and, in the main, cultivated them with their own hands, though there were numerous plantations cultivated by tenants and hired labor. Scattered over the county were many handsome and comfortable homes, which dispensed a friendly and genial hospitality, and there were few homes, however humble, in which the spirit of hospitality and good will did not abound. The manners of their inhabitants were simple, unassuming, and kindly; their sentiments humane and sincere. Industry and economy gave them a reasonable prosperity, and none were very rich or very poor.

They were a religious people, among whom skepticism and infidelity were almost unknown. They loved freedom, detested oppression, and were always ready to fight for their convictions.

In short, they were genuine North Carolinians, with many of the virtues and some of the faults that have appertained to this separate and distinct aggregation of the human family. They made their own wine and brandy, and some of them partook, at times, too freely of the products of their vineyards and orchards in the days when adulterated and poisonous liquors were unknown, and before the doctrine of total abstinence had been universally accepted.

I recall a scene in a court, presided over by a judge of great wisdom, humanity, and profound knowledge of human nature, before whom a young man was arraigned with a codefendant charged with a sanguinary affray, committed while the parties were intoxicated, and for whom his counsel entered a plea of guilty. The judge seemed much attracted to the defendant, who was barely more than a boy, and who was apparently decidedly the worse for the rencounter, inquired where he came from, and learning that he came from Smith's Township, Duplin County, proceeded to deliver a powerful lecture on the evils of intemperance, during which he stated that he had known the father and grandfather of the defendant, had often visited in their homes, and that he had never known two better men, their only fault being that sometimes they drank too much, and strongly appealed to the young man to cut out their vices and emulate their virtues. He concluded by suspending the judgment on payment of costs, but made such an impression that the defendant became a sober, industrious, law-abiding citizen. I need not say that the presiding officer of the court was Judge Oliver H. Allen, nor call attention to the hundreds of young men in this and other states who owe the incentive and opportunity for repairing the errors of youth and developing the virtues of good citizenship to the humane and considerate administration of the law by a Christian judge who, after more than a quarter of a century of helpful and beneficent service on the Superior Court Bench, is now about to retire from active labor and assume the duties of an Emergency Judge, as provided in a recent act of the General Assembly. It is but just to add in this connection that the people of Duplin, in their desire to improve conditions, long before the passage of the general prohibition act, secured the prohibition of the sale of intoxicating liquors within their boundaries.

When, in the year 1881, I came to know the people of the county, I was greatly impressed with the large number of strong, intelligent, and patriotic men who had participated in the stirring controversies preceding the Civil War, who, at the call of country had fought the battles of the Confederacy, and who, when the cause was lost, returned to their

impoverished and desolated homes and quietly and bravely took up the burdens of reconstruction. They were the friends and associates of Colonel Allen and his family, and his sons, growing up under their influence, received inspiration from the example, the character, and the wisdom of these simple great men.

The village of Kenansville, nine miles from the railroad, was the county-seat, and, during court, attracted a large attendance from the country. During the rest of the year it was as quiet and restful a spot as could be found anywhere, with its shaded streets, its antique court-house, built in 1785, and its ancient spring coming down from Indian days and furnishing the purest water for man and beast. There was no telegraph, no telephone, no radiograph, no moving picture, and no automobile to contaminate the pure air or disturb the speaking quietude of that peaceful scene. Its homes were the abodes of quiet, simple hospitality in which there was much of culture and refinement. The whole atmosphere was conducive to normal living, familiar social intercourse, to reading, study, reflection, and the enjoyment of the wholesome pleasures and recreations of country life. Its young men grew up strong and fit, many of whom, moving out into larger fields of usefulness, enriched the business and professional life of many communities, while its young women, clothed upon with modesty, purity, and goodness, exemplified in their lives the noblest attributes of Southern womanhood—the glory of our civilization.

With such parentage, in such environment, began the education of the subject of this address, with results differing widely from those that attended "The Education of Henry Adams."

His childhood was passed in a Christian home, presided over by parents whose precept and example laid the foundation of a character that won and held throughout his life the esteem, and often the affection, of those who knew him.

There he grew into a quiet and thoughtful youth, in daily association with his father and his older brother, whose serious and practical outlook on life entered deeply into his early experiences, and constantly stimulated by the bright, active mind of his mother, whose wide and intense interest in all that concerned the community and its people, became an enduring portion of his inheritance.

He attended the school of Prof. R. W. Millard, where, under that model teacher, who held that the thorough mastery of essential studies, rather than the discursive pursuit of many, was the chief requisite of any wise and effective scheme of education, he was prepared for college, peculiarly fortunate in having acquired habits of intelligent, orderly, and systematic application. While engaged in this preparation he read

extensively the best literature and mingled in the sports and the social life of the town, where his quick intelligence, tact, and kindness of heart made him a general favorite.

Entering Trinity College, he came under the influence of the great intellectual and spiritual head of that institution at a time when colleges were not crowded, and when the contact between the president and the student was close and intimate. Here he pursued the prescribed courses until the completion of his junior year, and formed strong friendships among his fellow-students, many of whom have since attained distinction, which he prized most highly and which lasted unbroken until his death. He always spoke of the president, Dr. Braxton Craven, in terms of the deepest respect and veneration. The year following his retirement from college he taught school at Auburn, in Wake County.

Returning to Kenansville, he began the study of the law with his father and brother, and, after careful preparation, passed his examination for license at the Spring Term, 1881, of this Court, but, being under twenty-one years of age, his license was withheld until he reached his majority.

Members of the class of 1881, of which his name is alphabetically first, have been greatly honored:

William R. Allen, member of House of Representatives, judge of the Superior Court, and Associate Justice of the Supreme Court.

Charles B. Aycock, district elector, elector at large, U. S. District Attorney, and Governor of North Carolina.

Edwin F. Aydlett, U. S. District Attorney and President North Carolina Bar Association.

William Black, Presbyterian minister and evangelist, much beloved and of great usefulness.

George McD. Bulla, clerk of House of Representatives.

Evan D. Cameron, minister of the gospel and Superintendent of Public Instruction of the State of Oklahoma.

Frank A. Daniels, State Senator and judge of the Superior Court.

Rodolph Duffy, member of House of Representatives and solicitor.

W. A. Gash, member of House of Representatives.

James M. Moody, State Senator, solicitor, and member of Congress.

William C. Newland, member of House of Representatives, district elector, solicitor, and Lieutenant-Governor.

Joseph E. Robinson, man of letters and editor of the *Goldsboro Argus* for nearly forty years.

John H. Small, member of Congress, 1899 to 1921.

Harry W. Stubbs, North Carolina's veteran legislator, member of the General Assembly, Senate and House, continuously since 1889, and chairman of the Joint Legislative Committee for compiling, collating,

and revising the public statutes of the State of North Carolina, published 1919, and known as Consolidated Statutes of North Carolina.

Francis D. Winston, member of House of Representatives, State Senator, judge of the Superior Court, district elector, elector at large, Lieutenant-Governor, U. S. District Attorney, and President of the North Carolina Bar Association.

Hugh M. Wellborn, State Senator.

Others of this class have also been prominent and useful citizens and have attained distinction at the bar.

Not as brilliant as some members of his class, he equalled any and excelled most in his thorough preparation, capacity for sustained mental effort, power of analysis, practical judgment, and clear, direct presentation of the subject under discussion. Withal, a modest young man, of quiet dignity and unaffected manner, tactful and friendly, he gained the respect and high regard of all his classmates.

He began the practice with his father at Kenansville, continuing it at Goldsboro until the death of Colonel Allen in 1884, when he became a member of the law firm of Faircloth & Allen, of which Hon. J. Y. Joyner, afterwards State Superintendent of Public Instruction, was at one time a member, which lasted until 1889, when he and William T. Dortch became partners under the name and style of Allen & Dortch.

In the meantime, in 1886, after a courtship that began in boyhood, he was happily married to Miss Mattie Moore, one of Duplin's fair daughters, at the home of her father, Dr. Matt Moore, a member of one of the oldest and most prominent families of the county.

Before taking this important step he consulted another impecunious young lawyer, recently married, who shall here be nameless, stating that he had heard that a married couple could live on what the husband had spent while single, and requesting the benedict's opinion upon the point. His friend gave him such encouragement, by his grave and confident assertion that before marriage he had spent all he made and that since marriage he had accomplished the same result, that the marriage was not long delayed.

The junior member of the new law firm, a son of Hon. William T. Dortch, inherited a large measure of his distinguished father's ability, his vigor of mind and body, and, as he approached middle age, much of his impressive personality and power of speech.

To Colonel Dortch the trial of a hotly contested case before the jury, the skillful examination and cross-examination of the witnesses, the development of the evidence, closing with one of his powerful and effective speeches, was a constant source of the highest pleasure. No one who saw him at his best, with all his great talents in action, the light of battle in his eyes, and the confidence of victory in his tones, ever forgot the spectacle.

While the senior, with rare skill, wise management, and clear, convincing argument, took part in the trial of their more important cases, he preferred the quiet ways of his profession. From the beginning of his practice he was an untiring student of law, not only as a means of earning his livelihood, but from a deep love of the great principles of law and equity which inspired him from his youth and until the shadows closed in upon his earthly career. No labor in the preparation of his cases was too arduous or long-continued, and his legal papers, his pleadings, his requests for instructions, and his briefs were models of accuracy, clearness, and order.

The practice of the firm grew, and he argued their cases in this Court, where his arguments and briefs, evidencing painstaking care, sound judgment and learning, with high powers of reflection and discrimination, and citing all pertinent authorities, were highly regarded, and where few practitioners have enjoyed more the confidence and esteem of the personnel of this great tribunal in whose labors he was destined in after years to participate.

He became so familiar with our decisions, and cited them so frequently and so accurately, that he was regarded by some members of the profession as a great "Case Lawyer," and so he was, but any implication that he was only a "Case Lawyer" was far astray.

He was thoroughly grounded in the great principles of the law, which he magnified and used with great effectiveness, but he delighted in well considered cases that recognized and illustrated these principles and applied them to varying states of fact, and referred to them so readily as sometimes to give color to that mistaken impression. It was to him a pleasant exercise to explore "the codeless myriad of precedent," cull "single instances" from the "wilderness," and skillfully combine them into a comprehensive and satisfactory view of some great topic of the law.

He, too, had, perhaps, profited by the tasks set by our loved preceptor, A. K. Smedes, who, giving only the facts of an opinion handed down by the Court, required the young members of the Goldsboro Bar to write our own independent opinion and compare it with that of the Court, and who, for our encouragement, would sometimes declare ours the better opinion.

In the trial of causes he was fair and candid in the statement of his contentions, deferential to the presiding judge, kind and courteous to his brethren, considerate of witnesses, and clear, direct, and forceful in his address to the jury. He had no such gift of eloquence as that possessed by his associates, often his opponents, Charles B. Aycock and W. S. O'B. Robinson, but his quiet, simple, persuasive speech often attained results beyond their reach. In some of his intellectual qualities

he somewhat resembled that Christian gentleman and learned and industrious lawyer, W. C. Munroe, without a certain subtlety that distinguished Mr. Munroe's mind, and with a more practical bent.

In his practice, as in his life, honorable and upright, he scorned the devices by which small men attempt to supplement their deficiencies, and there was never at any time or anywhere any question as to his character or his methods.

While pursuing his life-work, he was not unmindful of his duties as a citizen, taking part in every movement that promised benefit to the community or the State, and active and influential in advancing the success of the Democratic Party, to which he was devoted both by inheritance and by conviction.

He was elected a member of the House of Representatives of 1893 from Wayne, his able colleague in the Senate being Hon. Benjamin F. Aycock, and immediately took his place as one of the ablest and most resourceful members of that body, his principal committee assignments being the Judiciary Committee, of which he was chairman, and the Committee on Railroads and Railroad Commissioners, of which, under the chairmanship of Hon. F. S. Spruill, he was an active and useful member.

He served with Mr. Spruill and Hon. Cyrus B. Watson on the committee appointed to consider "questions of law, constitutional and otherwise," growing out of the proposition to repeal the tax exemptions of the Wilmington and Weldon Railroad Company, and strongly advocated the repeal of the tax exemptions in the charters of all of the corporations of the State, which ultimately prevailed. Among bills of general importance, he introduced the bill, prepared by himself and Hon. A. D. Ward, the able representative from Duplin, dividing murder into two degrees, which was passed at that session.

After the adjournment he returned to Goldsboro, where he continued the practice with Colonel Dortch until June, 1894, when he was appointed judge of the Superior Court.

In the ensuing election his opponent was his personal friend, W. S. O'B. Robinson, who was successful, and Judge Allen resumed, in January, 1895, his former partnership, which had been kept open for him by his loyal and devoted partner.

Again in 1899 he was a member of the House, and one of the leaders of as able and distinguished a body as has assembled in the history of the State, presided over by that great judge and eminent and beloved citizen, Henry G. Connor.

As a member of the Judiciary Committee and chairman of the Committee on Railroads and Railroad Commissioners, Judge Allen rendered valuable service. He redrafted the statute relating to the regulation of

public utilities, abolishing the Board of Railroad Commissioners, and establishing the North Carolina Corporation Commission, which was enacted into law.

He was a member of the Committee on Constitutional Amendments, consisting of Messrs. Rountree, Allen, Winston (F. D.), Overman, Foushee, Justice, Robinson, Moore, and Currie of Bladen. With the other able members of this committee he gave helpful and unremitting assistance to the chairman, Hon. George Rountree, an accomplished and learned lawyer, who, more than any other Representative or Senator, had, before the beginning of the session, made a careful and exhaustive study of the suffrage provisions of the constitutions of the states of the Union, and who was thoroughly prepared to consider and discuss the amendments proposed to the State Constitution, embracing what was known as "the Grandfather Clause," having for its ultimate purpose the establishment of suffrage upon the basis of a universal educational qualification.

Largely, perhaps principally, through Judge Allen's influence and his tactful labors, the divergent views of members of both houses, most of whom favored the proposition but were divided in opinion as to the form in which it should be submitted, were harmonized, the bill submitting the amendment perfected and enacted, and the amendment was thereafter, under the wise and masterful leadership of Charles B. Aycock, overwhelmingly ratified by the voters of the State. It is now believed to be the consensus of opinion of thoughtful citizens of all political parties that no single act of legislation nor constitutional amendment has contributed in so large a degree to the peace and prosperity of all classes, nor to our educational and industrial progress, with the many humane and uplifting movements which have followed in their wake. Judge Allen approached the important questions which arose with great breadth of view and thoughtful consideration for the opinions of others, deliberating with open mind upon every argument from every quarter, but, when his conclusion had been reached, he was tenacious and unyielding, but so clear, tactful, and persuasive in the presentation of his reasons that misconceptions were removed, antagonisms overcome, and unanimity often attained.

At the same session acts were passed providing for the general supervision of the shell-fish industry of the State of North Carolina, out of which, and out of judicial action ensuing thereon, arose a controversy, involving much strife and bitterness, which engrossed to a large extent the thought and labor of Representatives and Senators at the succeeding session, and resulted in the impeachment of two Justices of this Court.

Judge Allen's last service in the Legislature was as a member of the House at the session of 1901, presided over by Hon. Walter E. Moore,

the able representative from Jackson, whose valuable, unselfish, and patriotic services at the session of 1899 had greatly endeared him to his associates.

Judge Allen was again chairman of the Judiciary Committee, and was elected chairman of the Board of Managers for the Impeachment of the Judges, in which he made the opening argument before the court of impeachment. The trial resulted in an acquittal in which those who favored the prosecution cheerfully acquiesced in the belief that the purpose for which it had been instituted had been accomplished without injury or humiliation to the judges upon whose action it had been predicated.

Judge Allen's legislative career was one of much usefulness. A wise and constructive legislator, he ranked with the ablest statesmen of the period in which he served.

Again, in 1902, he was nominated for judge of the Superior Court, and again the opposing candidate was Judge W. S. O'B. Robinson, then closing a term on the Superior Court Bench in which he had impressed the people of the State with his love of justice, his hatred of fraud and oppression, his just but merciful administration of the law, and the brilliant and often humorous manner in which these great virtues had been demonstrated.

In this second contest between them Judge Allen was the victor, Judge Robinson retiring to the practice, but neither victory nor defeat could disturb their life-long friendship.

The change in his life-work so brought about was very grateful to Judge Allen, who might truly have said with Chief Justice Ames:

"I never designed to continue at the bar all my days. . . . I do not desire to be compelled to make the worse appear the better reason. I wish to pursue the better reason."

From Judge Allen's youth he had possessed so large an endowment of what, for lack of a better term, has been called "The Judicial Temperament" that those who knew him best had believed him destined to high judicial position.

He began his second service as judge of the Superior Court 1 January, 1903, held court in every county of the State, and, in that capacity, his learning, ability, and character won the instant recognition of the profession and the people. His orderly, prompt, and systematic conduct of the business of the court, his unfailing patience, tact, and courtesy, his impartiality and love of justice, his practical sense, the soundness of his rulings, and the clearness of his charges, which enabled juries easily to grasp complicated and troublesome questions of law and fact, marked him as one of the ablest trial judges the State had produced.

In his political life he had gained a reputation for intense partizanship which he would not have denied. His conviction that the welfare of the people of the State and of the South was dependent upon the rule of his party was so strong and controlling that he looked with dislike and with a feeling somewhat akin to intolerance upon every organization or movement that threatened what he believed the muniments of our civilization. Consequently, his opposition was strong, unyielding, and sometimes lacking in the moderation that in all other respects distinguished his life and conduct. But while this was true, he cherished no animosity toward individuals, numbered among his friends many of his political opponents, lawyers and laymen, and in the performance of his judicial duties put aside all political bias, exhibited such qualities of fairness, impartiality and justice, and "was so clear in his great office" that men of all parties united to acclaim him a just, wise, and upright judge.

He regarded the punishment of those convicted before him as the most difficult and painful duty imposed upon a judge; but, while he strove to mitigate the severity of the law when youth, ignorance, or sudden passion had concurred in its violation, he always kept before him the great fact that the protection of society, in the administration of the law, is paramount to all other considerations.

After a service of eight years on the Superior Court Bench, he was, in 1910, elected an Associate Justice of this Court, and, taking his seat at the Spring Term, 1911, entered into the labors of the hardest worked tribunal known to our institutions.

His first opinion, *Taylor v. Wahab,* 154 N. C., 219, filed 22 February, 1911, and his last, *Jennings v. Jennings,* 182 N. C., 26, filed 14 September, 1921, after his death, are fair specimens of his clear, direct, and forceful style. Between these, the volumes of the reports for nearly eleven years abound in opinions written by him touching almost every phase of the law, and furnishing evidence of his ability, learning, good sense, and almost infinite industry. Under permission, I here quote from the remarks of Chief Justice Clark upon the presentation of the proceedings of the Bar of this Court, 16 September, 1921:

"Here he was a patient hearer of argument, and we found him in conference invaluable in the consideration and decision of causes. His active and trained mind was quick to sense every view of a question, and he carefully considered it in all its bearings. He was tireless in his examination of precedents and careful in the preparation of his opinions. Always courteous, he was a most agreeable as well as a most valuable member of this Court."

A feature of Judge Allen's opinions that gave much satisfaction to lawyers was the brief but accurate statement of facts which preceded or

was a part of each opinion, and which threw light upon the legal propositions laid down. While his opinions were often short, he took care that brevity should not be sought at the sacrifice of clearness and a full understanding of the facts and the law governing them.

He had a profound veneration for the Federal Constitution, with its first eleven amendments, but was not so deeply impressed with the subsequent amendments to that great instrument, believing that most of them dealt with matters solely within the jurisdiction of the states.

He had a great admiration for the genius and learning of Chief Justice Marshall, but in his views of government he was essentially of the school of Jefferson.

He believed in simple, economical government, and the greatest liberty of the citizen consistent with peace and order.

Realizing that most of the wholesome progressive movements of his day were based on community welfare, he gave them his earnest support, but was sometimes oppressed, as some of his opinions and conversations indicated, with the fear that, in pursuing the good of the whole, the rights of individuals were being impaired and personal initiative enfeebled and often destroyed. He had little sympathy with the line of the poet, either as the statement of a fact accomplished or as a poetic vision, that "The individual withers and the world is more and more," and gave his hearty assent to the proposition announced by Professor Roscoe Pound, in his recent volume, "The Spirit of the Common Law": "Although we think socially, we must still think of individual interests, and that greatest of all claims which a human being may make, the claim to assert his individuality, to exercise freely the will and the reason which God has given him."

While he did not underrate those technicalities of the law which protect the citizen in his life, liberty, and property, he was no slave to precedent, and his mind dwelt upon the essential justice and inherent equity of the causes that came before him which he endeavored to draw from the record and establish by force of reason and authority.

Desirous of improving the tools of his profession and of lightening the labor of his brethren, in the midst of the most exacting labor, he found time to prepare his Annotations, published in the 164th Report, and his Table of Cases Overruled, Modified, and Reversed which appear in the 171st. He was honored by the University of North Carolina, which conferred upon him the degree of L.L.D.

In the summers of 1920 and 1921 he delivered a series of lectures before the Law School of the University which were highly appreciated, and which, it is hoped, may be published.

He was fond of association with young people, and was helpful and stimulating to students and young lawyers.

His relation to the members of this Court could not be better expressed than in the remarks of his friend and associate, Judge Hoke, at the memorial meeting of the Bar held shortly after his death:

"None know better than his former associates that a strong man amongst us has fallen; that North Carolina and its people have lost a great citizen, and the courts an upright, able, and learned judge. Going further, we realize that we have been bereft of a wise and warm-hearted friend, who was ever ready to spend himself in high-minded, helpful, and sympathetic service."

A distinct and unusual service was rendered by Judge Allen, especially in his later years, when his wise and mature counsel was sought by legislators and public men of all shades of political thought, and from all portions of the State, in matters of public welfare, in which to the last he manifested a deep and vital concern.

In his home community he was for years the general adviser of all classes upon almost all subjects, ranging from financial difficulties to the most intimate domestic relations. His professional brethren, his business associates, the richest and the poorest of his friends and neighbors, felt at liberty at all times to avail themselves of the patient, friendly, and helpful counsel which it was one of his highest pleasures to bestow on all who sought him.

His life and training had brought him in touch with every variety of problem affecting the lives of men, and his clear intelligence, his sympathetic understanding and practical judgment enabled him to render services, quiet and unostentatious, frequently unknown to any except the recipients, but often of inestimable value. I need not say that these fine qualities and their constant exercise had brought him troops of friends who loved him in life and who mourn him in death.

His attachments were strong and lasting. He was a man of emotion, seldom exhibited except when so deeply moved that his habitual self-control gave way under the stress of some dominating and overpowering feeling.

An affectionate and unbroken friendship existed between him and Charles B. Aycock, dating from their youth, and cemented by years of personal and professional association.

None knew or appreciated more the great and lovable qualities, the ability and eloquence, the noble ideals and high achievements of this honored and most beloved of North Carolinians.

No other speeches moved him as did Aycock's—sometimes to tears he could not hide. I recall a scene at the Democratic State Convention of 1900, when, after his nomination, the candidate for Governor came upon the platform to accept the honor conferred, in a speech of wonderful power that convinced, thrilled, and moved to action a whole people, and Allen listened, wept, and sobbed aloud.

Judge Allen was not of a demonstrative nature.

It is doubtful whether he ever told any man he was his friend, but he performed all the offices of friendship with such unselfish simplicity and sincerity that none could doubt his attachment or his loyalty. Indeed, one of his most marked characteristics was the simplicity and sincerity of his thought, speech, and life.

He had much of "that prudent, cautious self-control" which a great poet, who had little of it, described as "Wisdom's root." While he had at all times a just appreciation of his own powers, he was simple, unpretending, and without vanity or self-conceit.

During his service as judge of the Superior Court the training of their children, Mary Moore, William R., Elizabeth H., Oliver H., Dorothy S., who survived him, had devolved almost exclusively upon Mrs. Allen, who had devoted her life in wise and loving ministry to her children, her husband, and her home.

Near the conclusion of this service he decided to return to the practice, which would enable him to remain at home and aid Mrs. Allen more effectively in the education and training of their children, who were then reaching an age when the care of both parents seemed requisite.

His election, however, as Associate Justice, which permitted him to spend almost half of every week at home, where he prepared most of his opinions, gave him the opportunity he desired, and together they made the welfare of their children the supreme object of their lives.

He lived to complete the education of all of them, except Oliver H. and Dorothy S., and to see his namesake, William R., beginning the practice of his own profession.

It was my privilege for many years to be often in that home, in delightful association with its inmates, in the enjoyment of a life-long friendship with the father and mother, watching with affectionate interest the boys and girls grow up into young men and young women of intelligence, character, and refinement.

In early manhood Judge Allen became a member of the Methodist Episcopal Church, South, in which communion he continued until his death, and he was for a number of years a highly valued and useful trustee of the Methodist Orphanage at Raleigh.

He had the deepest conviction of the truth of the Christian religion, which became the inspiration and guide of his life.

After hearing arguments during the second week of the Fall Term, 1921, of this Court, returning, as was his custom, to his home in Goldsboro, where in tender and loving association with his wife and children, he experienced his highest joy, within an hour of his latest labor in the completion of his last opinion, on 8 September, 1921, he entered into the life immortal, happy in death as in life, in that the end came ere age and

infirmities had sapped his physical strength or abated his mental vigor, but happiest in that he heard the summons unafraid, and departed this life "in the confidence of a certain faith, in the comfort of a reasonable, religious, and holy hope."

Commissioned by the kindness of his loved ones to present to the Court the portrait of Judge Allen, the work of his friend, the gifted artist, Mrs. Marshall Williams, of Duplin, I should esteem myself fortunate if I could believe my portrayal of his life and character as worthy of him as is her portrayal of the calm, benignant face that, in the company of the wise, the great, and the good, whose effigies adorn these walls, shall look down upon future generations of judges and lawyers as they minister at this altar of justice.

REMARKS OF CHIEF JUSTICE CLARK UPON ACCEPTING PORTRAIT OF LATE ASSOCIATE JUSTICE WILLIAM R. ALLEN IN SUPREME COURT ROOM 6 SEPTEMBER, 1922

We have heard with great interest the able and ornate address of Judge Frank A. Daniels, summing up the career and services of our deceased friend and associate. All lawyers know from Judge Allen's own pen the service he has rendered to the law and the State, as recorded in his opinions in 29 volumes of the North Carolina Supreme Court Reports. They will abide and carry to a later generation a just conception of what Judge Allen did while among us, and what he was. But to few comparatively can there abide a vivid recollection of his appearance, the outer personality of the man as seen and known by those among whom he lived and had his being.

Words are powerless to transmit this. It is only the painter's brush that can present and preserve this essential feature and constituent of any man. Hence, the portraits that hang on public buildings the world around recall to the memory of admiring friends the features of those whom they loved and honored in life, and which shall present them "in their habit as they lived" to the generations that are to come.

To this, to these methods of preserving the memory of those who have deserved well of their countrymen the ingenuity of the present age is adding the voice, and the very tones and words spoken by them as recorded on imperishable tablets.

We can add nothing to the admirable presentation by Judge Daniels of the character and services of our deceased friend. We can but quote the words of Tacitus over one who in his day also deserved to be remembered in honor by his countrymen. That great historian said in the

sonorous tongue of old Rome: *"Quidquid ex eo amavimus, quidquid admirati sumus, manet, mansurumque est in eternatite temporum et fama rerum,"* "Whatever of him we loved, whatever of him we have admired, remains and will remain in the eternity of time, and in the fame of his deeds."

We accept this loving memorial from the hands of his family, and place it here where it will remain an inspiration to young lawyers and a proud memento to all as long as North Carolina shall reverence the laws and able and faithful service in their maintenance.

The marshal will place the portrait in its appropriate position and the proceedings on this occasion will be printed in the next volume of the reports.

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ABANDONMENT. See Appeal and Error, 40; Statutes, 12.

ABSENCE. See Appeal and Error, 54; Evidence, 16.

ABUSIVE LANGUAGE. See Carriers, 13.

ACCEPTANCE. See Contracts, 11, 13, 16; Instructions, 5.

ACCIDENT. See Insurance, 6, 9.

ACTIONS. See Corporations, 1; Evidence, 2; Insurance, 4, 5; Carriers, 16; Judgments, 4, 5, 10; Courts, 2, 6; Statutes, 1; School Districts, 8; Summons, 1; Appeal and Error, 33; Constitutional Law, 16; Easements, 1; Contracts, 30; Costs, 1.

1. *Actions — Attorney and Client—Attorney's Fees—Costs—Appeal and Error.*—The recovery of counsel fees for the prosecution of an action is not permissible. *Semble,* if otherwise, a finding would be necessary on appeal that the fees thus claimed were reasonable for the services rendered by the counsel. *Byrd v. Ins. Co.,* 224.

2. *Actions—Consolidation—Courts.*—During the pendency in the same court of two causes of action that involve practically the same issues, the court may consolidate them if this can be done without confusion or prejudice to the right of any party to either action, and under the facts appearing in these cases, they were not improperly consolidated. *Henderson v. Forrest,* 230.

3. *Actions—Consolidation—Appeal and Error—New Trial—Stakeholder—Courts.*—Where two actions have been brought in the same court, involving the payment of the funds by one of the parties to the other parties claiming it, who himself claims no interest in the disposition of the funds, it is proper for the trial judge, when the trial of one of them has been had and appeal therefrom perfected, to deny a motion for consolidation; but where a new trial on appeal has been awarded in one of them, and the other remains pending in the Supreme Court, this Court will dismiss this second appeal, so that the actions may be joined in the Superior Court for the protection of the mere stakeholder, when this appears to be necessary. *Bank v. Bank,* 243.

4. *Actions—State—Governmental Agencies—State Highway Commission—Statutes.*—The statutes creating the State Highway Commission enumerate their powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or impliedly giving it the right to sue and be sued, but manifestly as an agency of the State for the purpose of exercising administrative and governmental functions. Public Laws 1915, ch. 113; Public Laws 1919, ch. 189; Public Laws 1921, ch. 2, sec. 10. *Carpenter v. R. R.,* 400.

5. *Same—Constitutional Law.*—A State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, by statutes or in cases authorized by provisions in the organic law, instanced by Art. II, Const. U. S.; Art. IV, sec. 9, Const. of North Carolina. *Ibid.*

ACTIONS—*Continued.*

6. *Same—Officials.*—A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not against its officer or agent, whose acts are alleged to have caused the injury complained of. *Ibid.*

7. *Same—Private Corporations.*—C. S., 1126, giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental agency of the State, but only to private and *quasi*-private corporations. *Ibid.*

8. *Same—Torts.*—The principle upon which a governmental agency is not liable to an action in tort committed by its agents, rests upon public policy, and the State Highway Commission being a governmental agency, is immune from suits of this character, whether empowered by the statutes concerning it to sue and be sued or otherwise, there being no statute or constitutional provision authorizing it. *Ibid.*

9. *Same—Principal and Agent—Private Torts.*—The principle upon which the immunity of the State from suit does not extend to its officers and agents for a trespass committed in breach of an individual's legal rights under conditions prohibited by law, though they have assumed to act by authority of the State, can have no application when the State is the real party against which the relief is sought, and the party that will be affected or controlled by an adverse judgment, if rendered. *Ibid.*

10. *Same—Statutes—Constitutional Law.*—An officer or agent of the State is not liable to one injured by a breach of his administrative duty requiring the exercise of his judgment or discretion, when it is imposed solely for the public benefit, and he has acted within its scope without malice or corruption. *Ibid.*

11. *Actions — Causes — Parties — Misjoinder—Pleadings—Demurrer.*—The owner of certain lumber was indebted to two of the plaintiffs in a certain sum, and executed a deed in trust thereon to secure its payment, the trustee to dispose of the lumber for the payment of the debt and reconvey the balance thereof to the owner. The defendant insured the parties plaintiff, creditors of owner, against loss by fire, payable to the trustee, and thereafter issued another policy, on the same lumber, payable to the creditors, and the person named in the deed of trust, as their interest may appear. The owner had assigned his interest in the second policy to a bank to secure a loan it had made to him, and a part of the lumber covered by the policies was destroyed by fire: *Held*, the owner, his creditors, and trustee in the deed of trust, and the bank were all variously interested, and properly united as parties plaintiffs in an action on the policy, and that the loss by fire was the common cause thereof; and that a demurrer for misjoinder of parties and causes of action was properly overruled, especially is this proper when it has been made to appear that the creditors secured by the deed of trust had acquired the interest of the owner and of the bank. *Redmon v. Ins. Co.*, 481.

12. *Same—Amendments—Statutes.*—Upon the facts in this case, *it is held*, on appeal, that the trial court properly allowed the plaintiffs to

ACTIONS—*Continued.*

amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of C. S., 547. *Ibid.*

ADJOINING LANDOWNERS.

1. *Adjoining Landowners—Light and Air—Boundaries—Party Walls.*—The owner of lands in the business section of a city, unless otherwise restricted by his deed, may build upon his land to the line of a store building on the lands of an adjoining owner, though by so doing he will close the windows or openings of the owner on that side of his building, and to that extent deprive it of light and air. *Bank v. Vass*, 295.

2. *Same—Deeds and Conveyances.*—The legal implication that when the owner of lands conveys a part thereof he grants all those apparent and visible easements on the part retained which were at the time used by the grantor for the benefit of the part conveyed, and were reasonably necessary for its use, cannot be made effective against the contrary intent of the grantor as gathered by a proper interpretation of the deed. *Ibid.*

ACTS. See Injunction, 3; Corporations, 5; Criminal Law, 10.

ADJOINING LANDOWNER. See Deeds and Conveyances, 12; Adverse Possession, 3.

ADMISSIONS. See Deeds and Conveyances, 2, 6; Judgments, 2; Pleadings, 1; Criminal Law, 17; Intoxicating Liquors, 13.

ADVERSE POSSESSION. See Appeal and Error, 12; Evidence, 6; Instructions, 4; Limitation of Actions, 6; Trespass, 3.

1. *Adverse Possession—Limitation of Actions—Title.*—In order to ripen title to lands by possession, without color, it is not only required that the claimant should have had possession for twenty years, but that the possession should have been adverse under claim of right, and not by permissive user. *Nash v. Shute*, 383.

2. *Same — Trespasser—Estates—Remainderman—Permanent Damages.*—The remainderman is put to his action only for permanent injury caused by the continued trespass of an adjoining owner on his land during the continuance of the outstanding life estate. *Ibid.*

3. *Same—Adjoining Owners of Land.*—Negligible and nonapparent damages during the continuance of a life estate caused by the trespass of an adjoining landowner are not permannet damages that will put the remaindermen, or those claiming under them, to their action during the preceding life estate; and where, after the falling in of the life estate, the one who has acquired title from the remaindermen commences to erect a building on his lands, and permanent and serious damages to his walls are caused by dripping of water from the overhanging eaves of a building on the lands of an adjoining owner, first becomes apparent, the trespasser will not ripen title to an easement so to do until the lapse of twenty years, without color, from the time the damages became apparent and serious. *Ibid.*

ADVERSE POSSESSION—*Continued.*

4. *Same—Continuing Trespass.*—In this case, damages for a continuing trespass of an adjoining owner of lands were recoverable for a period of three years next before the commencement of the action. *Ibid.*

AGENCY. See Banks and Banking, 1, 2, 6; Carriers, 11; Contracts, 15; Bills and Notes, 5; Constitutional Law, 8; Actions, 4; Pleadings, 3; Summons, 1.

AGREED CASE. See Appeal and Error, 22; Constitutional Law, 17.

AGREEMENT. See Insurance, 5; Carriers, 16; Judgments, 5.

AGRICULTURAL DEPARTMENT. See Constitutional Law, 5; Statutes, 1.

AIDERS AND ABETTERS. See Intoxicating Liquors, 4.

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1. *Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.* Only the exceptions mentioned and discussed in the appellant's brief are considered in the Supreme Court on appeal. *Baker v. Winslow*, 1.

2. *Appeal and Error—Instructions—Slander—Actual Damages—Punitive Damages.*—A charge of the court in an action for slander is not objectionable in failing to repeat the distinction between implied malice, for which punitive damages may not be awarded, and actual malice, in the sense of personal ill-will, etc., upon which the jury may award punitive damages in their discretion, when it appears, upon considering the entire charge, that the judge has once, at least, clearly distinguished the implied malice that would alone entitle the plaintiff to actual or compensatory damages, from actual or express malice, or personal ill-will, which would permit the addition of punitive damages, under the evidence in the case. *Ibid.*

3. *Same—Harmless Error—Requests for Instruction—Burden of Proof.*—Where three issues in an action for slander have been submitted to the jury upon the pleadings and evidence, as to whether the defendant spoke the words defamatory of the plaintiff's character; as to their falsity and the amount of the damages, exception of defendant that

APPEAL AND ERROR—*Continued.*

the court failed to put the burden of proof of the third issue upon the plaintiff, is untenable, where it clearly appears from the charge that the burden of the first two issues was expressly placed upon the plaintiff, and that of the third by clear implication, so that the jury, acting with intelligence, must have so understood it, it being for the defendant to ask for more explicit instructions, should he have so desired. *Ibid.*

4. *Appeal and Error—Injunction—Evidence—Review.*—On appeal from an order of the judge of the Superior Court dissolving an injunction, the Supreme Court may review the evidence thereon. *Peters v. Highway Commission*, 30.

5. *Appeal and Error—Instructions—Objections and Exceptions—Prayers for Instruction—Special Requests.*—Where there is evidence of actionable negligence on the part of a city or town in permitting its drain, etc., to become successively stopped up so as to pond water upon the plaintiff's property, after notice thereof had been given, an exception that the charge of the court was not sufficiently definite as to the time of the notice, and the damage thereafter resulting, is untenable, it being required of the defendant to have presented this question by an appropriate request for special instruction. *Pennington v. Tarboro*, 71.

6. *Appeal and Error—Courts—Expression of Opinion—Statutes.*—Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion, forbidden by C. S., 564, and constitutes reversible error. *Greene v. Newsome*, 77.

7. *Appeal and Error—Instructions—Objections and Exceptions.*—An exception to a part of the charge of the judge containing several phases of the law upon the evidence, one or more of which is correct, will not be sustained on appeal, it being required of the appellant to point out the portion of the charge that he claims to be erroneous. *Harrison v. R. R.*, 87.

8. *Same—Briefs—Rules of Court.*—The appellant's brief must state the exception appearing of record he relied on, and assign the reason therefor, for the exception to be considered. Rule 34 (164 N. C., 551). *Ibid.*

9. *Appeal and Error—Instructions—Objections and Exceptions—Damages.* The charge of the court that the plaintiff in a personal injury case may recover, as the proximate cause of the defendant railroad company's negligence, for his pain, both physical and mental, is not objectionable as including "loss of bodily or mental power," of which there was no evidence, and will not be held for error when it correctly applies to a different element of damages. *Ibid.*

10. *Appeal and Error—Dismissal.*—Where, on appeal, it is decided in the Supreme Court that the plaintiff's action cannot be sustained, the defendant's appeal, dependent thereon, will also be dismissed. *Beard v. Sovereign Lodge*, 154.

11. *Appeal and Error—Verdicts—Issues.*—Where a verdict, interpreted by reference to the pleadings, the facts in evidence and the charge of the

APPEAL AND ERROR—*Continued.*

court, has given the appellant the full benefit of the positions he has insisted upon in the determination of the issue submitted, the refusal of the court to submit the issue in the precise terms as tendered by the appellant, will not be held for reversible error. *Pierce v. Carlton*, 176.

12. *Appeal and Error—Reversible Error—Limitation of Actions—Lands—Adverse Possession — Boundaries — Title—Intention—Instructions.*— While the mistake of the owner of land in using and occupying lands beyond his fixed and established boundary line without the intention of claiming more than he has within the acknowledged confines of his deed is not such adverse possession as will ripen his title under our statutes of limitation; this principle does not apply when the owner claims a certain divisional line as his boundary, identifies it as such, and introduces evidence of his possession and claim thereto; and where such appears as the evidence in the case, with further testimony of the claimant, the plaintiff, that he had never intended to hold any land that did not belong to him, but had always claimed the *locus in quo* to the line he claimed as his own, as of right, it is reversible error for the judge to charge the jury on this testimony alone that they should find for the defendant if they should further find that the plaintiff had occupied the land beyond the boundary by mistake, and not intentionally. *Dawson v. Abbott*, 192.

13. *Appeal and Error—Instructions—Reversible Error.*—Where the court has erroneously instructed the jury that an innocent holder for value of the note sued on, and without notice of its infirmity, is not entitled to recover if the defendant has not received value therefor; a correct instruction elsewhere appearing in the charge is contradictory and does not relieve the error from prejudice. *Crutchfield v. Rowe*, 211.

14. *Appeal and Error—Judgments—Supplementary Proceedings—Objections and Exceptions—Case on Appeal—Certiorari.*—Supplementary proceedings taken upon a final judgment not excepted to or appealed from, with exception only as to matters embraced in the order in the proceedings, does not permit a review of the judgment, but only of matters excepted to in the special proceedings; and where, upon the failure to docket the case in time in the Supreme Court, the appellant's motion for a *certiorari* is allowed, it brings up for review only the exceptions taken in the special proceedings, and appealed from. *Boseman v. McGill*, 215.

15. *Appeal and Error — Harmless Error—Witnesses—Qualification—Evidence—Courts—Erroneous Opinion.*—Where the mental capacity of a witness is the question before the trial judge to determine his eligibility as such, and upon the testimony of a medical expert he has, as a matter of law, erroneously adjudged the witness to be a competent one, this error is cured, or rendered immaterial by his subsequently making the same finding after hearing the testimony of other witnesses, and the testimony of the witness sought to be excluded, which supported his former ruling. *Lanier v. Bryan*, 235.

16. *Appeal and Error—Courts—Jurisdiction—Modification of Judgment—Pleadings.*—Where the Superior Court judge has properly overruled the defendant's demurrer to the court's jurisdiction, and has omitted from his judgment an order allowing the defendant to plead over, the

APPEAL AND ERROR—*Continued.*

Supreme Court, on appeal, will modify the judgment to the end that the Superior Court judge may supply this omission with the proper order. *Motor Co. v. Reaves*, 260.

17. *Appeal and Error—Costs—Habeas Corpus.*—On appeal from the order of the Superior Court judge erroneously hearing proceedings in *habeas corpus* and awarding the custody of a child of the marriage, after a decree of divorcement had been entered: *Held*, the petitioner will pay the costs of this appeal, and the proper judge hearing the motion to be made in the said cause will determine its ultimate payment as between the parties. *In re Blake*, 279.

18. *Appeal and Error—Evidence—Remarks of Counsel—Prejudice—Res Inter Alios Acta—Trials.*—In an action to recover damages for a personal injury alleged to have been negligently inflicted, involving the previous good health of the plaintiff before the injury, it is reversible error for the trial judge to admit as evidence plaintiff's certificate of discharge from the United States Army during the World War, containing recitals of honest and faithful services, etc., the same being *res inter alios acta*, the certificate but hearsay evidence, and prejudicial to the defendant, both in itself and the argument of the plaintiff's attorneys to the jury based thereon, and allowed by the court. *Stanley v. Lumber Co.*, 302.

19. *Appeal and Error—Improper Argument—Trials—Prejudice.*—Improper remarks of plaintiff's counsel in addressing the jury in this case, as to defendant's indemnity from liability by a bonding company, were sufficient for the trial judge to withdraw a juror and order a mistrial, had motion therefor been made by defendant. *Ibid.*

20. *Appeal and Error—Dismissal—Courts—Jurisdiction—Supersedeas Bond—Principal and Surety—Statutes.*—Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of C. S., 650. *Murray v. Bass*, 318.

21. *Appeal and Error—Unanswered Questions—Presumptions—Evidence.*—Upon the exception to the exclusion of an answer by the witness of a question, it must be made properly to appear what the expected answer would have been, to be considered on appeal, so that its materiality may appear of record, under the rule that prejudicial error will not be presumed, but must affirmatively be established by the appellant. *Blevins v. R. R.*, 324.

22. *Appeal and Error—Case Agreed—Parties—Consent—Procedure.*—Where all of the proper or necessary parties having an interest in the lands sought to be conveyed by a deed, the sufficiency of which is attacked in a case agreed, are not parties to the action or the agreement, but the Superior Court judge has rendered judgment, from which an appeal has been taken, the case on appeal may be retained in the Supreme Court for a reasonable time, or remanded, as the parties may elect, to afford those who have not consented an opportunity to consent to the facts as at present presented, or to change or modify them as they

APPEAL AND ERROR—*Continued.*

may all agree, or take such steps for the complete determination of the case as may be in accordance with the law and the course and practice of the court. *Wagoner v. Saintsing*, 362.

23. *Appeal and Error—Evidence—Trials—Prejudice.*—The admission of evidence upon the trial, if erroneous, must be of such character, in relation to the subject-matter of the action, as to work prejudice in the consideration of the jury to the appellant's rights, and not so unimportant, in connection with the other pertinent evidence on the subject, that the jury could not have reasonably been misled into rendering a verdict that they would not otherwise have given. *Rierson v. Iron Co.*, 363.

24. *Same—Employer and Employee—Master and Servant—Safe Place to Work—Safe Appliances—Custom.*—In an action by an employee of a steel and iron works company to recover damages for a personal injury alleged to have been negligently inflicted by the failure of the defendant to furnish a reasonably safe place to work, and reasonably safe appliances therefor, there was evidence that the plaintiff, while engaged in his duty, was cutting iron by the use of an acetylene torch, in front of an opening in the factory building through which other employees were conveying, by means of an overhead trolley, beams or pieces of iron with only one chain encircling them, when more chains should have been used for safety, and further, by using a hook for the purpose of fastening the loop together that was improper and unsafe, etc. The injury was caused by the slipping of the iron within the encircling chain, which fell upon the plaintiff at work below: *Held*, the testimony of a witness that the defendant was using only one chain, "only custom I know," while insufficient to show a general custom, was not reversible error to the defendant's prejudice, the obvious meaning being, in its relation with the other evidence, that the defendant had used only one chain in moving the trolley from place to place when carrying the beams or pieces of iron, at the times he had observed it. *Ibid.*

25. *Appeal and Error—Instructions—Employer and Employee—Master and Servant—Negligence.*—Where the principle of a primary or nondelegable duty of an employer to furnish his employees a reasonably safe place to work, and reasonably safe appliances therefor, is involved in an action, wherein the plaintiff has been injured by the alleged negligent acts of his fellow-servants, the instructions of the judge substantially stating the correct principle to the jury, when given a fair and reasonable interpretation as a whole, as they should be, are sufficient, and so considered, no reversible error is therein found on the appeal in this case. *Ibid.*

26. *Appeal and Error—Judgment—Fragmentary Appeal—Cost.*—Where the clerk of the Superior Court, in supplemental proceedings, has erroneously entered an order that a bank holding certain collateral of the judgment debtor turn the same over to the sheriff to satisfy the execution issued under the judgment, the finding of the Superior Court judge that the facts were insufficient, and his setting aside the clerk's order and remanding the cause for further hearing and findings in the proceedings, without prejudice to either party, is not such

APPEAL AND ERROR—*Continued.*

final judgment, or one in its nature final, as will admit of instant appeal to the Supreme Court, and the appeal therein will be dismissed, at appellant's cost. *Grocery Co. v. Newman*, 371.

27. *Same—Dismissal—Court's Discretion—Objection and Exception.*—While it is held in this case that the appeal was premature and improvidently taken, the Supreme Court expresses its opinion on the exceptions presented in the record, the nature of the case rendering it desirable, under the authority of *S. v. Yates*, 183 N. C., 753, and other cases cited. *Ibid.*

28. *Appeal and Error—Objections and Exceptions—Sufficiency of Exception—Arbitration and Award.*—The form of an exception to the judgment of the Superior Court that presents on appeal the question as to whether the arbitrators had exceeded the authority conferred upon them by the agreement to arbitrate, will not be held insufficient when it substantially presents the real point intended to be raised. *Geiger v. Caldwell*, 387.

29. *Appeal and Error—Findings by Court—Consent—Evidence.*—Where the judge finds by consent the facts controverted in the action, his findings are not reviewable on appeal to the Supreme Court when supported by evidence. *Chemical Co. v. Long*, 398.

30. *Same—Judicial Sales—Confirmation—Discretion of Court.*—The confirmation of a judicial sale by the Superior Court judge is a matter within his sound discretion, and will not be reviewed by the Supreme Court on appeal when it has been exercised reasonably and not arbitrarily. *Ibid.*

31. *Appeal and Error—Objections and Exceptions—Briefs—Rule of Court.* An exception not set out in appellant's brief on appeal will be considered as abandoned. Rule 34, 174 N. C., 837. *Worley v. Bruton*, 438.

32. *Appeal and Error—Evidence—Fraud—Instructions—Verdict.*—Where the defense to an action to recover upon the notes sued on is fraud in the procurement of the notes, and the evidence is conflicting, an exception by plaintiff that the judge failed to charge the jury that there was insufficient evidence of the fraud comes too late after a verdict in defendant's favor to be considered on appeal. *Mica Co. v. Mining Co.*, 490.

33. *Appeal and Error—Injunction—Actions—Suits—Causes of Action Ceasing—Dismissal—Costs—Highways—Roads and Highways.*—Where it appears, on appeal from an order of the Superior Court judge enjoining a board of county commissioners from wasting and misapplying certain proceeds from the sale of bonds issued for highway purposes, that on account of the change in the personnel of the board the proceedings have become unnecessary, the action will be dismissed. On this appeal the cost is taxed equally between the plaintiffs and defendants. *Semble*, the judge was without authority to direct the application of the funds, but that good cause was shown for continuing the injunction to the final hearing. *Morris v. Comrs.*, 549.

34. *Appeal and Error—Several Causes of Action—Fragmentary Appeals.*—An appeal is not fragmentary where the complaint alleges four distinctive causes of action and the breach of each, and there is no

APPEAL AND ERROR—*Continued.*

exception raised as to the judgment on two of them, but from the judgment on the other two the plaintiff has appealed, assigning error in the exclusion of his evidence by the trial judge on the two to which his exceptions have been duly taken and prosecuted. *Cement Co. v. Phillips*, 182 N. C., 437, cited and distinguished. *Garland v. Improvement Co.*, 551.

35. *Same—Issues—Objections and Exceptions.*—Where there are several causes of action alleged, and the plaintiff has duly excepted to the exclusion of all evidence on one or more of them, his failure to except to the judge's refusal to submit issues relating thereto or to except to an issue as to damages which in the court's discretion may have been submitted as to each of the separate causes alleged, is not necessary to his appeal thereon, and his enforcing the judgment by execution under the judgment on the issues decided in his favor will not estop him. *Ibid.*

36. *Appeal and Error—Objections and Exceptions—Instructions—Exceptions—Damages — Present Value — Negligence — Wrongful Death—Federal Statutes—Federal Employers' Liability Act.*—A charge of the court upon the measure of damages to be given to the legal dependents of an employee negligently killed by the defendant railroad company under the provisions of the Federal Employers' Liability Act, that omits from the jury's consideration the present value of the future benefits that the legal dependents had been deprived of by the death, permits a recovery beyond that allowed by the statute, and an exception thereto presents the error on appeal without the necessity of a special request confining the recovery within the proper limits, there being but one legal principle involved and erroneously stated, which makes the error positive or affirmative, it being a failure to state the applicable principle correctly, and not a mere omission to charge as to some special or particular phase of the case. *Strunks v. Payne*, 583.

37. *Appeal and Error—New Trials as to One Issue—Damages.*—There being no error upon the issues of negligence, etc., committed by the trial court in an action against a railroad company for the alleged negligent killing of plaintiff's intestate, but only upon the issue as to the measure of damages, a new trial upon that issue alone is ordered on this appeal. *Ibid.*

38. *Appeal and Error—Appeal—Amendments—Execution—Supersedeas—Bond—Judgment—Payment.*—A judgment debtor may stay execution pending appeal by giving the bond required by our statute, or he may pay the debt and preserve his right to prosecute his appeal according to the course and practice of the court, with order for restitution should he succeed therein, unless such payment was made by way of compromise and agreement to settle the controversy, or, under peculiar circumstances, which amounted to a confession of the correctness of the judgment. C. S., 1534, and a withdrawal of the appeal. *Bank v. Miller*, 593.

39. *Same—Evidence—Trials—Questions for Jury—Reference.*—Where the appeal of the judgment debtor from a judgment of a justice of the peace is properly in the Superior Court, and it is made to appear in the latter court that the judgment had been paid since its rendition

APPEAL AND ERROR—*Continued.*

by the justice, and there is evidence in the defendant's behalf that he had paid it under duress on compulsion, and without any intention on his part to abandon the right of appeal that, instead, he had preserved, it was error for the Superior Court judge to regard this evidence as irrelevant and dismiss the appeal, said evidence, if denied, raising an issue of fact to be determined by the jury, or a finding by the court or referee, as the parties may agree, or the court may decide in proper instances. C. S., 1534. *Ibid.*

40. *Appeal and Error—Appeal—Motions—Judgment—Abandonment—Evidence—Burden of Proof.*—Where, in the Superior Court, the plaintiff moves to dismiss the appeal of his debtor from a judgment rendered against him in the court of a justice of the peace on the ground that the appeal had been abandoned by the payment of the judgment, the burden is on him to show such acts or conduct as would amount to the abandonment he has alleged in his motion. C. S., 1534, the giving of a stay bond, or even the payment of the judgment, not, of itself, being sufficient to show an abandonment. *Ibid.*

41. *Appeal and Error—Record—Instructions—Presumptions.*—Where the record on appeal does not set out the charge of the trial judge to the jury, and no exception thereto appears therein to have been made, it will be presumed that it was in all respects correct, and that the jury were properly instructed as to the law. *Raines v. Osborne*, 603.

42. *Appeal and Error—Objections and Exceptions—Questions and Answers—Evidence—Objectionable in Part.*—An objection and exception to a proper question asked a witness does not include the answer of the witness, and where the answer is competent in part, exception should be taken specifically to the erroneous part in order that it may be considered on appeal, and not merely to the question, which is competent and in proper form, but only to the incompetent part of the answer. *Ibid.*

43. *Appeal and Error—Docketing—Certiorari—Dismissal—Rules of Court—Statutes.*—Appeals to the Supreme Court are only within the rights of the parties when the procedure is in conformity with the appropriate statutes or rules of court, and neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals in the Supreme Court; and where the appellant has failed to docket his appeal or move for a *certiorari* under the rule regulating the matter, the appeal will be dismissed. *Rose v. Rocky Mount*, 609.

44. *Appeal and Error—Agreements—Amendments—Remanding Case—School Districts—Elections.*—On the appeal of this suit to restrain the issuance of bonds for the erection of schoolhouses, a material fact was omitted from the case agreed, as to whether the question was carried by a majority of the qualified voters at an election in the district, which the Supreme Court permits the parties to supply, under the alternative of remanding the case for the finding of additional facts. *Roebuck v. Trustees*, 611.

45. *Appeal and Error—Instructions—Evidence—Burden of Proof—Deeds and Conveyances—Reservations in Deeds—Timber.*—Where the defendant's rightful cutting the timber that the plaintiff seeks to enjoin

APPEAL AND ERROR—*Continued.*

depends upon whether it falls within the reservation of the plaintiff's deed of "second-growth timber and original-growth in the pastures," the burden is upon the plaintiff to show that the timber in question is within the exception, and an instruction that places it upon the defendant is reversible error. *Bright v. Lumber Co.*, 614.

46. *Appeal and Error—Verdict—Excessive Damages.—Held*, the question of the award of excessive damages in this case was subject to the correction of the trial judge, and not reviewable on appeal. *Newby v. Realty Co.*, 617.

47. *Appeal and Error—Rules of Court—Procedure—Statutes—Constitutional Law.*—The rules prescribed by the Supreme Court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a *recordari* prayed for in apt time, will be strictly enforced; and under the exclusive authority therein given to the Supreme Court by the Constitution, Art. I, sec. 8, as distinguished from procedure applying to courts inferior therto, Art. IV, sec. 2, a statute in conflict therewith will not be observed. *S. v. Ward*, 618.

48. *Appeal and Error—Homestead—Judgment—Incomplete Appeal.*—On this appeal from an allotment of a homestead by the judgment debtor, it appears that the record failed to show a signed judgment, and the appeal is incomplete. *Vann v. Winders*, 629.

49. *Appeal and Error—Verdict—Proposition of Law.*—The verdict, upon conflicting evidence, determines the issue of fact, and will not be disturbed when it appears that there is no error in the application of the principles of law involved in the controversy. *Meadows v. Mann*, 630.

50. *Appeal and Error—Fragmentary Appeal—Roads and Highways—Road Commission.*—An appeal to the Supreme Court in an action to recover damages from a county road commission for injury to land in laying out a highway will be dismissed as premature when it appears that in the orderly procedure in such matters the commission has not reached the stage for the assessment of damages, and has not assessed them, and the appeal is properly dismissed in the Superior Court. *Green v. Road Commission*, 636.

51. *Appeal and Error—Instructions—Reversible Error—Conflicting Instructions—Homicide—Murder.*—Where the judge has erroneously charged, on the trial for a homicide, that the prisoner must show, with his evidence, the actual necessity for his having taken the life of the deceased in preserving his own life, as a justification for the killing, a correct instruction given elsewhere in the charge, without retracting the erroneous part, does not cure the error or render it harmless. *S. v. Johnson*, 738.

52. *Appeal and Error—Objections and Exceptions—Briefs.*—The exceptions of the appellant are restricted to those considered in his brief on appeal. *S. v. Dill*, 645.

53. *Appeal and Error—Instructions—Harmless Error—Criminal Law—Trials.*—Where two defendants are on trial for the breaking into and stealing from a store at night, and there is evidence of the admission of one of them that he, with the other, was in an automobile in front

APPEAL AND ERROR—*Continued.*

of the store on the night in question, and the court has given the requested instruction that one of them should not be bound by the admission of the other, it is harmless error for indefiniteness as to time and place, for the judge to qualify the requested instruction by adding, "unless the circumstances go to show that they were together that night," there being plenary evidence that both defendants were then acting in pursuance of the unlawful design, and the one who admitted the fact was dominated by the one who excepted to the instruction. *S. v. Maynard*, 654.

54. *Appeal and Error—Improper Remarks of Counsel—Jury—Absence of Defendant's Witnesses—Objections and Exceptions—Prayers for Instruction—Evidence—Nonsuit—Trials.*—Where there is evidence that the defendant and others were present, participating in the operation of a still, evidently used at the time and theretofore extensively in the manufacture of liquor, and had left to avoid arrest; and there is evidence as to whether or not it was the defendant who was seen to help another put the cap on the still, it is sufficient to sustain a verdict of guilty, without the necessity of proving this single fact as to the cap; and the remarks of the solicitor to the jury commenting upon the absence of defendant's witness to prove that he did not help with the cap, is regarded as harmless, and upon an immaterial point, it appearing that the defendant's attorney permitted the solicitor's remarks to go unchallenged at the time, and did not offer special prayers for instruction thereon. *S. v. Jenks*, 660.

55. *Appeal and Error—Case—Settlement by Judge—Mistake—Certiorari.*—The case on appeal, as settled by the trial judge, imports verity, and must be accepted as absolutely true in the Supreme Court on appeal; and unless it is made to properly appear by the judge's own statement that he will correct the record as to matters relied on by the movant, a motion for writ of *certiorari* will not be granted; the averment of the movant's belief that the judge will supply the omission if afforded an opportunity is insufficient. *S. v. Thomas*, 666.

56. *Appeal and Error—Assignments of Error—Rules of Court.*—Assignments of error should be incorporated in the case on appeal, to be considered. Rule 19 (2), 174 N. C., 832. *S. v. Campbell*, 765.

57. *Appeal and Error—Evidence—Instructions—Presumptions.*—Where the trial judge recites in his charge to the jury the testimony of a witness, which does not appear in the record, and no objection has been made thereto, it will be presumed on appeal that the recitation of the judge was correct. *S. v. Burnett*, 784.

APPEARANCE. See Courts, 2.

APPLIANCES. See Employer and Employee, 1, 2, 7; Appeal and Error, 24.

APPROVAL. See Schools, 4; Trials, 1; Constitutional Law, 10; School Districts, 7.

ARBITRATION AND AWARD. See Appeal and Error, 28.

1. *Arbitration and Award—Contracts—Intent—Scope—Conclusiveness.*—An agreement to submit a controverted matter to arbitration is, in its interpretation, to be regarded as a contract between the parties and

ARBITRATION AND AWARD—*Continued.*

construed to arrive at their intent, and the scope of their award will be confined to such matters only as are submitted to them. *Geiger v. Caldwell*, 387.

2. *Same—Extraneous Matters.*—Where the arbitrators have included in their award matters relating to the subject that are not properly within its scope, the award as to the matters that are properly therein passed upon will be held to conclude the parties when capable of being separated without prejudice to the rights of any of them. *Ibid.*

3. *Same.*—Where the vendor of land has agreed with the purchaser under a writing that the latter was to repair the dwelling upon the land, not to exceed a certain sum, as a part of the purchase price, and he claims that he has exceeded the sum limited in making the repairs; a written submission to arbitration of the value of the repairs made by the purchaser within the limitation imposed by the agreement to arbitrate, is conclusive only within the amount so limited, and to that amount only are the parties bound by the award. *Ibid.*

4. *Arbitration and Award—Award if Two Arbitrators.*—Where the parties have each selected an arbitrator under an agreement that three were to determine the controverted matter, and have conducted the proceeding upon the idea that the third should be called in only in case of disagreement of the arbitrators so selected, it becomes unnecessary for those selected to call in the third when they both have agreed and rendered their award accordingly. *Ibid.*

ARGUMENT OF COUNSEL. See Trials, 1; Appeal and Error, 19.

ASSAULT. See Carriers, 13; Criminal Law, 3.

ASSAULT AND BATTERY.

1. *Assault and Battery—Automobiles—Highways—Statutes—Public Safety—Criminal Law—Evidence.*—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways, among them, C. S., 2617, as to the passing without interference; 2618, amended by Public Laws 1921, ch. 98, Extra Session, as to reckless driving, having regard to the width of the highway, traffic thereon, and the various rates of speed in accordance with location in the country, upon streets of cities, towns, etc.; 2599, making a violation of any of the provisions of ch. 55, C. S., a misdemeanor, are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. *S. v. Sudderth*, 753.

2. *Same.*—A battery includes an assault, and to constitute an assault it is not necessary that the defendant should have struck the one assaulted, for any unlawful touching of the person alleged to have been assaulted, or the setting in motion of any force that is committed through means which ultimately produce this result, and are likely to produce it, is sufficient, and applies when a person driving an automobile upon the State's highway, in consequence of his violating the statutes on the subject, collides with another person driving an

ASSAULT AND BATTERY—*Continued.*

automobile thereon, which results in a physical jarring of such other person, though he may not have been thrown from his automobile, or struck in any part of his body. *Ibid.*

ASSIGNMENTS OF ERROR. See Appeal and Error, 56.

ASSUMPTION OF RISKS. See Employer and Employee, 6; Railroads, 3.

ATTACHMENT. See Contracts, 15; Courts, 1.

1. *Attachment—Process—Courts—Amendments.*—An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. *Temple v. Hay Co.*, 239.

2. *Attachment—Garnishment—Conflicting Claims—Stakeholder—Parties—Statutes.*—Where the funds of a nonresident defendant are attached in the courts of this State in the hands of a local bank, an agency for collection only, and the garnishee bank answers, setting forth this fact and claiming absolute ownership in its forwarding bank, and asks that the latter be made a party to the suit, and, in effect, alleging that it, the garnishee, is a mere stakeholder without interest in the funds attached: *Held*, it is the policy and express purpose of our Code Procedure that all matters should be settled as far as possible in one and the same action; and the forwarding bank, being a necessary party, the refusal of the court to make it a party was of the substance of the controversy, and constituted reversible error. C. S., 460. *Ibid.*

3. *Attachment — Garnishment — Stakeholder— Parties—Statutes.*—Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. C. S., 826. *Ibid.*

4. *Same—Bond.*—The bond required of an intervener by C. S., 840, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. *Ibid.*

5. *Same—Title—Procedure.*—Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. *Ibid.*

6. *Same—Issues.*—The requirement of C. S., 821, that an issue shall be made up and determined by the jury where the garnishee in attach-

ASSAULT AND BATTERY—*Continued.*

ment denies owing the principal defendant, should be construed with C. S., 460, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court. *Ibid.*

7. *Attachment — Interpleader — Banks and Banking—Bills and Notes—Negotiable Instruments—Burden of Proof.*—Where the forwarding bank intervenes and claims title to a draft of a nonresident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached, and upon its evidence tending to show *prima facie* that it was the purchaser of the draft for value, and is a holder thereof in due course, without notice of any defenses or equities, an issue of fact is raised for the determination of the jury. C. S., 3040. *Sterling Mills v. Milling Co.*, 461.

8. *Same — Evidence — Questions for Jury—Trials—Instructions—Verdict Directing.*—Where the forwarding bank of a nonresident debtor intervenes in the creditor's action, and claims the proceeds of a draft in the hands of a local bank, in attachment proceedings, and the intervener's officer testifies positively that the intervener was a purchaser for value, in due course, without notice of any infirmity, etc., in the paper, his further testimony, on cross-examination, as to general dealings with the attachment debtor, crediting it with drafts, and charging them back if not paid on presentation, raise the question of the intent between the forwarding bank and its depositor, as to whether the paid draft in question was acquired by the intervener in due course, C. S., 3040, or whether it had accepted the draft as a mere agency for collection, in which latter event the proceeds of the draft would be subject to attachment in the hands of the local bank; and on this conflicting evidence a direction of the verdict against the intervener is reversible error. *Ibid.*

ATTORNEY AND CLIENT. See Actions, 1.

AUTHORITY. See Banks and Banking, 1, 4; Principal and Agent, 2.

AUTOMATIC COUPLINGS. See Employer and Employee, 6.

AUTOMOBILES. See Mortgages, 8; Instructions, 7; Insurance, 7; Intoxicating Liquors, 1; Assault and Battery, 1.

BANKRUPTCY. See Principal and Surety, 1.

Bankruptcy — Principal and Surety — Discharge—Defenses—Pleas—Puis Darreign Continuance.—In proper instances, the surety on the defendant's undertaking to stay execution on appeal may successfully plead in the State court the defendant's discharge in bankruptcy *puis darreign continuance. Murray v. Bass*, 318.

BANKS AND BANKING. See Contracts, 15; Bills and Notes, 4, 6; Execution, 3; Attachment, 7.

1. *Banks and Banking—Principal and Agent—Cashier—Personal Interest—Implied Powers of Agency—Inquiry as to Agent's Authority.*—A

BANKS AND BANKING—*Continued.*

cashier of a bank has no implied authority, by virtue of his position, to bind the bank by a transaction with another, in which, with the knowledge of the other party, express or implied, he is acting for his own interest alone, and not that of the bank for which he is cashier; and where such third party relies upon a transaction of this character as a credit upon a note he owes the bank, the burden is upon him to show that such authority has been actually or impliedly given the cashier by the board of directors or other officers of the bank having this power. *Grady v. Bank*, 158.

2. *Same—Dual Agencies—Equity—Innocent Parties—Negligence.*—Where a cashier of a bank accepts as a credit upon his note a note given to the borrower by a concern which the cashier largely owns and controls, without the knowledge or consent of the directors or other proper officers of the bank: *Held*, the borrower was put upon notice of the want of authority of the cashier to act for the bank in this respect, and he is not entitled to have such credit allowed upon his note to the bank. *Ibid.*

3. *Banks and Banking—Cashier—Principal and Agent—Deposits—Overdrafts.*—Where a cashier of a bank, in his individual capacity, and for his own private use, purchases an automobile and promises to deposit the purchase price to the seller's credit at the bank, to meet his draft therefor; but the cashier fails to make the deposit and carries the amount on the books of the bank as an overdraft of the seller, and this is done without the knowledge of the directors or other officers of the bank: *Held*, the seller is responsible on the failure of the cashier to make the deposit as promised, for the amount of his overdraft in an action by the bank. *Bank v. West*, 220.

4. *Same—Want of Authority—Knowledge Imputed.*—Knowledge of a transaction by a cashier of a bank made with a depositor for the cashier's sole benefit against the interest of the bank, will not be imputed to the bank, and the bank will not be bound thereby in the absence of actual knowledge. *Ibid.*

5. *Banks and Banking—Overdrafts—Notice—Knowledge of Depositors—Notice Imputed—Principal and Agent—Antagonistic Interests.*—A cashier of a bank cannot bind the bank by permitting a depositor to overdraw his account for the sole personal interest of the cashier for the agent's interest is antagonistic to that of his principal. The depositor is affected with knowledge of the status of his own account with the bank, and the fact that the bank fails to notify him of the overdraft cannot defeat the latter's recovery upon the overdraft even if there is no fraud. *Ibid.*

6. *Banks and Banking—Interpleader—Drafts—Burden of Proof—Agency for Collection—Questions of Law—Trials.*—Where the proceeds of a draft have been attached in the hands of a local bank, a forwarding bank that intervenes and claims independent title has the burden of proof of its right to the fund; and where the draft has not thereon been endorsed to it, and there is no evidence in its behalf to show that it had not reserved the right to charge it against the drawer's account, if returned unpaid, but only a conclusion of law to that effect testified to by an officer of the intervener, a judgment against it by

BANKS AND BANKING—*Continued.*

the trial judge, as a matter of law, will be upheld on appeal, upon the principle that the intervening bank has not disproved it was an agency for collection only. *Temple v. LaBerge*, 252.

BENEVOLENT SOCIETIES. See Insurance, 1, 2.

BETTERMENTS.

1. *Betterments—Equity—Damages—Ejectment—Mortgages—Purchasers—Sales.*—In an action of ejectment there was evidence tending to show that the illegitimate daughter of the owner of lands was induced by her father to build a dwelling upon a certain three acres under her father's promise of a gift thereof; but that thereafter, the father becoming mad with her, he agreed with the plaintiff that the latter should bid in the land at a sale under mortgage he had given, and hold title for him, the mortgagor, which was accordingly done at a grossly inadequate price, the transaction between the father and the daughter having been with the plaintiff's knowledge: *Held*, the defendants, the daughter and her husband, under a favorable verdict and proper instructions, were entitled to recover in equity the increase in value to the lands caused by the improvements they had placed thereon, without reduction for the rental value of such improvements, for the time they had occupied the dwelling. *Albea v. Griffin*, 22 N. C., 9, cited and applied. *Gray v. Davis*, 95.

2. *Same—Notice—Evidence*—In this action of ejectment, upon the defense to hold the purchaser at a foreclosure sale liable in equity for improvements the defendants had placed on the mortgagor's land, the evidence *is held* sufficient that the plaintiff had purchased for the mortgagor with notice or knowledge of the defendants' equitable claim. *Ibid.*

3. *Same—Declarations of Purchaser—Deeds and Conveyances—Title.*—Where there is evidence sufficient to show that the plaintiff, in ejectment, bought the lands through a purchaser at a foreclosure sale for the mortgagor, subject to the defendant's equitable claim for improvements thereon, it was competent for the defendant to testify that the purchaser told her, before he had made the deed to the plaintiff, that he had bought it for the mortgagor, it being in derogation of his title under which the plaintiff claimed, contradictory of the purchaser's affidavit in corroboration of the inadequacy of the consideration paid, and the other evidence in this case tending to show the entire transaction. *Ibid.*

BIDS. See Judgments, 8.

BILLS OF LADING. See Carriers, 4, 16, 19; Judgments, 5; Pleadings, 2.

BILLS AND NOTES. See Contracts, 4, 7; Attachment, 5.

1. *Bills and Notes—Notes—Negotiable Instruments—Fraud—Title—Acquisition by Original Payee—Holder in Due Course—Burden of Proof.*—Where the fraud of a payee of a negotiable note would render the instrument invalid originally in his hands, it will also render the instrument invalid in his hands when, with notice of and participating in the fraud, another has acquired the note by endorsement for value, and, in turn, has endorsed the same to the original payee for value; and the burden is upon the original payee in his action upon the note

BILLS AND NOTES—*Continued.*

to show that he had acquired the title as a holder in due course, when the defendant has shown the infirmity in the instrument. C. S., 3040. *Pierce v. Carlton*, 175.

2. *Bills and Notes—Notes—Negotiable Instruments—Fraud—Title—Original Payee—Holder in Due Course.*—The payee of a negotiable instrument, that he has procured by fraud, may not acquire a valid title by afterwards acquiring the same from a bona fide holder in due course, who had no knowledge of the infirmity of the instrument. *Ibid.*

3. *Bills and Notes—Negotiable Instruments—Drafts—Intervener—Title—Burden of Proof.*—An intervener claiming the proceeds of a draft attached in the plaintiff's action, in order to recover, must make out his claims and show title to the property attached. *Mangum v. Grain Co.*, 181.

4. *Same—Banks and Banking—Holder in Due Course—Prima Facie Case.* Where it is shown that the draft, the subject of plaintiff's attachment, had been duly executed, made payable to the intervener and in its possession, it raises the presumption that the intervener became a holder in due course; and with the other evidence in this case: *Held*, sufficient to establish a *prima facie* case of the intervener's bona fide ownership and to leave the issue for the jury to determine, under a proper instruction. *Ibid.*

5. *Same—Depositors—Instructions—Agency for Collection.*—The plaintiff attached the proceeds of a draft in the hands of a local bank for a debt against the defendant nonresident drawer, which had been sent by the intervener bank where the defendant deposited. The evidence raised the question as to whether the intervener was a purchaser in due course or merely received the draft for collection. The draft was endorsed to the intervener bank, and there was evidence that it had no authority to charge it back to the drawer, if unpaid, but was taken with other collateral for the defendant's debt to it under a plan for substituting securities, etc.: *Held*, it was correct to charge the jury that if the intervener bank was a purchaser for value without notice, it became *prima facie* the owner; but if by express agreement or one implied from the course of dealing, the intervener had a right to charge back the draft to the depositor, if unpaid, it was an agency for collection. *Ibid.*

6. *Bills and Notes—Negotiable Instruments—Banks and Banking—Purchase—Due Course.*—Where one of two partners has given his individual note to the other to be discounted at a bank, and the one thus acting as the agent for the other has placed the proceeds to the partnership credit, and has checked it out for partnership purposes, in the firm's name, the maker of the note is guilty of negligence in not notifying the bank of his partner's want of authority to thus check out the funds until after the maturity of the note; and the bank, being an innocent purchaser for value and in due course may recover on the note, irrespective of the question of whether the maker of the note had received benefit from the transaction. *Crutchfield v. Rowe*, 210.

7. *Same—Evidence.*—Upon the question of whether a bank, discounting a note of an individual partner, at the instance of his copartner, was a

BILLS AND NOTES—*Continued.*

purchaser in due course for value, without notice, it is competent for the cashier, as both substantive and corroborative evidence, to testify that the partner making the transaction informed him at the time that the proceeds were the contribution of the maker to the partnership funds, and also in contradiction of the maker's evidence of the lack of the authority of his partner to place the proceeds to the partnership credit, and check on it in the partnership name for partnership purposes, upon which he relies in defense to the bank's action upon the note. *Ibid.*

8. *Same—Principal and Agent—Partnership.*—Where a partner makes his individual note and gives it to his copartner to have discounted at a bank, it is with the ordinary implied authority for the partner so acting to place the proceeds to the partnership credit, and check it out under the partnership name for partnership purposes; and the bank discounting the note without notice of the maker's claim to the contrary is a purchaser in due course, and may recover in its action upon the note against the maker. *Ibid.*

BONDS. See Schools, 1, 2, 3, 5, 9; Statutes, 4; School Districts, 1, 9, 11; Attachment, 4; Appeal and Error, 20, 38; Principal and Surety, 1; Roads and Highways, 1; Judgments, 18.

BONUS. See Employer and Employee, 3.

BOUNDARIES. See Deeds and Conveyances, 1, 3; Appeal and Error, 12; Evidence, 5; Instructions, 4; Adjoining Landowners, 1.

BREACH. See Damages, 1; Easements, 1.

BRIEFS. See Appeal and Error, 1, 8, 31, 52.

BURDEN OF PROOF. See Appeal and Error, 3, 40; Bills and Notes, 1, 3; Carriers, 3; Contracts, 10; Deeds and Conveyances, 8; Banks and Banking, 6; Attachment, 7; Vendor and Purchaser, 1; Evidence, 8; Homicide, 1.

CANCELLATION. See Trusts, 1.

CAPIAS. See Criminal Law, 5.

CAPTIONS. See Statutes, 10.

CARRIERS. See Railroads, 1.

1. *Carriers of Freight—Railroads—Damages.*—Where a railroad company has received for shipment a lot of "log chains," and has negligently failed to deliver a part of them, and the consignee is under contract with third parties to do certain work for the consignor with them, and had promised the latter to return them, or their value if lost, after the work had been done: *Held*, the carrier is responsible in damages to the consignee for the loss of the chains. *Coppersmith v. R. R.*, 26.

2. *Same — Negligence — Consequential Damages—Notice—Instructions—Special Circumstances.*—Where the railroad company is liable in damages for such consignee's loss caused by its negligence, and the consignee also sues for consequential damages arising from an additional expense or a particular loss caused by being able to use only a part

CARRIERS—*Continued.*

of the shipment of "log chains," in performing his contract with the third parties, it is reversible error for the trial judge to submit only one issue as to damages, and charge the jury, in effect, that the carrier would be liable for the consequential damages, if sustained by the plaintiff and caused by the carrier's negligence without more. *Ibid.*

3. *Carriers of Goods—Railroads—Negligence—Contracts—Special Damages—Burden of Proof.*—Where the consignee sues the railroad company for the value of certain "log chains" lost by the negligence of the defendant, and as consequential or additional damages, for the extra cost of performing a contract he had made with others, as resulting from this loss, it is required that the plaintiff show that the defendant had express notice of the particular use for which the chains were required; or notice implied from the nature of the shipment or the circumstances indicating their use, which does not appear under the facts of this case. *Ibid.*

4. *Carriers of Goods—Railroads—Bills of Lading—Stipulations.*—The reasonableness of the stipulations of an interstate bill of lading is to be determined by the Federal law and decisions. *Thigpen v. R. R.*, 33.

5. *Same—Contracts.*—The stipulation in an interstate bill of lading that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery (by the carrier) of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed," is upheld as a reasonable one. *Ibid.*

6. *Same—Limitation of Actions—Statutes.*—A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by our State statute, C. S., 412, providing that "in case a person dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative after the expiration of that time, and within one year from his death. *Ibid.*

7. *Carriers of Goods—Railroads—Damages—Penalty—Statutes—Filing of Claim.*—Under the terms of our statute, C. S., 3524, imposing, in favor of the consignee, a penalty upon the carrier for loss of or damage to goods while in its possession, if not paid, "within ninety days after the filing of such claim by the consignee with the carrier's agent at the point of destination or at the point of delivery to another carrier": *Held*, the filing is sufficient if delivered to the designated agent for that purpose, and so received by him. *Eagles v. R. R.*, 66.

8. *Same—United States Mail.*—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of C. S., 3524, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. *Ibid.*

9. *Same—Evidence—Prima Facie—Conflicting Evidence—Questions for Jury—Trials.*—Where the consignee properly addresses, stamps, and

CARRIERS—*Continued.*

mails his claim for such loss or damage at a postoffice of the United States Government, it will be presumed that it was delivered, as addressed, in the usual course of the mails, and a denial of delivery by the carrier raises a conflict of evidence thereon for the determination of the jury, and the carrier's motion as of nonsuit is properly denied. *Ibid.*

10. *Carriers of Goods — Railroads — Penalty — Statutes — Principal and Agent.*—The penalty imposed by C. S., 3524, on the carrier to pay a claim for damages, etc., within ninety days after the filing of the claim by the consignee with carrier's agent at the terminal point, etc., is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover the penalty, the consignee must file his claim with the agent, as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. *Ibid.*

11. *Carriers of Goods—Railroads—Director General—Federal Statutes—Substituted Agent — Motions — Parties — Nonsuit.*—An action, commenced against the Government Railroad Administration during its control, and prior to 1 March, 1920, does not abate under the provisions of the Federal statute of 28 February, 1920; and there being no stated time in which the agent of the Government designated in substitution of the Director General must be made a party: *Held*, the motion of such agent to dismiss on that ground should be denied; and "the cause proceed to judgment upon his being made the party defendant by the court, a recovery, if anything, to be promptly paid out of the revolving fund." The effect of the statute is otherwise when the action has been commenced since 1 March, 1920. *Bagging Co. v. R. R.*, 73.

12. *Carriers of Passengers — Railroads — Care for Passengers — Rules—Damages.*—It is the carrier's duty to its passengers to so enforce its reasonable rules of travel, that its employees will not subject the passengers to unnecessary assault, rudeness, or insult. *Harrison v. R. R.*, 86.

13. *Same — Assault — Abusive Language — Mental Suffering—Damages.*—Where the conductor of a carrier on a passenger train unnecessarily assaults, insults, and abuses a passenger, causing him personal injury and humiliation in the presence of his fellow-passengers, besides injuring his person, the passenger may recover damages for the injury to the person and to his feelings thereby caused. *Ibid.*

14. *Carriers of Passengers—Railroads—Rules—Care for Passengers—Damages.*—It is a reasonable regulation of the carrier that its passenger occupy only the one seat for which he has paid, and it may in a proper manner enforce this rule without liability for damages, when the passenger has, in violation thereof, turned the back of the seat in front so that the seats faced each other, and reclined on one and placed his feet on the other. *Ibid.*

15. *Same—Evidence.*—The plaintiff, in an action for damages against the carrier, was returning on the defendant's train from a city wherein he had undergone a surgical operation, and a fellow-passenger, seeing his weak condition, and to relieve his suffering, had turned two seats

CARRIERS—*Continued.*

so as to face each other, so that the passenger could recline on one, with his feet on the other seat, seeing which, the conductor, in passing, suddenly and violently, and without notice, jerked the back of the seat whereon the plaintiff was sitting, causing him pain and suffering and the continued necessity for the injection of an opiate for several weeks. Upon evidence that the conductor knew the plaintiff, and his then physical condition, and that he was informed thereof at the time: *Held*, the jerking of the seat was an assault upon the plaintiff by the defendant's conductor, for which the defendant was responsible in damages; and was also responsible for the insulting and abusive language he had used to the plaintiff in the presence of the other passengers in the coach, that was unnecessary under the circumstances. *Ibid.*

16. *Carriers of Goods—Bills of Lading—Agreement as to Time of Bringing Action—Limitation of Actions.*—In the absence of any unusual or extraordinary circumstances, an agreement between the common carrier and its shipper may fix a reasonable period within which the shipper shall bring action for damages caused by the carrier's breach of its duty to transport the shipment, which will prevail in its enforcement over a longer time fixed by the general statute of limitations. *Dixon v. Davis*, 207.

17. *Carriers—Railroads—Commerce—Federal Law.*—Where a common carrier is sued in the courts of this State for damages for personal injury alleged to have been caused by the defendant while employed in interstate commerce, our courts apply the rule for the ascertainment of defendant's actionable negligence recognized and enforced in the Federal courts. *Soles v. R. R.*, 283.

18. *Same—Evidence—Questions for Jury—Nonsuit—Trials.*—In an action to recover damages of carrier in interstate commerce for the negligent killing of its flagman sitting asleep or apparently unconscious on the rail of defendant's track in front of an approaching train, the liability on the part of the defendant for the negligence of its engineer, on the issue of negligence, depends upon whether he had exercised due care after discovering the perilous condition of the plaintiff's intestate, and the evidence in this case was sufficient to take the case to the jury. The difference between the rule as applied under the State and Federal decisions discussed by WALKER, J. *Ibid.*

19. *Carriers—Refusal of Shipment—Carriers of Goods—Railroads—Commerce—Bills of Lading—Order, Notify—Interstate Commerce—Storage—Options—Negligence—Public Warehouses.*—By accepting a bill of lading from the initial carrier of an interstate shipment of goods, approved by the Interstate Commerce Commission under the authority of Congress, the consignor becomes bound by its terms; and where, upon an interstate shipment "to order notify," the person to be notified has refused it, and the consignor has been duly notified, the exercise of the option given in the bill of lading to store the goods in a public warehouse without liability, releases the railroad from all liability, either as a common carrier or warehouseman, and the destruction by fire of the goods while thus stored cannot be considered as its negligence, or permit recovery against the initial carrier, in the line of transportation, under the Carmack (now Cummins) Amendment. *Hosiery Mills v. Hines*, 356.

CARRIERS—*Continued.*

20. *Carriers of Goods—Express Companies—Contracts—Waiver—Limitation by Contract.*—The principles of law involved in this action to recover for a part loss in the shipment of currency, etc., while in defendant company's possession under its contract of carriage, relating to a waiver by the defendant of the stipulation that demands for the alleged loss be made against the carrier in ninety days, etc., and the commencement of the suit within a year, etc., are decided in *Dixon v. Davis, ante,* 207; *Thigpen v. R. R., ante,* 33. *Hosiery Co. v. Express Co.,* 478.

CARRIERS OF FREIGHT. See Carriers; Damages, 3; Judgments, 5; Pleadings, 2; Evidence, 8.

CARRIERS OF PASSENGERS. See Carriers; Employer and Employee, 6.

CASE. See Appeal and Error, 14, 44, 55.

CASHIER. See Banks and Banking, 1, 3.

CAUSE OF ACTION. See Actions, 11; Appeal and Error, 33, 34.

CAVEAT. See Wills, 3.

CERTIORARI. See Appeal and Error, 14, 55; Habeas Corpus, 1.

CHARACTER. See Homicide, 1; Witnesses, 3.

CHARGE. See Instructions.

CHATTEL MORTGAGE. See Receivers, 1.

CHILD. See Mortgages, 3; Rule in Shelley's Case, 5; Constitutional Law, 4; Statutes, 8, 12.

CHOSES IN ACTION. See Execution, 1.

CITIES AND TOWNS. See Municipal Corporations, 1, 2, 4.

CLAIMS. See Carriers, 7; Attachment, 2.

CLAIM AND DELIVERY. See Judgments, 4.

CLERKS OF COURT. See Verdict, 1; Pleadings, 5; Criminal Law, 5.

COLLATERAL AGREEMENTS. See Contracts, 22.

COLLATERAL ATTACK. See School Districts, 8.

COLLATERAL SECURITY. See Executions, 3.

COLLECTION. See Contracts, 15; Bills and Notes, 5; Banks and Banking, 6.

COLOR. See Evidence, 6; Instructions, 4; Trespass, 3.

COMMERCE. See Carriers, 17, 19.

COMMISSIONERS. See Injunction, 1; Roads and Highways.

COMMISSIONER OF AGRICULTURE. See Contracts, 6.

COMMON LAW. See Executions, 1; Evidence, 12, 15.

COMPENSATION. See Damages, 4.

COMPENSATORY DAMAGES. See Slander, 4.

COMPROMISE AND SETTLEMENT.

Compromise and Settlement—Statutes—Distinctive Items of Damages—Receipts.—Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, one for the loss he has sustained in preparing to fulfill his part of the contract, and the other for the loss of profits he would have received except for the defendant's breach, the plaintiff's agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, under the provisions of our statute relating to compromises, C. S., 895, or by a receipt he has given therefor, when it appears that the settlement had been made in contemplation of the first item alone, without reference to the second, the subject of the action. *Garland v. Improvement Co.*, 552.

CONDEMNATION. See Municipal Corporations, 2, 4.

CONDITIONS. See Insurance, 5; Contracts, 30, 32.

CONCURRENT JURISDICTION. See Intoxicating Liquors, 9.

CONFIDENTIAL RELATIONS. See Limitation of Actions, 4.

CONFIRMATION. See Contracts, 17; Appeal and Error, 30.

CONFLICT OF RULES. See Supreme Court, 2.

CONSENT. See Appeal and Error, 22, 29; Judgments, 17.

CONSIDERATION. See Corporations, 2; Judgments, 16; Contracts, 25; Employer and Employee, 3.

CONSOLIDATION. See Actions, 2, 3; School Districts, 5, 7, 8, 9, 10; Constitutional Law, 9; Schools, 5.

CONSOLIDATED STATUTES.

SEC.

7. The husband entitled to wife's land, under the will of her father as personalty, under the doctrine of conversion. See secs. 137, 137 (8). *McIver v. McKinney*, 393.

137. Where the daughter takes land by will from her father as personalty, under the doctrine of conversion, and dies without child or representative of such, leaving a husband, the husband takes the property as personalty subject to the demands of creditors; C. S. 137 (8) not applying. *Ibid.*

412. A reasonable stipulation in a bill of lading as to time in which action may be brought is a matter of contract and not regarded as a statute of limitation. *Thigpen v. R. R.*, 33.

412. The time between the death of deceased and the qualification of his personal representative is not counted against the action of claimants against the estate. *Irvin v. Harris*, 547.

437 *et seq.* Defendant railroad not appealing from final judgment obtained during Federal control, may be sued upon the judgment after property restored to it. *King v. R. R.*, 442.

CONSOLIDATED STATUTES—*Continued.*

SEC.

441 (9). The plaintiff must show not only ignorance of the fraud, but that he could not have discovered it in the exercise of proper diligence. *Latham v. Latham*, 55.

443 (2). This statute will not bar right of action against justice of the peace for penalty for performing marriage ceremony without license, when brought within a year. *Wooley v. Bruton*, 438.

460. Where a garnishee bank alleges its forwarding bank is the real party, and that it is a mere stakeholder, the forwarding bank should be made a party. *Temple v. Hay Co.*, 239.

466. Application for extension of time to plead should be made to the judge and not to clerk, when time had expired before ch. 304, Public Laws of 1921, went into effect. *Campbell v. Asheville*, 492.

504. An assumption of defendant's unadmitted guilt upon the State's evidence, in the charge, is reversible error. *S. v. Sparks*, 745.

511. A nonresident entering special appearance and demurring to jurisdiction must confine himself to that ground and not plead to merits. *Motor Co. v. Reaves*, 260.

527. A warrant of attachment erroneously addressed to improper officer may be amended by order of court. *Temple v. LaBerge*, 252.

547. The exercise of the sound discretion of the trial judge in allowing amendments to pleadings is nonreviewable in Supreme Court. *Fay v. Crowell*, 415.

547. The judge properly allowed amendment to complaint to allege some of the defendants had acquired the interest of the others in the subject matter of the action. *Redmond v. Insurance Co.*, 480.

564. Judge instructing the jury that defendant's absence from court is a circumstance of fraud is an expression of opinion forbidden by statute. *Greene v. Newsome*, 77.

564. An instruction upon the principles of fraud applicable to facts of the case is only required. *Williams v. Hedgepeth*, 114.

564. An omission of a principle of law from the charge that works substantial prejudice, is in itself reversible error. *Bowen v. Schnibben*, 248.

567. Defendant waives his right under his motion to nonsuit upon introducing evidence after his motion upon plaintiff's evidence has been overruled, and not reviewing the motion upon conclusion of all the evidence. *Wooley v. Bruton*, 438.

595. Judgment by default final is permissible when complaint alleges one or more causes of action and breach of an express or implied contract to pay absolutely or upon contingency a sum fixed by the contract or computable therefrom. The failure to answer admits allegations of complaint, the sufficiency being a matter of legal construction. *Beard v. Sovereign Lodge*, 154.

613. This section does not apply to judgments signed out of term by consent, when third persons are not prejudiced. *Chemical Co. v. Long*, 398.

CONSOLIDATED STATUTES—*Continued.*

SEC.

650. The surety on supersedeas bond on appeal is not released by principal's adjudication in bankruptcy after the appeal has been properly dismissed by the Superior Court as abandoned. *Murray v. Bass*, 318.

663. Where lien on specific property is insufficient, judgment in personam may be obtained. *Boseman v. McGill*, 216.

711, 714, 717, 723. No lien on judgment debtor's choses in action acquired by supplemental proceedings. *Grocery Co. v. Newman*, 370.

712, 719. Lands sold by commissioner to satisfy lien not being sufficient at a fair sale, order for supplementary proceeding to examine third persons, to enforce judgment in personam is permissible. *Boseman v. McGill*, 215.

721. Facts sufficient for order to examine opposing party in supplementary proceedings. *Boseman v. McGill*, 216.

821. See sec. 840. *Templeton v. Hay Co.*, 239.

836. See sec. 2306 and apply. *Rogers v. Booker*, 183.

840. The bond required in attachment has no application to a garnishee bank claiming no interest but that of a stakeholder. *Temple v. Hay Co.*, 239.

895. This does not apply to a distinctive element of damage from that of element compromised. *Garland v. Improvement Co.*, 551.

900. Affidavit in this held sufficient to sustain order for examination of adverse party to the action. *Whitehurst v. Hinton*, 11.

1126 (3). Any device duly adopted by the corporation as its seal, as the word seal within a scroll, is sufficient for the corporation's deed. *Bailey v. Hassell*, 450.

1534. Appellant does not necessarily lose his right of appeal by failure to give supersedeas bond and paying judgment appealed from. *Bank v. Miller*, 593.

1664. Superior Court has exclusive jurisdiction to award custody of minor children pending and after divorce. Sec. 2241 applies when parents otherwise live apart, without suing for divorce. *In re Blake*, 278.

2116-18. See sec. 564. *Bowen v. Schnibben*, 248.

2212, 2213, 2214. Where the jurors are not disqualified a substantial compliance in drawing their names from the boxes, etc., is not sufficient ground upon which to quash the verdict. *S. v. Mallard*, 667.

2241. See sec. 1664. *In re Blake*, 278.

2306. The second mortgagee is only required to pay the principal to the first mortgagee for the assignment to him of the first mortgage, when the latter is affected by usury. *Broadhurst v. Brooks*, 123.

2306. Where the first mortgage is tainted with usury, a judgment ordering sale of automobile should direct payment of first mortgage lien without interest, with surplus to defendant after deducting cost, and any payment made by purchaser on the first mortgage lien, etc. *Rogers v. Booker*, 183.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2498-9. The statute of limitation in action to recover the penalty will not bar the right of action within a year from the performance of the marriage ceremony. *Wooley v. Bruton*, 438.

2617 *et seq.* The violation of sections regulating automobiles upon a highway may be received in evidence, in proper instances, upon a trial for murder or manslaughter or of an assault. *S. v. Sudderth*, 753.

2791-2. The courts will not interfere with the discretionary powers of municipal authorities as to the taking of lands to widen its streets when no abuse of this discretion is manifest. *Lee v. Waynesville*, 565.

2937. The board of trustees of Newberry Academy have the authority under this section and relevant statutes, to issue bonds to take upon indebtedness incurred under stringent financial conditions. *Jones v. New Bern*, 131.

3039. The fraud of the original payee will render the note after acquired by him from a holder without notice, void for his fraud in its inception. *Pierce v. Carlton*, 175.

3040. Upon nonresident forwarding bank showing *prima facie* that it purchased by draft the proceeds of which are attached in local bank, and issue of fact is raised. *Sterling Mills v. Milling Co.*, 460.

3326. The literal compliance with this section as to corporate seal is not necessary if substantially complied with, with reasonable presumption in favor of regularities, of which parol evidence may be received. *Bailey v. Hassell*, 450.

3354-5. The defects, if any, in the use of a proper corporate seal and the signatures of its officers incurred under the facts of this case. *Bailey v. Hassell*, 450.

3379, 3383, 3385. Evidence that defendant's place of business was bad for selling liquor is hearsay and incompetent upon a trial for violating these sections. *S. v. Springs*, 768.

3385. Evidence held sufficient to sustain verdict. *S. v. Bradshaw*, 680.

3403. The innocent mortgagee of an automobile does not lose his lien by the unlawful transportation of liquors therein by the mortgagor. *Motor Co. v. Jackson*, 328.

3406. Witnesses on the second trial of defendant in a criminal action may testify to matters tending to incriminate him that he himself had testified to on the preliminary trial without objection. *S. v. Burnett*, 783.

3409. Prisoner indicted for unlawful manufacturing is guilty when aiding therein is proven. *S. v. Grier*, 723.

3524. The filing with the carrier's agent is sufficient under this section, and may be given through the United States mail. The terms of the statute should be strictly construed. *Eagles v. R. R.*, 66.

4145. A will admitted to probate is held valid unless otherwise judicially determined. *New Bern v. Leigh*, 166.

4171. This section does not control a local law making in effect the manufacture and sale of spirituous liquor a felony. *S. v. Burnett*, 783.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4200. Where the judge by his charge erroneously deprives the defendant of his right to the principles applying to manslaughter, under his charge as to murder, it is reversible. *S. v. Thomas*, 757.

4447-9. Absolute divorce does not relieve father for willful abandonment of children. *S. v. Bell*, 702.

4515. The two-year statute does not apply when a local law applicable, makes the manufacture and sale of intoxicating liquor a felony. *S. v. Burnett*, 783.

4560, 4563, 4572. The statutes making record evidence on the preliminary trial evidence in the second one, with certain restrictions, is an extension of the principle upon which evidence of this character may be admitted. *S. v. Maynard*, 653.

4643. Where the State's and defendant's evidence are substantially the same, and tends to exculpate the defendant, his motion of nonsuit should be granted. *S. v. Fulcher*, 663.

4697-8. Statutes are constitutional, and user must show deficiency in analysis by Agricultural Department as a basis for recovering damages to crop alleged to have thereby been caused. *Pearsall v. Eakins*, 291.

4742-3-4-9. In an action by the seller upon the note given by the purchaser of foodstuff, the plaintiff, it is necessary for the plaintiff to have complied with the requirements of these sections. *Miller v. Howell*, 119.

5473. The constitutionality of the consolidation of a school district authorized by statute is not presented in the absence of the question of taxation. *Board of Education v. Bray*, 484.

5523. The requirements of an election for an additional special tax for school districts, ch. 87, Public Laws of 1920, is not in substitution for the provisions of this section, but in addition thereto. *Story v. Comrs.*, 337.

5530. Non-special school tax territory combined with special tax territory must separately vote in approval of a bond issue for the combined district. *Barnes v. Comrs.*, 325.

5530. It appearing that the non-special tax school territory combined in a district with former districts having a special tax, had separately voted for the special tax in question, the election is *held* to be constitutional. *Board of Education v. Bray*, 483.

5533. The provisions of this section, as to an election for bonds in a school district within two years does not affect an authority given a city or district by special statute. *Story v. Comrs.*, 336.

5926. Applies to bond issues by school districts, and failure to give preliminary notice of new registration is not alone sufficient to invalidate the bonds. *Miller v. School District*, 197.

6042. The power to review election returns is given to precinct registrar and judges of election; and when the county board of elections has assumed to exercise the power, mandamus will lie to compel them to tabulate the returns made by the proper authorities. *Rowland v. Board of Education*, 78.

CONSOLIDATED STATUTES—*Continued.*

SEC.

7768. Property used by an institution for "church, school or charitable purposes," that is exempt from taxation, does not include lands detached and rented and otherwise used. *Trustees v. Avery*, 469.

7979. *Semble* the remedy of a taxpayer is to pay illegal tax under protest and sue for recovery, and not by injunctive relief when bonds have been issued and proceeds distributed. *Galloway v. Board of Education*, 245.

CONSTITUTIONAL LAW. See Supreme Court, 2; Schools, 3; School Districts, 5; Actions, 5, 10; Taxation, 7; Appeal and Error, 47; Evidence, 14; Intoxicating Liquor, 8, 9.

1. *Constitutional Law—Racial Discrimination.—Held*, on this appeal, there was no evidence to sustain an allegation that the constitutional inhibition against race discrimination in the distribution and use of the public school funds had been violated. *Galloway v. Board of Education*, 245.

2. *Constitutional Law—School Districts—Local Legislation—Statutes.*—Since the enforcement of the amendment to our Constitution, Art. II, sec. 29, a special act of the Legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. *Ibid.*

3. *Constitutional Law—Amendments—School Districts—Poll Tax—Appeal and Error—Costs.*—Since the constitutional amendment of 1920, a tax by a school district upon the poll with the property tax, under a statute authorizing it, is unconstitutional as to the poll tax, and where the property tax is legal and valid, the taxation upon the poll will be eliminated, and the valid part upheld by the courts. On this appeal the cost is taxed equally between the parties. ***Burney v. Comrs.*, 275.**

4. *Constitutional Law—Supreme Court—Supervisional Powers—Remedial Writs—Habeas Corpus—Divorce—Custody of Children—Courts—Jurisdiction—Motions—Notice.*—Where a parent erroneously seeks the custody of a minor child of the marriage by proceedings in *habeas corpus*, after decree of divorce has been entered upon suit in the court of a certain county, without providing therefor, the Supreme Court, on appeal, having regard for the best interest of such child before the motion can be made in the court having granted the divorce, may exercise its powers given by Const., Art. IV, sec. 8, to generally supervise and control the proceedings of the inferior courts by remedial writ, or process; and on this appeal from an order of the Superior Court judge, erroneously hearing the matter upon proceedings in *habeas corpus*, the Supreme Court adjudges that the custody of the child shall remain with the mother, as directed by the judge hearing the same, until the mother can properly seek her relief upon motion made in the action granting the divorce at the next term of the said court, or as soon thereafter as the judge may hear the same, upon giving the respondent ten days previous notice of her application. *In re Blake*, 279.

5. *Constitutional Law—Statutes—Police Powers—Fertilizers—Analysis—Agricultural Department—Evidence.*—Statutes requiring evidence of

CONSTITUTIONAL LAW—*Continued.*

the analysis of fertilizer, made by a State department, showing a deficiency in the ingredients used therein and different from those represented in the warranty of sale, in order to recover for damages to crops caused by their use, are constitutional and valid within the exercise of the police powers of the State. C. S., 4697, and recent amendments thereto. *Pearsall v. Eakins*, 291.

6. *Constitutional Law—Races—Negro—Schools—School Districts—Taxation.*—A school district, made under the provisions of a private statute coterminous with the limits of a city, vesting in a school committee appointed under Public Laws of 1899, ch. 732, sec. 76, the sole control of the public schools of the city, by reference to a school district for each race is not a violation of our State Constitution, Art. IX, sec. 2, as a discrimination between the races, when by proper interpretation it appears that the intent of the statute was to define the boundaries of a district where the races were to attend separate schools, without discrimination in the apportionment of the proceeds of the bonds, or school facilities; and the sale of the bonds may not be enjoined on that account. *Story v. Comrs.*, 336.

7. *Constitutional Law—Statutes—Interpretation.*—The rules for the interpretation of statutes also apply to constitutional provisions, and therein the intent and purpose should be considered with regard to the object to be accomplished and the wrong to be prohibited or redressed; and to determine whether the terms of a statute are unconstitutional, every presumption is in favor of the validity of the statute, and of the honesty of purpose of the Legislature to conform to the organic law with its restrictions and limitations; and the courts will sustain the constitutionality of the statute unless its invalidity, thus ascertained, is "clear, complete, and unmistakable," or the nullity of the act is beyond question. *Coble v. Comrs.*, 342.

8. *Same—State Agencies.*—The purpose of the Constitution, as applied to the subordinate provisions of the State Government, is not to weaken or destroy the power of the Legislature in its necessary control over them, but to preserve their cohesion and prevent their dismemberment. *Ibid.*

9. *Same—Schools—School Districts—Consolidation—Taxation—Statutes—Local or Special Laws.*—Where special school tax districts have been combined with nontax territory, a public-local act to provide an additional tax to that of the special tax districts, and to equalize the benefits among them all for the better equipment of the schools, better pay for the teachers, the transportation of the scholars, expressly leaving intact the boundary lines and management of the schools of each of the districts so consolidated, the question of this supplementary taxation to be submitted to the voters of the enlarged or consolidated district made for the purpose, is not in contravention of Art. II, sec. 29, of the State Constitution, prohibiting the Legislature from enacting local, private, or special acts establishing or changing the lines of school districts. *Ibid.*

10. *Same—Elections—Approval of Electors.*—Special school tax districts may be consolidated and their lines established within a county, where no special tax has been imposed, without the approval of the voters

CONSTITUTIONAL LAW—*Continued.*

thereof; and where special tax and nonspecial tax territory have been consolidated, a statute which authorizes an additional tax for school purposes upon the approval of a majority of the qualified voters of the district so formed, the proceeds to be equalized among the special tax and nonspecial tax territory, without impairing the existing obligations of the former, does not come within the inhibition of our State Constitution, Art. VII, sec. 7, as to agencies of the State Government pledging their faith, loaning their credit, or levying a tax, unless approved by a majority of the qualified voters, etc. *Ibid.*

11. *Same—Contracts—Federal Constitution.*—The question as to whether a statute authorizing an additional tax for a consolidated school district, composed of special tax and nonspecial tax territory, impairs the obligation of the contract of the tax territory in issuing bonds, U. S. Const., Art. I, sec. 10, cannot be raised in a suit by the taxpayers in the district, but only by the bondholders, or those who have a legal or equitable right arising under the contract; and *semble*, under the facts of this case, the bondholders' rights were preserved by the requirement of the statute that the new district assume and pay the obligation of the old district. *Ibid.*

12. *Constitutional Law — Taxation — Exemptions — Statutes.*—The fundamental principle of our Constitution, as to the taxing of property, is that all property shall be taxed uniformly so as to equalize its burdens, except that which is either expressly exempt by the Constitution itself or by the Legislature within the limits prescribed by the Constitution; and the courts will strictly construe such exemptions, and resolve all doubts in favor of liability to taxation. *Trustees v. Avery*, 469.

13. *Same—Religious Purposes—Schools—Education—Lands—Rentals.*—An institution created by statute to provide for the Christian education of boys and girls in a certain locality, and to do other institutional work, in which its property is exempt from taxation as long as it shall be used for "church, school, or charitable purposes," does not include within its tax exempting terms, either under its charter or under the general law relating to the subject, Laws 1921, ch. 38, sec. 72 (4); C. S., 7768, lands from which the rentals are applied to educational purposes alone; in this case, to a tract of land three miles distant from that upon which the corporation conducts its operations, a portion of which has been cleared and rented out for a part of the crop, and also used for grazing purposes. *Ibid.*

14. *Constitutional Law — Contracts — Vested Rights — School Districts—Schools—Taxation.*—The constitutional amendment of 1920 will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract. *Board of Education v. Bray*, 485.

15. *Constitutional Law—Taxation.*—The State Constitution invests exclusive authority in the Legislature to levy taxes, Art. V, sec. 3, which may not be interfered with by the courts, a coördinate part of the Government, when it is exercised within the constitutional restrictions. Art. I, sec. 8. *Person v. Watts*, 499.

CONSTITUTIONAL LAW—*Continued.*

16. *Constitutional Law—Mandamus—Actions—Controversy.*—While either the relator or respondent may raise constitutional questions for the Court to pass upon in proceedings for *mandamus*, they must be material to the determination of the rights of the parties, so as to conclude them by judgment in the controversy presented to the courts; and the courts will not pass upon such questions when they merely present abstract principles not so related to the subject-matter of the action. Laws 1921, ch. 34, sec. 4. *Ibid.*

17. *Constitutional Law—Trial by Jury—Criminal Law—Facts Agreed.*—In order for a conviction of a criminal offense, including misdemeanors, it is required by Article I, section 13, of our State Constitution that the final sentence be upon a "unanimous verdict of a jury of good and lawful men in open court," etc., and the accused cannot be lawfully convicted otherwise, though he has agreed with the solicitor upon the facts in the case, under a plea of not guilty, and the judge has found him guilty upon the agreed facts, as a matter of law and imposed a sentence. *S. v. Pulliam*, 681.

18. *Same—Inferior Courts—Superior Court—Trial de Novo.*—The right to a trial by jury in a criminal action is preserved to the accused by a trial *de novo* in the Superior Court on appeal from a court of subordinate jurisdiction, and conviction in the Superior Court cannot be had unless upon the verdict of the jury, in accordance with the provisions of Article I, section 13, of our State Constitution. Const., Art. I, sec. 12. *Ibid.*

19. *Same—Appeal and Error.*—While the sentence in this criminal action was unlawfully imposed by the Superior Court upon the facts agreed, and the judgment is set aside, the Supreme Court, on appeal, passes upon the legal inferences upon which it is founded, under the reasons stated in *S. v. Wells*, 142 N. C., 596. *Ibid.*

20. *Constitutional Law—Statutes—Transaction of Business.*—A statute which prohibits as a criminal offense the exposing of goods, merchandise, etc., for sale, and keeping open of a store on Sunday, except for the sale of drugs, etc., is constitutional and valid. *Ibid.*

21. *Constitutional Law—Federal Constitution—Limitation of Powers—Courts—Procedure—Indictment—Grand Jury.*—Article V of the Federal Constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" is a limitation imposed on the powers of the Federal Government, and applies to the procedure in the Federal courts, and not to trials for the violation of our State statutes relating to our liquor laws in the State courts. *S. v. Pulliam, ante*, 681, and other like cases, cited and applied. *S. v. Beam*, 730.

22. *Constitutional Law—Criminal Law—Preparation for Trial—Discretion of Court—Courts—Appeal and Error.*—The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of Article I, section 17, of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. *S. v. Burnett*, 784.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 8. The rules of practice by the Supreme Court will be observed over statutory interference, exception being as to courts of inferior jurisdiction. *Cooper v. Comrs.*, 615; *S. v. Ward*, 618.

I, sec. 8. Taxation in conformity with the terms of the statute will not be interfered with by the court, when the statute is within the constitutional limits. *Person v. Watts*, 499.

I, sec. 11. The right of the accused to confront, examine, etc., the State's witnesses is not deprived him on the trial, when such was given him on preliminary examination. *S. v. Maynard*, 653.

I, sec. 13. Conviction of criminal offense must be by verdict, and not upon facts agreed to with solicitor. *S. v. Pulliam*, 681.

I, sec. 17. It is within the sound legal discretion of the trial judge to determine whether the defendant in a criminal action is given sufficient time to prepare his defense before commencing his trial. *S. v. Burnett*, 783.

II, sec. 29. A statute that permits an existing consolidated school district to issue bonds, does not change or establish new lines, etc., and is valid. *Burney v. Comrs.*, 274.

II, sec. 29. Statute allowing a supplemental tax for an existing combined school district is not unconstitutional. *Coble v. Comrs.*, 342.

II, sec. 29. *Held*, under the facts of this case, the result of an election in favor of a special tax in a consolidated school district of special with nonspecial school tax territory, is valid. *Board of Education v. Bray*, 484.

II, sec. 29. A statute allowing an existing school district to submit the question of a bond issue to its electors, is not prohibited. *Burney v. Comrs.*, 275.

II, sec. 29. A statute authorizing an increase of school bonds for a district, established before the operative effect of this amendment, is constitutional. *Roebuck v. Trustees*, 144.

II, sec. 29. Since the adoption of this amendment, an act to establish or change lines of a school district, is void. *Galloway v. Board of Education*, 245.

IV, sec. 9. State cannot be sued unless there is statutory or constitutional consent. *Carpenter v. R. R.*, 400.

V, sec. 3. Authority to tax is given exclusively to legislature; and where corporations are fully taxed and shareholders are expressly exempt, the courts may not interfere. Art. I, sec. 8. *Person v. Watts*, 499.

VII, sec. 7. A statute permitting a levy of a special tax by a combined school district, equalizing the proceeds among special and nonspecial tax territory as theretofore existing, is not invalid under the "faith and credit" clause of the Constitution. *Coble v. Comrs.*, 342.

IX, sec. 2. A statute does not discriminate between the races that apportions the funds fairly in keeping up separate schools provided for them. *Story v. Comrs.*, 336.

X, sec. 4. Homestead may not be claimed against lien of judgment for furnishers of material given under the statute. *Sugg v. Pollard*, 494.

CONTENTIONS. See Instructions, 17.

CONTRACTS. See Carriers, 3, 5, 20; Statutes, 5; Damages, 1, 2; Insurance, 4, 5, 9; Principal and Agent, 2; Vendor and Purchaser, 1; Pleadings, 2; Highways, 4; Judgments, 16; Railroads, 1; Constitutional Law, 11, 14; Arbitration and Award, 1; Employer and Employee, 3; Limitation of Actions, 8.

1. *Contracts, Written—Warranty—Parol Evidence—Receipts.*—Damages for breach of warranty on sale of cattle, as to number and disposition resting in parol, are recoverable in the warrantee's action, and a receipt for the purchase price thereof, in the ordinary form, not purporting to contain the full contract between the parties, does not exclude the admission of parol evidence of the warranty by its failure to contain the same. *Sample v. Gray*, 24.

2. *Contracts—Fraud—Promises—Intent to Deceive.*—A promisor, not intending to perform his promise to pay for goods or lands, and who receives the goods or lands in consequence, and does not perform his promise, is guilty of such fraud or deceit as will set the contract aside at the suit of the other party to the contract. *Williams v. Hedgepeth*, 114.

3. *Same—Deeds and Conveyances—Fraud—Equity.*—A promise by defendant to perform necessary services to an old and enfeebled man, the plaintiff, which the defendant had not intended to, and which he did not, perform, and in consideration of which he had obtained a deed from the plaintiff to his lands, is evidence of fraud sufficient in equity, if established, to set aside the deed in plaintiff's suit. *Ibid.*

4. *Contracts—Fraud—Stipulations—Parol Evidence—Principal and Agent—Bills and Notes—Negotiable Instruments.*—Stipulations in a written contract made by an agent in behalf of his principal that exclude all evidence of agreements made by the agent that are not contained in the written contract are maintainable when the contract itself is valid and enforceable; but where the verbal representations of the agent are fraudulent, and affect the existence of the contract, they are admissible to set it aside in its entirety. *Miller v. Howell*, 119.

5. *Contracts—Statutes—Public Policy—Fraud.*—Where a note is given in consideration of a contract concerning a transaction that is forbidden and made criminal by the public laws of the State, it is not enforceable between the parties; and it is not required that the statute expressly declare the contract void. *Ober v. Katzenstein*, 160 N. C., 439, cited and distinguished. *Ibid.*

6. *Same—Foodstuffs—Commissioner of Agriculture.*—Where a note is given in consideration of the sale of a foodstuff or "conditioner" coming within the provisions of C. S., 4742, requiring the seller to file with the Commissioner of Agriculture a statement of his purpose, a duly verified certificate as to its qualities, for registration, with a labeled package, section 4743 requiring a fee for registration, section 4744 making a noncompliance a misdemeanor, and section 4749 declaring the legislation designed to protect the public from deception and fraud, and those requirements have not been complied with by the seller, the note is uncollectible against the purchaser or maker. *Ibid.*

7. *Contracts—Public Policy—Statutes—Fraud—Bills and Notes—Negotiable Instruments—Holder With Notice.*—Where it is properly estab-

CONTRACTS—*Continued.*

lished by the verdict of the jury that a note, rendered void for fraud or under the provisions of a statute, had been acquired by one not a holder for value, without notice, etc., the claim is affected with the infirmities that would invalidate it in the hands of the orginal holder. *Ibid.*

8. *Contracts, Written—Effect of Signature of Party—Vendor and Purchaser.*—One having signed a written contract is presumed to have read and agreed to it, and is bound by its terms. *Colt v. Turlington*, 137.

9. *Same—Parol Evidence—Evidence—Trials.*—Where the purchaser has signed with the vendor's selling agent a contract for the sale of goods, in this case a heating and lighting plant, naming the contract price in a certain sum, restricting the terms of the contract to those therein stated, and expressly excluding any representation the agent may make not included in its written terms, parol evidence on the purchaser's behalf, in the absence of fraud or other equitable defense that would avoid the contract, tending to show that the agent, as a part of the consideration, had agreed for his principal that the price named included other obligations of the principal, in this case the installation of the plant, is incompetent as contradicting the terms of the writing. *Ibid.*

10. *Same—Waiver—Burden of Proof.*—Where the purchaser is excluded by the written terms of his contract from showing, by parol evidence, other obligations the agent of the seller had agreed to for him, as principal, the burden of proof is on him to show that the agent had a right to waive the written terms of the contract, if he relies thereon as a defense in an action brought to recover the contract price. *Ibid.*

11. *Contracts—Offer and Acceptance—Reasonable Time—Evidence—Questions for Jury—Trials.*—Where men of fair minds may come to differing conclusions on the question, the reasonableness of the time in which an offeree must accept a contract for the sale of goods is a question for the jury, when the parties have determined upon no specific time in which the acceptance must be made, but only that it be a reasonable one. *Jeanette v. Hovey*, 140.

12. *Same—United States Mails.*—Where the seller of potatoes has made an offer of sale for future delivery to the proposed purchaser to be accepted within a reasonable time therefrom, by mail, the purchaser's letter of acceptance within a reasonable time, and mailed to the seller before receipt of the latter's letter of cancellation, completes the contract, and upon the seller's breach thereof the purchaser may recover his damages. *Ibid.*

13. *Contracts—Offer and Acceptance—Breach—Damages.*—Where the seller has breached his contract of sale of potatoes, to have been delivered to the purchaser at a specified future time and place, the measure of damages is the difference between the contract price, and the market value of the potatoes at the time when and at the place where the goods should have been delivered by the terms of the contract. *Ibid.*

14. *Same—Instructions—Verdict—Appeal and Error—Harmless Error.*—In this action, permitting a recovery by the defendant of damages for the plaintiff's (seller's) breach of contract in the delivery of potatoes,

CONTRACTS—*Continued.*

the jury having awarded as damages the difference between the contract price and the market value, etc., an instruction that allowed them to include the defendant's loss under contracts he had made with third parties, if erroneous, was harmless error. *Ibid.*

15. *Contracts—Breach—Attachment — Intervener — Banks and Banking—Agency for Collection—Principal and Agent.*—Where the defendant pleads and relies on a counterclaim for damages alleged to have been caused by the plaintiff's breach of the contract he has sued on, and has attached here a draft of the plaintiff, a resident of another state: *Held*, a bank that has intervened, claiming the right to the proceeds of the draft, cannot maintain this position when the jury have found, under correct instructions upon sufficient evidence, that the intervening bank was only an agent for collection. *Ibid.*

16. *Contracts—Offer—Acceptance—Vendor and Purchaser.*—An essential element of a binding contract for the sale of goods is the offer of sale by the one party and the acceptance of its terms by the other; and when the offer is communicated and shows an intent to assume liability, and is so understood and accepted by the party to whom it is made, it becomes equally binding upon the promisor and promisee. *May v. Menzies*, 150.

17. *Same—Silence—Evidence of Confirmation.*—The acceptance of an offer of the sale of goods may be established by words or conduct of the offeree showing that he meant to accept it according to its terms; and while ordinarily the mere silence of the offeree will not amount to his assent, it may otherwise be construed when such silence is under circumstances that would justify the reasonable inference of its acceptance. *Ibid.*

18. *Same—Traveling Salesman—Principal and Agent.*—The term "traveling salesman" generally implies one who takes or solicits orders for goods in behalf of his principal, and forwards them to his principal for approval or rejection; and where a person has only represented himself as such to the buyer of goods and the sale was accordingly made on this authority, the consent of the principal must in some sufficient way be evidenced for the purchaser to establish the contract as one binding upon him. *Ibid.*

19. *Same—Evidence—Nonsuit—Questions for Jury—Trials—Appeal and Error.*—Where there is evidence that the purchaser of merchandise has placed two orders with the traveling salesman of the seller, in February, one for immediate shipment and the other for July; and by custom the seller was allowed eight or ten days for acceptance, and the seller, having shipped the first order and received payment, has written in June for the financial statement from the purchaser, promising attention, and opening up an investigation of the seller's responsibility, resulting in cancellation of the July shipment; and thereafter, in August, the seller has shipped the goods at advanced prices, claiming it was a new order for the goods: *Held*, the evidence raised an issue which should be answered by the jury, and the seller's motion of nonsuit in the purchaser's action to recover the difference between the contract price and the advanced prices charged should have been denied. *Ibid.*

CONTRACTS—*Continued.*

20. *Contracts—Breach—Damages—Railroads—Sidetracks — Warehouses — Drayage.*—Damages recoverable for a breach of contract are those which were in the contemplation of the parties, and are capable of ascertainment with a reasonable degree of certainty; and where the owner of a tobacco warehouse has rented the same under an agreement to save the tenant the cost of drayage, depending upon his contract with the defendant railroad company to put in a sidetrack within a certain time, for a consideration he had performed, the defendant railroad company is answerable in damages in the owner's action in such amount as he has been required to allow his tenant for such drayage charges made necessary by reason of the defendant's failure to put in the sidetrack by the time designated, and which the defendant had agreed to with knowledge of the plaintiff's purpose to thereby save the cost of drayage. The question as to unlawful discrimination in freight rates, contrary to the Federal statutes, does not arise in this case. *Barrow v. R. R.*, 202.

21. *Contracts, Written—Evidence—Parol Evidence.*—Where a contract is not required to be in writing by the statute of frauds, and is partly written and partly rests in parol, evidence of the unwritten part is permissible, if it does not contradict the written part, to establish the contract in its entirety. *Henderson v. Forrest*, 230.

22. *Same—Collateral Agreements—Principal and Agent.*—Where a real estate agency has taken an option on the plaintiff's lands, it may be shown by parol that as a part of the consideration for the option, the agency would pay off a certain note given by the plaintiff to another, before maturity, either by exercising this option themselves or making sales to another as the plaintiff's agent, the consideration being sufficient to support both the principal and collateral contract. *Ibid.*

23. *Same—Statute of Frauds.*—Where the optionee in a written option to purchase lands has agreed by parol either to take the land within the time required, and pay off an obligation of the owner, or sell the same to another with the same result, the parol or collateral agreement does not come within the meaning of the statute of frauds, and is enforceable. *Ibid.*

24. *Same.*—The two individual defendants composed the defendant realty company. The plaintiff entered into a written contract with the realty company, giving it an option to purchase his certain lands within a stated time, which it did not exercise, and there was evidence tending to show that the plaintiff had bought through the said realty company a tract of land it had for sale for another, that he had received the deed therefor and executed his note to the seller, secured by a deed in trust: *Held*, parol evidence was competent, in the plaintiff's behalf, tending to show, as against the realty company, that the realty company, at the time of the execution of the note, had warranted that it should be paid out of the proceeds of the sale of the plaintiff's land, upon which they had taken the option, the parol evidence not being within the meaning of the statute of frauds or contradicting or varying the terms of the written contract. *Ibid.*

25. *Contracts—Promise—Consideration—Abstinence from Drink.*—An offer from an uncle to his nephew that if the latter would abstain from drink for a period of five years, and devote his entire time and atten-

CONTRACTS—*Continued.*

tion to the former's business, he would pay him $10,000, is for a sufficient consideration to support the promise upon the fulfillment of the obligation assumed by the nephew, and enforceable, it appearing that the parties were then living together in a relationship nearly approaching that of parent and child; and the nephew was an efficient manager of his uncle's mercantile business, and his sobriety, therefore, of monetary value to him. *Bank v. Scott*, 312.

26. *Same—Trusts—Statute of Frauds.*—Where the promisee has fulfilled his obligation, extending over a period of five years, made upon a valid and enforceable agreement of the promisor to pay him $10,000; and the promisor just before the expiration of the period has agreed by parol with the promisee that the consideration should be changed from the sum stated to his purchase for the promisee of a home of the latter's selection, which was accordingly done, but title was taken by the promisor in his own name under the parol trust in favor of the promisee, and the promisor continues to live there with the promisee and to pay the taxes on the house to the time of his death without making the deed as agreed upon, the promisee may in equity enforce the conveyance of the home against the heirs at law of the deceased promisor upon the principle of a parol trust, it being, in effect, the purchase of the home with the money belonging to the promisee, and which was due him upon the fulfillment of the original agreement; and the principle relating to the enforcement of a parol agreement affecting interests in land under the statute of frauds does not apply. *Ibid.*

27. *Contracts—Writing—Statute of Frauds—Incomplete Contracts—Evidence—Parol Evidence—Appeal and Error.*—When a contract, not required by the statute of frauds to be in writing, is partly in writing and partly oral, parol evidence of the oral part is competent when not contradictory of the written part; and in an action for breach of contract in preventing the plaintiff from cutting and logging certain of defendant's timber for him, requiring the loading upon cars, it is competent for the plaintiff to show that defendant agreed by parol to furnish them, when the writing does not specify the one who had obligated himself thereto, and the exclusion of this evidence by the judge constitutes reversible error. *Garland v. Improvement Co.*, 551.

28. *Contracts—Executory Contracts—Interpretation—Interdependent Parts.* Where all of the parts of an entire contract are interdependent, so that one part cannot be violated without violating the whole, a breach by one party of a material part will discharge the whole at the option of the other party; and, as a general rule, when one party is unable to perform such executory contract, and the promises are interdependent, and made in consideration of each other, he is not entitled to performance by the other, or where he positively refuses to perform his contract in an essential particular he cannot recover of the other for nonperformance. *Edgerton v. Taylor*, 571.

29. *Same—Breach—Liability.*—Where a party obligates himself to the performance of his contract dependent upon an act to be performed by the other party, the doing of such act is a condition precedent, and generally without injury by the courts whether the doing of such act is beneficial to the one to whom the promise has been made, and the

CONTRACTS—*Continued.*

performance of the consideration becomes a condition precedent; and where the promise forms the whole consideration for the other, the promises are not independent of one another, and the failure of one party to perform on his part will exonerate the other from liability to perform. *Ibid.*

30. *Same—Conditions Precedent—Conditions Concurrent—Actions.*—One party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a nonperformance thereof; or, if the stipulations are concurrent, his readiness and ability to perform them. *Ibid.*

31. *Same—Principal and Surety.*—The surety on a bond given by some of the parties defendant for the faithful performance of a contract on their part is only bound upon the failure or refusal of his principal to comply with the terms which the written instrument has imposed on him, and the surety's liability is to be considered as *strictissimi juris.* *Ibid.*

32. *Contracts—Rights of Parties.*—Parties must be permitted to make their own contracts in their own way, and they will be valid and binding upon them except where not contrary to good morals, or for some other reason, deemed sufficient, they are not sanctioned by the law, or are declared invalid and unenforceable in the interest of public policy. *Ibid.*

33. *Contracts—Conditions Precedent—Breach—Sales—Suppressing Bidding—Principal and Surety—Damages.*—The defendants, contractees, in a contract to convey land, for the purpose of meeting their payment of the consideration, platted the same into several lots contemplating an auction sale at a certain date, when the plaintiff objected; and at his request the defendants executed their bond, with sureties, for the payment of the balance of the purchase price at the time specified in the contract of sale, upon condition that the plaintiff should withdraw his objections to the sale of the land at auction by defendants, and not interfere therewith. The plaintiff's action being against the defendants and their sureties for specific performance of the contract, and for damages, etc., and there being evidence in defendant's behalf tending to show that the plaintiff had violated the conditions to be performed on his part, by appearing at the sale and suppressing the bidding thereat, in consequence of which there were no purchasers: *Held*, as to the sureties, the condition that the plaintiff should not so interfere was a condition precedent to any obligation on the part of defendant sureties; and as to the defendant principals, they were entitled to have the jury consider whether or not, under the evidence, they were entitled to be compensated for any loss they may have sustained, caused by the plaintiff's conduct at the sale, which was prejudicial to them. *Ibid.*

34. *Same—New Trials—Pleadings—Amendments to Pleadings—Issues.*—*Held*, under the evidence in this case, the issues submitted by the judge were insufficient to determine the rights of the parties upon the principles of law involved, and a new trial is ordered upon all the issues with suggestion that the parties replead, if so advised and permitted by the trial court, and that issues be so framed as to more clearly present the controversy to the jury. *Ibid.*

CONTRACTS—*Continued.*

35. *Contracts—Breach—Damages—Loss of Business—Profits Prevented—Duty of Damaged Party—Rule of Prudent Man.*—Where a party to a contract wilfully interferes with the other party and wrongfully causes him to quit operation, or prevents him from filling it, which results in loss to his established business and property used in his undertaking, the party so injured may recover in his action such damages as may reasonably be shown as a result of the wrong done him, including profits prevented thereby, after deducting therefrom such amount of the loss as he might have avoided in the exercise of ordinary business prudence. *Harrell v. Brinkley*, 624.

36. *Same—Evidence.*—Where a party to a contract may recover for the loss to his established business wrongfully caused by the breach of the other party, evidence of past profits may be shown as an element for the jury to consider in passing upon the issue, with the other facts in evidence. *Ibid.*

37. *Same—Nonsuit—Trials—Punitive Damages.*—The evidence in this case held sufficient to be submitted to the jury upon the question whether the defendants wrongfully prevented the plaintiff from fulfilling his obligation under a contract with him, within the life of the contract, causing loss to his business, etc., and the defendant's position that the loss was caused by the plaintiff's weakly submitting to the defendant's acts instead of asserting his rights is untenable. *Semble*, the plaintiff was entitled to recover punitive damages had he chosen to assert them. *Ibid.*

CONTRACTS TO CONVEY. See Mortgages, 1; Deeds and Conveyances, 13; Wills, 16.

CONTRIBUTING CAUSES. See Negligence, 4.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1, 4.

CONTROVERSY. See Constitutional Law, 16.

CONVERSION. See Wills, 11.

CONVICTION. See Intoxicating Liquor, 9.

CORPORATIONS. See Fraud, 1; Actions, 7; Limitation of Actions, 7; Taxation, 7.

1. *Corporations — Purchase — Absorption — Stockholders—Actions—Independent Promise.*—Two corporations by proper procedure agreed that the one should purchase the entire assets of the other, giving the stockholders of the selling corporation the right to take for their stock either cash from or stock in the purchasing corporation, at par value, and the purchasing corporation accordingly took over the assets of the selling one, and refused payment in cash to a stockholder in the latter company that he had elected to take, and he, upon the refusal of both corporations, brought action against them for the purchase price, in cash for his shares of stock: *Held*, the transaction between the corporations was for the personal benefit of the plaintiff, and he may maintain his action against the purchaser on its promise to pay, independently of any action of the selling corporation in which he was a shareholder. *Way v. Sea Food Co.*, 171.

CORPORATIONS—*Continued.*

2. *Same—Consideration.*—Where one corporation has absorbed or taken over the entire assets of another corporation, by purchase, under an agreement giving the stockholders in the latter the choice of taking stock in the purchasing corporation or cash for his stock, the transaction affords a consideration for the promise of the purchasing corporation to pay cash to a stockholder in the selling one, who has elected to sell for the cash, and duly notified both companies of his election, and made proper demand for the money, all before this action brought to recover the amount. *Ibid.*

3. *Corporations—Deeds and Conveyances—Seal—Statutes.*—While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. C. S., 1126 (3). *Bailey v. Hassell*, 450.

4. *Same—Adoption of Seal.*—The simple word "seal," with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. C. S., 1126 (3). *Ibid.*

5. *Corporations—Deeds and Conveyances—Probate—Statutes—Validating Acts.*—It is not necessary to the valid probate of a deed made by a corporation that it literally follow the statutory printed forms, C. S., 3326, if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that these officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seem to be cured under the provisions of C. S., 3354, and as to signatures of the officials by C. S., 3355. *Ibid.*

6. *Corporations—"Seal"—Probate—Statutes—Presumption.*—Where a conveyance of land purports upon its face to be the act of a corporation, and the word "seal" with a scroll has been used thereon, it is competent to show that the corporation had adopted for the purpose the word "seal" with a scroll in the place of the corporate stamp seal, which had been broken and could not be used; and that the officials signed as such were thereto authorized by the directors and stockholders of the corporation, although the statutory form of the probate, C. S., 3326, had not been strictly, though substantially, followed the presumption being that the officer taking the probate had complied with the requirements of the law as to corporate probate. *Ibid.*

7. *Same—Equity—Correction of Instrument.*—*Semble*, the power of courts of equity to correct, reform, and reëxecute an instrument upon sufficient allegation and proof extends to the probate of corporate deeds,

CORPORATIONS—*Continued.*

when it thereon appears that the president and secretary have executed it in behalf of the corporation in substantial compliance with the printed form of the statute. C. S., 3326. *Ibid.*

8. *Corporations—Seals—Probate—Parol Evidence—Appeal and Error.*—Parol evidence of the action of the stockholders and directors of a corporation in adopting the word "seal" in a scroll as its corporate seal and authorizing the conveyance of its lands by its president and secretary is admissible, when it is made to appear that there were no minutes kept of the meeting at which this action was taken, and the finding of the trial judge thereon is conclusive, on appeal, if there was evidence to support it. *Ibid.*

CORRECTION OF INSTRUMENT. See Corporations, 7.

COSTS. See Actions, 1; Appeal and Error, 17, 26, 33; Constitutional Law, 3.

Costs — Criminal Law — Submission — Statutes — Civil Actions—Jury—Trials.—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent and meaning of C. S., 1229, requiring in criminal cases a tax of $4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of $5 in civil action should be imposed, as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, being immaterial in construing the meaning of the statute. *S. v. Smith*, 728.

COUNSEL. See Appeal and Error, 18, 54.

COUNTERCLAIMS. See Statutes, 1.

COUNTS. See Criminal Law, 8.

COUNTY BOARDS. See Elections, 1.

COUNTY COMMISSIONERS. See Highways, 1, 2; Roads and Highways, 1.

COURTS. See Appeal and Error, 6, 15, 16, 20, 29; Witnesses, 1, 2; Elections, 3; Instructions, 14; Judgments, 3, 17, 21; Trials, 1; Attachments, 1; Actions, 2, 3; Constitutional Law, 4, 18, 21, 22; Divorce, 1; Pleadings, 4, 5, 6; Verdict, 2; Criminal Law, 5, 11; Municipal Corporations, 2; Statutes, 7.

1. *Courts — Attachments — Amendments of Warrant — Process—Service—Statutes.*—A warrant of attachment served by the sheriff of the county and addressed to "any constable or other lawful officer of the county," may be allowed by the court to be amended to conform to the statutory requirement. C. S., 547. *Temple v. LaBerge*, 252.

2. *Courts—Jurisdiction—Statutes—Demurrer—Special Appearance—Plea to Merits of Action—Waiver—Judgments.*—Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject

COURTS—*Continued.*

matter, it is to be taken as a general appearance as to the merits, waiving the objection as to proper service, and he will be bound by the adverse judgment of the court having jurisdiction over the subject-matter of the action. C. S., 511 (1). *Motor Co. v. Reaves*, 260.

3. *Same.*—The intent of the nonresident defendant to enter a special appearance and demur to the jurisdiction of the court upon the ground of insufficient service of summons on him, is ineffectual when it appears that he further denies in his demurrer the jurisdiction of the court over the subject-matter of the action, and thus goes to the merits of the controversy. *Ibid.*

4. *Courts—Jurisdiction—Judgments.*—The Superior Court is one of general jurisdiction, and reasonable intendment is presumed in favor of the validity of its judgments, which may not be impeached collaterally except for lack of jurisdiction of the cause or the parties, apparent on the face of the record; and in case jurisdiction has attached, the binding force and conclusions of such judgments is not impaired because it had been erroneously allowed, though the error may be undoubted and apparent on the face of the record. *King v. R. R.*, 442.

5. *Same.*—Generally, jurisdiction is the power lawfully conferred upon a court to deal with the general subject involved in the litigation, and the subject-matter exists whenever the court has jurisdiction of the class of cases and the parties to which the particular case belongs. *Ibid.*

6. *Same—Pleadings—Evidence—Actions — Defenses — Government—Railroads.*—The effect of the acts of Congress and the orders made by the United States Government in pursuance thereof, regarding actions at law and suits in equity against railroads, including death or injury to persons, etc., while such carriers were in possession, use, and control or operation of the United States Government, under the Director General of Railroads, etc., was not to create any question as to the jurisdiction of the State courts in matters theretofore cognizable by them, but only to afford immunity from suit when properly pleaded by the carriers and insisted on and maintained according to the course and practice of the courts. *Ibid.*

7. *Same—Appeal and Error—Final Judgments.*—Where, during the control by the United States of railroads, a railroad subject thereto has permitted a judgment to be rendered against it without availing itself of the defense from liability under the Federal statutes and the Government orders made in pursuance thereof, and a final judgment fixing liability upon the railroad has been rendered notice of appeal to the Supreme Court given, but not perfected, the judgment so rendered is not void for the lack of jurisdiction in our courts, and may not be declared void in an action brought to enforce it after the railroad has been returned by the Government to private control. *Ibid.*

8. *Same—Execution—Federal Statutes.*—The effect of the inhibition that no execution shall issue against the property of a carrier that had been under Federal control, etc., provided by the Federal act restoring such railroad to private ownership, does not arise for interpretation before such execution is sought to be levied; but the question is considered on this appeal, the answer containing averment that

COURTS—*Continued.*

the plaintiff is wrongfully seeking in the present suit to avoid the force and effect of the statutory provision; and *semble*, it would be lawful for the execution to issue on the defendant's property under a proper judgment. *Ibid.*

9. *Same.*—The effect of the Federal statute terminating the control of railroads by the United States Government, 41 Statutes at Large, ch. 91, sec. 200, by correct interpretation, is to apply its provisions to judgments provided by the act, or, at most, to those and other judgments for such causes of action which had been permitted and obtained against the Director General under other and cognate legislation, and the effect of sec. 10, ch. 25, Federal Statutes of 1918 (40 Statutes at Large, p. 456), was to protect the properties taken over from physical interference by execution, under judgment by creditors or third parties, as a necessary inhibition to the efficient user of the roads by the Government in the successful prosecution of the war, and from its terms and purpose would cease when such necessity no longer existed, and the Government control had lawfully terminated. *Ibid.*

10. *Same—Multiplicity of Suits—State Statutes.*—The defendant railroad, as lessor of the Southern Railroad Company, was sued in the Superior Court for damages for the alleged negligent killing by its lessee road of the plaintiff's intestate, during the United States Government control of railroads, including the lessee, as a war measure, and without interposing a defense under the Federal statutes and orders of the United States Government, a judgment final was obtained against the defendant in due course and practice of the courts. After the railroad's properties were restored to private ownership under the Federal statutes, the plaintiff brought his action upon the judgment theretofore rendered: *Held*, his second action may be prosecuted. C. S., 437, 601. *Ibid.*

11. *Courts—Practice—Federal Courts—State Courts.—Semble*, the Federal courts follow the rules of practice in the state courts holding an exception to the charge is sufficient on appeal, without a request for instruction, when the charge is an erroneous statement of the measure of damages to be awarded by the jury for a wrongful death, in this case the negligent killing by a railroad company of its employee. *Strunks v. Payne*, 584.

COVENANTS. See Easements, 1.

CREDITORS. See Limitation of Actions, 11.

CRIMINAL LAW. See Intoxicating Liquors, 3, 5, 10; Judgments, 21; Appeal and Error, 53; Assault and Battery, 1; Constitutional Law, 17, 22; Costs, 1; Evidence, 12, 15, 16; Instructions, 13, 16.

1. *Criminal Law—Evidence—Nonsuit.*—Upon a motion as of nonsuit, in a criminal action, the State is entitled to the most favorable consideration of the evidence. *S. v. Johnson*, 637.

2. *Criminal Law—Evidence—Nonsuit—Statutes.*—Where the State's evidence and that of the defendant is substantially to the same effect, in an action for an assault, and tends only to exculpate the defendant,

CRIMINAL LAW—*Continued.*

his motion as of nonsuit after all the evidence has been introduced, considering it as a whole, should be sustained. C. S., 4643. *S. v. Fulcher*, 663.

3. *Same—Assault—Parent and Child—Right of Parent to Protect His Child.*—The father may shield his child from the assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. C. S., 4643. *Ibid.*

4. *Criminal Law—Sentence.*—The sentence of a defendant for a criminal offense does not require the fixing of the commencement of the term of the imprisonment, and is complete if it specifies the kind of punishment to be given and the duration thereof. *S. v. Vickers*, 676.

5. *Same—Courts—Capias—Clerks of Court—Sheriffs.*—A court having jurisdiction may order the arrest of one already convicted, for the enforcement of its sentence, if the defendant is present at the time; and if not present, the court may order a *capias* to be issued by the clerk to bring him before the court for sentence. *Ibid.*

6. *Same—Judgments—Suspended Judgments.*—An order for the arrest of a defendant by *capias* to be issued by the clerk of the court, for the enforcement of its sentence, upon the application to him by the sheriff of the county, is not in that respect a suspended judgment. *Ibid.*

7. *Criminal Law—Prosecution in Good Faith—Evidence—Appeal and Error—Prejudice—Reversible Error.*—In an action for embezzlement it was competent to ask the prosecutor, on cross-examination, if he was acting therein in behalf of another in attempting to obtain from the defendant a deed to land involved in a civil action, upon the question of the prosecutor's good faith, etc., and a refusal to allow such examination constitutes reversible error. *S. v. Flowers*, 688.

8. *Criminal Law—General Verdict—Counts in the Indictment.*—A general verdict of guilty upon several counts in a bill of indictment will be interpreted to apply to the one alone, if only one, that is supported by the evidence, and to which the charge of the court was directed, and to which the case has been confined upon the trial; and not to such others that would violate the theory upon which the criminal action was tried, and was unsupported by the evidence and ignored by the charge. *S. v. Bell*, 701.

9. *Criminal Law—Reasonable Doubt Defined.*—The reasonable doubt of defendant's guilt in a criminal action beyond which the State must satisfy the jury is not a vain, imaginary, or fanciful doubt; and it is required that the jury be entirely satisfied or convinced of the defendant's guilt, before convicting him, or that they be satisfied thereof to a moral certainty, after considering, comparing, and weighing all the evidence; and if then there should be a reasonable doubt existing in their minds, as to his guilt of the offense charged, their verdict should acquit him. *S. v. Schoolfield*, 722.

10. *Criminal Law—Evidence—Other Offenses—Scienter—Guilty Knowledge—Related Criminal Acts.*—The principle upon which other offenses

CRIMINAL LAW—*Continued.*

may be shown to have been committed against our criminal law by the defendant, though not charged therewith in the indictment, should be strictly construed, and applies only when they are so related with the unlawful act charged as to show *scienter* or guilty knowledge, if such is relevant to the inquiry in the particular case, and not too remote in point of time; and where the defendant is on trial for having possession of spirituous liquor for the purpose of sale, evidence that he had committed a like offense eleven years previous to the time of the offense charged is incompetent, and its admission at the trial constitutes reversible error when there is no evidence tending to show that the previous offense was related to or in any way connected with the one for which he was being tried. *S. v. Beam*, 179 N. C., 768, and other cases, cited and applied, and the competency and relevancy of such testimony discussed by WALKER, J. *S. v. Beam*, 731.

11. *Criminal Law—Sentence—Discretion of Court—Courts—Inference—Appeal and Error.*—A permissible inference that the trial judge increased the sentence of the defendant, convicted of an assault and battery, because the defendant later exercised his right of appeal, on the facts of the record *is held* insufficient to justify the Supreme Court in setting the judgment aside on the ground that the judge has grossly abused the exercise of the legal discretion given him by the law. *S. v. Sudderth*, 754.

12. *Criminal Law—Homicide—Murder—Manslaughter—Instructions—Appeal and Error—Objections and Exceptions.*—Where, upon the trial of one charged with homicide, there is evidence tending to show murder in the first degree, murder in the second degree, manslaughter, and self-defense, it is the duty of the presiding judge, in his charge to the jury, to declare and explain the various phases of the evidence relating to self-defense, and to the various degrees of felonious homicide, and his failure to instruct upon all the essential questions of law properly raised by the evidence constitutes as to each reversible error, which is presented by exception on appeal without specifically raising the question of error complained of by prayers for instructions tendered and refused. *S. v. Thomas*, 757.

13. *Same—Statutes—Malice.*—Where, upon a trial for a homicide, the prisoner has admitted the killing with a pistol, and relies upon the plea of self-defense, and the evidence presents for the consideration of the jury murder in the first degree, murder in the second degree, and manslaughter, and the prisoner has been convicted of murder in the second degree, it is reversible error for the trial judge to charge the jury as to the law relating to murder in the first degree under the provisions of C. S., 4200, and then to instruct them that all other killings would be murder in the second degree, for this would deprive the prisoner of such of the evidence as tended to repel the inference of malice from the killing with a deadly weapon, which, if established, would, at least, reduce the grade to the offense of manslaughter. *Ibid.*

14. *Same.*—A charge which fails to instruct the jury as to the law upon every essential phase of the evidence relating to the degrees of felonious homicide is reversible error, and an exception for failure to

CRIMINAL LAW—*Continued.*

charge the jury concerning the various degrees when the evidence presents them takes the question to the Supreme Court on appeal without the necessity of its presentation by defendant's request for special instruction. The necessary elements of the criminal offense of manslaughter arising under the evidence in relation to the charge given in this case discussed by ADAMS, J. *Ibid.*

15. *Criminal Law—Evidence—Identity—Nonsuit—Trials.*—Where the prisoner is being tried for violating the criminal law upon the question of his identity, as one who participated in the commission of the crime charged, but who broke away from the officer, the testimony of the officer, on cross-examination, that he could be mistaken, but the prisoner looked very much like the one, and that to the best of his knowledge and belief he was the same as the one upon whose face he had flashed the searchlight, is sufficient to sustain a verdict of guilty with the other evidences of identity introduced at the trial, unobjected to by the prisoner. *S. v. Buckner*, 767.

16. *Criminal Law—Punishment—State's Prison—"Penitentiary."*—The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meannig the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. *S. v. Burnett*, 784.

17. *Criminal Law—Several Defendants—Admissions.*—Where several defendants are on trial for a criminal offense, the admissions of one are properly confined by the court to the one having made them, and excluded as to the others. *Ibid.*

CUSTOM. See Appeal and Error, 24.

CUSTODY. See Constitutional Law, 4.

DAMAGES. See Appeal and Error, 2, 9, 36, 37; Betterments, 1; Negligence, 8; Carriers, 1, 2, 3, 7, 12, 13, 14; Contracts, 13, 20; Municipal Corporations, 1; Principal and Agent, 1; Slander, 1, 4, 6; Trespass, 2; Contracts, 32, 35; Judgments, 4; Instructions, 8; Adverse Possession, 2; Employer and Employee, 4; Compromise and Settlement, 1.

1. *Damages—Consequential Damages—Contracts—Breach—Tort.*—Consequential damages awarded in an action for breach of contract must be such as may fairly have been in the contemplation of the parties at the time the contract was made; and in tort arising therefrom, such as must be the natural and proximate consequence of the act complained of, and as naturally arising, according to the usual course of things, from the breach of the contract, in the absence of malice, fraud, oppression, or evil intent; and these damages are practically the same whether they arise either by breach of contract or in the tort resulting therefrom. As to whether the time of the application of the principle is the same as to actions arising from breach of the contract, and the tort committed, *quere*, the question not being presented by the facts of this case. *Johnson v. R. R.*, 101.

2. *Damages—Contracts—Torts—Duty of Injured Party.*—The party damaged by either a breach of contract or in tort therein arising is required to do what he can in the exercise of a reasonable care and

DAMAGES—*Continued.*

diligence to avoid or lessen the consequence of the wrong, and for any part of the loss incident to such failure no recovery can be had. *Ibid.*

3. *Same—Carriers of Goods—Railroads—Ejecting Passenger.*—A passenger wrongfully ejected from the defendant carrier's passenger train is not entitled to recover consequential damages in his action for the loss of his rights and consequent profits under a contract he had made with a third person, of which the carrier was unaware, and caused by the failure of the passenger to meet an appointment with laborers at his destination, necessary to the performance of his contract. *Ibid.*

4. *Damages—Statutes—Federal Employers' Liability Act—Compensation—Negligence—Wrongful Death—Present Value—Railroads.*—The measure of damages under the Federal Employer's Liability Act for the negligent killing of plaintiff's intestate, an employee of the defendant railroad company, is for "compensation" to the legal dependents, to be computed at the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance, according to the circumstances, for the earning power of money. *Strunks v. Payne*, 583.

DANGER. See Employee and Employer, 2; Negligence, 5.

DATE. See Judgments, 17.

DEALERS. See Insurance, 7.

DEATH. See Insurance, 5.

DEBT. See Schools, 1.

DEBTOR AND CREDITOR. See Judgments, 8; Limitation of Actions, 8.

DECEIT. See Contracts, 2.

DECLARATIONS. See Betterments, 3; Vendor and Purchaser, 2; Intoxicating Liquors, 6.

DEEDS AND CONVEYANCES. See Evidence, 5, 6, 7, 10; Instructions, 4; Mortgages, 8; Adjoining Landowners, 2; Corporations, 3, 5; Easements, 1; Wills, 16; Appeal and Error, 45; Betterments, 3; Contracts, 3; Estates, 1; Limitation of Actions, 3; Principal and Agent, 5; Trusts, 1.

1. *Deeds and Conveyances—Boundaries—Natural Boundaries—Evidence.*—In order to the application of the rule that where natural objects or muniments of title are called for as the boundaries described in grants or deeds, they generally control or prevail over courses and distances, it is essential that the muniments or objects relied on be identified, or their location admitted or established beyond controversy, and in this event the location may become a matter of legal interpretation. *Hoge v. Lee*, 44.

2. *Same—Trials—Admissions—Questions of Law.*—Where muniments of title or natural objects are called for in a grant or deed to lands, the subject of the action, concerning the location of which there is a dispute between the parties upon conflicting evidence, or where the

DEEDS AND CONVEYANCES—*Continued.*

evidence tends to show two or more natural objects that may answer the description, the question of the location of the boundaries dependent thereon must be determined by the jury under the instructions of the court. *Ibid.*

3. *Deeds and Conveyances—Boundaries—Natural Boundaries—Natural Reputation—Evidence.*—Where the location of the lands in dispute is dependent upon the true location of a natural boundary called for in a grant or deed under which a party to the action claims title, in this case, the location of "the head of Juniper Swamp," and there is evidence to sustain the contentions of both the plaintiff and the defendant, testimony of a witness that he had known the point, or had it pointed out to him five or seven years ago, is not competent. *Ibid.*

4. *Same—Hearsay Evidence.*—Testimony as to common reputation of the location of a natural object in the description in a deed or grant of land should have its origin at a time comparatively remote, should be *ante litem motam;* and it should attach itself to such boundary or natural object, or be fortified by evidence of occupation or acquiescence tending to give the land some fixed and definite location; and evidence of such reputation extending over a period of only five or seven years, is insufficient. *Ibid.*

5. *Same—Rule of Evidence.*—The restrictions on the declarations of an individual concerning private boundary are that such declarations be made *ante litem motam;* that the declarant be dead when they were offered, and that the declarant be disinterested when they were made. *Ibid.*

6. *Same—Instructions—Admissions.*—The descriptions and calls in a junior grant may not be received as evidence of the boundaries of a senior grant, but a reference in a later deed to the location of land described in an older deed may, in connection with other evidence, become competent as an admission of the grantee named in the deed containing such reference. *Ibid.*

7. *Deeds and Conveyances—Equity—Fraud—Evidence—Values of Land.*—Where a suit has been brought to set aside plaintiff's deed to land alleged to be void upon the ground of fraudulent promises of the defendant to render continued services to the plaintiff, that he did not intend to perform, of which there is evidence, and the defendant contends, with his evidence, that the consideration was for past services already rendered, testimony in plaintiff's behalf as to the value of the land at the time of the agreement and the value at the time of the trial, is competent, when in confirmation of the plaintiff's position, and tends to impeach or weaken the evidence of the defendant in regard to the value of the services he claims he has rendered *Williams v. Hedgepeth,* 115.

8. *Deeds and Conveyances—Ejectment—Reservations in Deed—Burden of Proof.*—The burden is on the defendant in ejectment, claiming that the *locus in quo* is within the exception of the plaintiff's deed, both claiming under a common source of title, to show that it is, in order to maintain his defense. *Southgate v. Elfenbein,* 129.

9. *Same—Evidence—Nonsuit—Questions for Jury—Trials.*—The plaintiff and defendant in ejectment claimed under a common source of title

DEEDS AND CONVEYANCES—*Continued.*

and the defendant relied upon the contention that the *locus in quo* was within the reservation of the plaintiff's deed, and the reservations were not set out in plaintiff's deeds by particular metes and bounds, but incorporated therein by reference to other deeds, which were not offered in evidence: *Held*, the case was one for the jury, and defendants' motion as of nonsuit upon the evidence was improperly granted. *Ibid.*

10. *Deeds and Conveyances—Formal Parts—Interpretation—Grantor and Grantee.*—The formal parts of a deed are construed together to ascertain the intent of the grantor, and though it is necessary that there should be a grantor and a grantee, it is not required that their names should appear in any particular part of the deed, where there is no repugnancy, if the deed is signed properly by those assuming to convey, and it elsewhere appears that the grantor and grantee are mentioned sufficiently clear to designate them as the respective necessary parties. *Berry v. Cedar Works*, 187.

11. *Deeds and Conveyances—Interpretation.*—A deed to lands will be so construed as to effectuate the intent of the parties as gathered from each and every related part. *Bank v. Vass*, 295.

12. *Same—Adjoining Landowners—Light and Air—Party Walls—Alleys—Easements.*—A conveyance of a part of the owner's lands from a line running in the center of a dividing wall of his store building in the business section of a city, conveys to the grantee the right to build to that wall; and where the right to the permanent joint use of an alleyway running along this wall is also conveyed by or reserved in the deed, the conveyance or reservation of this right does not preclude the grantee from using the party wall by arching over the alleyway and preserving its proper use as such. *Ibid.*

13. *Deeds and Conveyances—Lands—Subdivisions—Maps—Plats—Streets—Lots—Limitation as to Size and Frontage—Purchasers—Equity—Contracts to Convey—Title.*—The plaintiff was a purchaser of a subdivision of land remaining undeveloped by the original owner, who had sold lots in his other subdivisions with restriction as to the size of the lots and their frontage upon the streets, each of the subdivisions being separate and distinct *(Stephens v. Home Co.*, 181 N. C., 335), without having adopted any definite plan or fixed purpose affecting the area or frontage of the lots in the subdivision acquired and being developed by the plaintiff, but had plats or maps made and recorded showing only a tentative or prospective plan of the sale of the entire property that were open to inspection by proposed purchasers. Having acquired the *locus in quo*, the plaintiff platted it into lots of smaller area and less frontage on the platted streets, and accordingly sold some of them, but the defendant refused to specifically perform his contract of purchase on the ground that the purchasers of lots of the other subdivisions, from the original owner, had acquired the right or equity of having the lots in this subdivision of the same size and frontage as the lots in the other subdivisions, in which they had purchased: *Held*, the equity relied on by the defendant did not apply to the facts of this case, and the defense that a good title could not be made by the plaintiff by reason of the limitations in the deeds to purchasers made by the original owner was untenable. Instances

DEEDS AND CONVEYANCES—*Continued.*

wherein lands have been platted into streets and lots, and sold upon the strength of representations made thereby, or covenants to that effect contained in the purchaser's deeds, have no application to the facts of this case. *Homes Co. v. Falls*, 426.

DEFAULT. See Judgments, 2.

DEFECTS. See Railroads, 5.

DEFENSES. See Bankruptcy, 1; Courts, 6; Homicide, 4.

DEMURRER. See Courts, 2; Pleadings, 3; Actions, 11.

DEPOSITIONS. See Trials, 1.

DEPOSITS. See Banks and Banking, 3; Executions, 6.

DEPOT. See Railroads, 1.

DESCENT AND DISTRIBUTION. See Wills, 4, 5.

DESCRIPTIO PERSONÆ. See Statutes, 11.

DEVISES. See Estates, 1; Wills, 1, 17, 19.

DIRECTING VERDICT. See Attachment, 8; Instructions, 9.

DIRECTORS. See Fraud, 1.

DIRECTOR GENERAL OF RAILROADS. See Carriers, 11; Judgments, 1.

DISABILITIES. See Insurance, 4.

DISCHARGE. See Bankruptcy, 1; Principal and Surety, 1; Employer and Employee, 4.

DISCOVERY.

Discovery — Evidence — Examination of Parties — Statutes—Appeal and Error—Parties.—An affidavit in support of a motion in the cause, to allow the plaintiffs to examine the defendant adversely under the provisions of C. S., 900, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law, under a paper-writing purporting to be a will, but which had been set aside by the court upon *caveat* entered, and that this was the only available way in which certain information necessary in the action could be obtained, etc., *is held* sufficient to sustain the order of examination allowed by the clerk and approved by the judge of the Superior Court, and defendant's appeal is accordingly dismissed in the Supreme Court. *Jones v. Guano Co.*, 180 N. C., 319, cited and distinguished. *Whitehurst v. Hinton*, 11.

DISCRETION. See Injunctions, 1; Witnesses, 1; Pleadings, 4; Municipal Corporations, 2; Appeal and Error, 27, 30; Verdict, 2; Criminal Law, 11; Constitutional Law, 22.

DISCRIMINATION. See Instructions, 1; Constitutional Law, 1.

DISMISSAL. See Appeal and Error, 10, 20, 27, 33.

DIVORCE. See Trusts, 2; Constitutional Law, 4; Statutes, 8.

Divorce—Husband and Wife—Parent and Child—Habeas Corpus—Courts —Jurisdiction—Juvenile Courts.—The Superior Court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, C. S., 1664, and though by proceedings in *habeas corpus* under the provisions of C. S., 2241, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or suing for a decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. *Quere*, whether the statutes relating to the juvenile courts confer juridiction in such instances. *In re Blake*, 278.

DOCKET. See Liens, 2.

DOMICILE. See Taxation, 2, 4.

DOWER. See Mortgages, 1.

DRAFTS. See Bills and Notes, 3; Banks and Banking, 6.

DRAINS. See Municipal Corporations, 1.

DUTIES. See Damages, 2; Employer and Employee, 1, 7; Contracts, 35.

EASEMENTS. See Deeds and Conveyances, 5.

Easements—Deeds and Conveyances—Covenants—Breach—Lakes—Boating and Fishing—Servient Tenement—Dominant Tenement—Actions.—A deed to a lot of land, included in a large tract thereof developed into a summer resort, whereon a large lake had been made by damming a stream flowing through it, that has a covenant running with the land giving the owner upon its banks, and his successors in title, the right of boating, fishing, bathing, etc., creates an easement in favor of the grantee and his successors in title, constituting the said property of the grantor the servient and that of the grantee the dominant tenement in reference to the rights and privileges described and specified in the instrument; and in the absence of an express agreement in the instrument, the owner of the servient tenement is not bound to maintain such easement or keep it in repair; and where the dam has been later swept away by an unusual and unprecedented rainfall in this vicinity, no cause of action lies in favor of the grantee in the deed to compel the grantor to rebuild the dam, or to recover damages for being deprived of the benefits he had acquired under the covenants in the deed. *Richardson v. Jennings*, 559.

EDUCATION. See Constitutional Law, 13.

EJECTMENT. See Betterments, 1; Deeds and Conveyances, 8.

Ejectment—Instructions—Appeal and Error.—Upon the trial of this action in ejectment and for damages, the charge of the court upon the principles of constructive and adverse possession are held to be without error. *James v. Baker*, 612.

ELECTIONS. See Taxation, 6; Constitutional Law, 10; Appeal and Error, 44; Schools, 1, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16.

1. *Elections—Primary Law—County Board—Powers of Review—Qualification of Electors—Returns.*—Under our primary law the right of a proposed elector to vote for the party's choice of a county official, in this case a register of deeds, is expressly referred to the precinct registrar and judges of election, without power of review, or otherwise, in the county board of elections, the authority of the county board extending only to supervise or to review "errors in tabulating returns or filling out blanks." C. S., 6042-6048. *Rowland v. Board of Elections*, 78.

2. *Same—Mandamus.*—Where the county board of elections has assumed to pass upon the qualifications of the electors voting in a primary for the selection of a party candidate for a county office, and in so doing has declared certain of the electors disqualified, and has accordingly changed its returns and declared the one appearing to have received a smaller vote, the choice of the party as a candidate, an action will lie by the one appearing to have received the larger vote, against the county board, to compel them, by *mandamus*, to tabulate the returns made by the registrars and judges of the precinct, and then to publish and declare the same as the result of the election. C. S., 6042-6048. *Ibid.*

3. *Elections—Primary Law—Statute—Legislative Powers—Courts.*—The courts will not determine the reasonableness of the legislative enactment differentiating the authority of the county board of elections in passing upon the qualification of the electors of a precinct in a primary selection of a candidate for a county office, from the powers to be exercised by it in a general election, this being a matter entirely within the province of legislation and not subject to judicial inquiry by the courts. *Ibid.*

4. *Elections—Primary Law—Repealing Statutes.*—The primary law to select a party candidate for a county office repeals all laws inconsistent with its provisions, and by incorporating therein certain provisions of the general election law, confers no authority on the county board of electors to pass upon the qualifications of the voters of a precinct, and thereby change the result of the election from that appearing upon the face of the returns it had officially tabulated. *Ibid.*

EMINENT DOMAIN. See Municipal Corporations, 2, 4.

EMPLOYER AND EMPLOYEE. See Wills, 19, 24; Trespass, 1; Appeal and Error, 24, 25; Railroads, 2.

1. *Employer and Employee—Master and Servant—Duty of Employer—Safe Appliances—Negligence—Evidence.*—The plaintiff was employed in the defendant's knitting mill, among other things, to place stockings, after they had been dyed, into a basket or receptacle for drying, and which he was to revolve for that purpose, at great speed, with power-driven machinery; that there was an opening in this basket through which the ends or parts of the stockings would fly from the revolving basket, importing menace to the operator, and which was closed in more improved devices of this sort, and which, in the present case, could have been closed at small expense without diminishing the use-

EMPLOYER AND EMPLOYEE—*Continued.*

fulness of the basket; that while operating the machine the plaintiff's arm was caught by the flying ends of the stockings and thus drawn into the machinery and severely injured: *Held*, sufficient to take the case to the jury upon the issue of the defendant's actionable negligence in proximately causing the plaintiff's injury by its failure to exercise reasonable care in the selection of the appliance with which the plaintiff was required to work. *Lacey v. Hosiery Co.*, 19.

2. *Same—Rule of the Prudent Man—Appliances Known and Approved—Unnecessary Dangers.*—The duty of an employer to furnish an employee, in the observance of ordinary care in the selection of power-driven appliances at which the employee is required to work in the performance of his duties, is not fully met when he furnishes like appliances to those known and approved and in general use in plants of the same character, for it is also required of him, under the rule of the prudent man, not to subject his employee to obvious and unnecessary dangers, which could be readily removed without destroying or seriously impairing the efficacy of the implement, and of which he knew, or should have known under the circumstances, in the exercise of ordinary care. *Ibid.*

3. *Employer and Employee—Master and Servant—Contracts—Consideration—Bonus—Supplementary Contracts.*—An offer of a bonus by an employer to such of his employees working for wages by the week, as would continue to work for a designated period of months, is a supplementary contract to that by the week, and becomes binding on the promisor, without express agreement by the employee, when the latter continues to work under the inducement offered. *Roberts v. Mills*, 406.

4. *Same—Discharge of Employee—Damages—Quantum Meruit.*—Where an employee by the week continues to work during the period for which his employer has offered a bonus, and is discharged without lawful excuse by the employer before the ending of the term, he is entitled to recover his weekly wage, under his contract relating thereto, to the time of his discharge, and upon his supplementary contract for the bonus to that time upon a *quantum meruit*, the question as to whether the employer had a reasonable ground to discharge his employee being for the jury upon conflicting evidence. *Ibid.*

5. *Same—Husband and Wife.*—Where the employees of a manufacturing plant, working for a bonus under the promise of their employer, are husband and wife, living together in the tenant house on the company's premises, the discharge of the husband accompanied with an order to leave the premises he was occupying with his wife, is an implied discharge of his wife also. *Ibid.*

6. *Employer and Employee—Master and Servant—Carriers of Freight—Railroads—Negligence—Federal Employers' Liability Act—Automatic Couplings—Federal Safety Appliance Act—Contributory Negligence—Assumption of Risk—Instructions.*—The plaintiff was employed in interstate commerce as head brakeman by the defendant railroad company with the duty to set all through switches and to couple and uncouple cars, and while performing this duty he was struck and injured while cutting off a car coupled to the train with an improper

EMPLOYER AND EMPLOYEE—*Continued.*

automatic coupler used in violation of the Federal statute known as the "Safety Appliance Act," by his striking a car that had been placed on the "house track" under his supervision, with conflicting evidence as to whether this car had been placed in the "clear," and the conductor so informed: *Held*, in an action brought under the Federal Employers' Liability Act, the refusal of a requested instruction by the defendant that the injury would be due to the plaintiff's contributory negligence if it was caused by the close proximity of the car on the house track under the circumstances was not erroneous; and an instruction of the court that the defendant would be answerable if the violation of the Federal statute contributed to the injury was proper, both upon the issues of contributory negligence and assumption of risks. *Gordon v. R. R.*, 544.

7. *Employer and Employee—Master and Servant—Safe Appliances—Duty of Master—Ordinary Tools—Reasonable Care of Selection—Negligence.*—The principle requiring an employer, in the exercise of reasonable care, to furnish to his employees a safe place to work, and provide them with implements, tools, and appliances suitable to the work in which they are engaged, applies to simple or ordinary tools where the defect is readily observed, and of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and the employer should have known of the defect, or discovered it under the duty of inspection ordinarily incumbent upon him in tools of this character, and the injury complained of occurred without having afforded the employee an opportunity of remedying the defect. *McKinney v. Adams*, 562.

8. *Same—Evidence—Nonsuit—Questions for Jury—Trials.*—The plaintiff, an employee of the defendant, was furnished by the defendant's foreman, to trim limbs from logs, in the course of his employment, an axe with a split handle that made "a limber, switchy handle," with which one could not strike true, the foreman telling the plaintiff during his work to be careful, that the axe was sharp, and he might cut his foot, which a little later he did, without having an opportunity to remedy the defect, and caused substantial damage, the subject of the action, the axe having glanced from a small dead snag on a limb he was trimming by reason of the limber handle: *Held*, sufficient evidence of actionable negligence, and defendant's motion as of nonsuit was properly overruled. *Ibid.*

ENTRY. See Liens, 2.

EQUITY. See Banks and Banking, 2; Betterments, 1; Contracts, 3; Deeds and Conveyances, 7, 13; Injunction, 2; Mortgages, 1, 7; Trials, 1; Execution, 2; Corporations, 7; Wills, 11.

ESTATES. See Wills, 4, 7, 14, 17; Adverse Possession, 2; Limitation of Actions, 11.

Estates—Wills—Devise—Tenants in Common—Deeds and Conveyances.—An estate devised to the step-daughter of the testator "to her and to her children and children's children," possession to be given after the death of the testator and his wife, the testator and his wife being dead, leaving the devisee alive with two living children without children: *Held*, the title to the estate vested in the step-daughter and her

ESTATES—*Continued.*

two children, as tenants in common, and the deed of the daughter and her husband was alone insufficient to convey a full and complete title to the lands. *Benbury v. Butts*, 23.

ESTOPPEL. See Judgments, 18; Municipal Corporations, 4.

EVIDENCE. See Appeal and Error, 4, 15, 18, 21, 23, 29, 32, 39, 40, 42, 45, 54, 57; Betterments, 2; Carriers, 9, 17, 18; Contracts, 9, 11, 17, 19, 21, 27, 36; Deeds and Conveyances, 1, 3, 5, 7, 9; Discovery, 1; Employer and Employee, 1, 8; Injunction, 1; Instructions, 2, 9, 10, 11, 16; Insurance, 1; Mortgages, 3; Principal and Agent, 4, 6; Slander, 3, 6; Trespass, 1, 3; Verdict, 1; Bills and Notes, 7; Criminal Law, 1, 2, 5, 7, 10, 15; Fraud, 1; Judgments, 9; Wills, 20; Pleadings, 2; Witnesses, 2, 3; Highways, 3; Constitutional Law, 5; Assault and Battery, 1; Jury, 1; Statutes, 1; Attachment, 8; Homicide, 1, 2, 9, 10, 11; Courts, 6; Railroads, 2; Trials, 2, 3; Vendor and Purchaser, 1, 2; Intoxicating Liquors, 2, 3, 4, 5, 6, 7, 8, 10, 13, 14; Rape, 1.

1. *Evidence—Nonsuit—Motions—Statutes.*—Under the provisions of C. S., 567, the defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed. *Blackman v. Woodmen*, 76.

2. *Evidence—Sufficiency—Appeal and Error—Actions.*—The plaintiff's evidence will be taken as true in passing upon the defendant's position that it was insufficient to prove his cause of action. *Harrison v. R. R.*, 87.

3. *Evidence—Written Contracts—Lost Writing—Contents—Search—Notice to Produce.*—Where a party to a written duplicated contract desires to introduce parol evidence of its terms, on the ground that he had lost his own copy, and on the failure of the adverse party to produce the duplicate original after notice, it is necessary that he shall have reasonably exhausted all sources of information and means of discovery of his own copy, of which the circumstances would suggest, and which were accessible to him; and the written notice to produce must also be reasonable as to time and place. *Sermons v. Allen*, 127.

4. *Same—Nonresident Party.*—Where the adverse party, to whom notice to produce a written contract, the subject of the action, is to be given, resides at a different place from that of the trial, it is required, for the introduction of parol evidence of the terms of the writing, that such notice shall have been given him before he had left home to attend the trial, and notice thereof given him during the trial of the cause is insufficient. *Ibid.*

5. *Evidence—Grants—Deeds and Conveyances—Boundaries—Location of Lands—Substantive Facts—Questions for Jury—Trials.*—Where, in an action of trespass, a surveyor has testified that he knows the boundaries of the land in dispute as described in the complaint, he may testify that they are within the natural boundaries set out in a grant from the State, upon which the plaintiff relies, and such evidence, being of a substantive fact, is not objectionable as involving

EVIDENCE—*Continued.*

a vital matter on which the parties were at issue, or that it assumed to determine an essential element of the verdict for the jury to decide. *Berry v. Cedar Works*, 187.

6. *Evidence—Deeds and Conveyances—Color—Adverse Possession—Fraud.* A deed in the chain of title of a party in an action of trespass does not lose its character as color under which sufficient adverse possession will ripen his title, by reason of fraud in a prior grantor, the deed being valid until set aside by a court of equity. *Ibid.*

7. *Evidence—Deeds and Conveyances—Probate—Parol Evidence—Written Instruments.*—Where the probate of a corporation's deed for land is in substantial compliance with the statutory form, C. S., 3326, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. *Bailey v. Hassell*, 451.

8. *Evidence—Burden of Proof—Carriers of Goods—Express Companies—Loss of Shipment—Trials—Appeal and Error.*—In an action against an express company to recover a certain amount of currency alleged to have been stolen while in the defendant's possession under its contract of carriage, and delivered to it in a bag also containing silver money, sealed and delivered in the same condition to the plaintiff, the consignee, and opened by the plaintiff in the absence of the defendant's agents or employees, when the loss was first discovered, the burden of proof is on the plaintiff to show this fact in issue, upon the principle that this particular fact, necessary to be proved, was peculiarly within the plaintiff's knowledge, and this principle involving an important and indispensable right, it is reversible error for the trial judge to place the burden of proof thereof upon the defendant. *Hosiery Co. v. Express Co.*, 477.

9. *Same.*—In an action against a common carrier to recover for the loss of or damage to a shipment of goods under a contract of carriage, the plaintiff must show the delivery to the carrier; an undertaking on the carrier's part, express or implied, to transport them; a failure of the carrier to perform its contract or duty, *i. e.*, nondelivery of the goods or delivery in a damaged condition; and upon the failure of the plaintiff to thus make out a *prima facie* case the carrier is not required to offer any evidence. *Ibid.*

10. *Evidence—Nonexpert Testimony—Deeds and Conveyances—Mental Condition—Opinion.*—A witness may not only testify to the facts he knows concerning a grantor whose deed is being impeached for his mental incapacity to have made it, but may also give his opinion or belief upon the personal knowledge he has of his sanity or insanity. *Trust Co. v. Gear*, 612.

11. *Evidence—Nonsuit—Trials.—Combs v. Extract Co.*, 631.

12. *Evidence—Criminal Law—Preliminary Hearings—Trials—Witnesses—Testimony as to Evidence at Former Hearing—Common Law.*—Under the common-law rule, where a witness in a criminal action on the preliminary trail in a court having jurisdiction, has been examined by the State under oath, in the presence of the defendant, to whom the right to cross-examine has been accorded, and being bound over

EVIDENCE—*Continued.*

to the Superior Court, it has been properly made to appear that his presence had wrongfully been prevented at the trial by the act of procurement of the defendant, it is competent, at the second trial, to show, by the testimony of another witness, that he was present at the preliminary trial and to his own knowledge the absent witness had there sworn to a certain state of facts relevant to the inquiry. *S. v. Maynard*, 653.

13. *Same—Stenographer's Notes.*—In the above case the stenographer's transcribed notes, taken at the preliminary trial of a criminal action, are competent evidence on the second hearing of what a witness had testified on the former one, when the stenographer, as a witness, has testified that his notes are substantially correct; and they come within the common-law rule as to the admissibility of evidence of this character. *Ibid.*

14. *Same—Constitutional Law—Right of Accused.*—The common-law rule of evidence, allowing upon the second trial of a criminal action, testimony of a witness of the evidence given by a witness on the preliminary trial, under the conditions specified, does not deprive the defendant of his constitutional right to confront his accuser and his witnesses, Const., Art. I, sec. 11, this right having already been accorded him on the preliminary hearing. *Ibid.*

15. *Evidence—Criminal Law—Common-law Rule—Preliminary Hearings—Statutes.*—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action does not affect the common-law rule, but it is an extension of its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. C. S., 4560, 4563, 4572. *Ibid.*

16. *Evidence—Criminal Law—Preliminary Hearings—Trials—Procuring Absence of Witness—Questions for Court—Questions for Jury.*—The findings of the trial judge, in his sound discretion, and upon sufficient evidence, that the defendant had wrongfully procured the absence of a witness at the second hearing, whose evidence on the preliminary hearing was permitted to be testified to by another witness is conclusive of this question on appeal, when this discretion has not been abused by him; and a requested instruction that makes this finding a question for the jury, is properly refused. *Ibid.*

EXECUTORY CONTRACTS. See Contracts, 28.

EXAMINATION. See Discovery, 1; Judgments, 8.

EXCEPTIONS. See Appeal and Error, 36.

EXCESSIVE DAMAGES. See Appeal and Error, 46.

EXECUTION. See Judgments, 13; Principal and Surety, 1; Courts, 8; Appeal and Error, 38.

1. *Execution—Choses in Action—Common Law—Statutes.*—At common law, choses in action were not subject to seizure and sale under final

EXECUTION—*Continued.*

process of execution, and except and to the extent the same have been modified or changed by statute, this rule still prevails. *Grocery Co. v. Newman*, 370.

2. *Same—Equity—Fi. Fa.—Supplemental Proceedings.*—Except in case of attachment proceedings, wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.*, or by the statutory method of supplemental proceedings, both of which methods, in this jurisdiction and in proper instances, are still open to claimants. *Ibid.*

3. *Same—Negotiable Instruments—Notes—Banks and Banking—Collaterals—Set-off.*—In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured, and it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold which specifically affects the property. *Ibid.*

4. *Same—Notice.*—A judgment creditor, in pursuing the remedy allowed by our statutes in supplemental proceedings, C. S., 711 *et seq.*, acquires no lien upon the choses in action of the judgment debtor held by a bank as collateral by the issuance of notice, this being shown by perusal of section 714, providing for arrest and bond, on proper affidavit, etc.; section 717, for an order of the judge, without arrest, for bidding the transfer of the judgment debtor's property, etc.; section 723, for the appointment of a receiver, etc. *Ibid.*

5. *Same—Deposits.*—A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. *Ibid.*

6. *Same—Levy.*—Where it has been determined in proceedings supplemental to execution that there are certain notes made payable to the judgment debtor, some of which he has hypothecated with a bank as collateral to his own notes given thereto, a levy of the sheriff, by virtue of the writ therein, requiring that the bank turn over and deliver to him all such of the collaterals as may be sufficient to satisfy the judgment in a certain amount, is inoperative and ineffectual. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See Limitation of Actions, 1, 11.

EXEMPTIONS. See Constitutional Law, 12.

EXPRESS COMPANIES. See Carriers, 20; Evidence, 8.

FACTS. See Principal and Agent, 2.

FALSE REPRESENTATIONS. See Insurance, 3.

FEDERAL COURTS. See Carriers, 17; Courts, 11; Intoxicating Liquor, 9.

FEDERAL EMPLOYERS' LIABILITY ACT. See Employer and Employee, 6; Appeal and Error, 36; Damages, 4.

FEDERAL SAFETY APPLIANCE ACT. See Employer and Employee, 6.

FEDERAL STATUTES. See Principal and Sureties, 2; Courts, 8; Carriers, 11; Appeal and Error, 36.

FEES. See Actions, 1.

FERTILIZERS. See Constitutional Law, 5; Statutes, 1.

FI. FA. See Executions, 2.

FINAL JUDGMENTS. See Injunctions, 4; Courts, 7.

FINDINGS. See Reference, 1; Witnesses, 2; Appeal and Error, 29; Roads and Highways, 4; Municipal Corporations, 3.

FISH. See Easements, 1.

FOOD. See Contracts, 6.

FORECLOSURE. See Judgments, 8.

FORFEITURE. See Intoxicating Liquors, 1.

FRAUD. See Bills and Notes, 1, 2; Contracts, 2, 3, 4, 5, 7; Deeds and Conveyances, 7; Instructions, 2; Insurance, 3; Limitation of Actions, 1; Wills, 3; Evidence, 6; Pleadings, 2; Vendor and Purchaser, 1; Appeal and Error, 32.

1. *Fraud—Corporations—Officers—Directors—Evidence—Verdicts—Trials.* Evidence that the directors of the defendant corporation sent an agent to the plaintiff and secured a loan of money she had received upon an insurance policy on the life of her husband; that the plaintiff was inexperienced in business affairs and relied upon the assurance of the representative that the loan would be amply secured, and the directors individually liable therefor; that theretofore the banks had lent the corporation money upon its note with the individual endorsements of the directors, but at this time had refused to further do so, and that the money obtained from the plaintiff was upon the unendorsed and unsecured note of the corporation, which was soon thereafter thrown into the hands of a receiver and its assets bought in by the directors at a small per cent of its true valuation, is sufficient to sustain a verdict of the jury finding fraud on the part of the individual directors, defendants in the action, and a judgment that the plaintiff recover of them in her action. *Harper v. Supply Co.*, 204.

HABEAS CORPUS. See Appeal and Error, 17; Constitutional Law, 4; Divorce, 1.

Habeas Corpus—Appeal and Error—Certiorari.—An appeal to the Supreme Court will not lie from the denial of a petition in *habeas corpus* proceedings, such as were taken in this case, the remedy being by application to this Court for a writ of *certiorari*. *S. v. Vickers*, 677.

HARMLESS ERROR. See Contracts, 1, 4; Intoxicating Liquor, 7.

HEALTH. See Insurance, 9.

HEARINGS. See Injunctions, 4; Evidence, 12.

HEARSAY EVIDENCE. See Deeds and Conveyances, 4; Verdict, 1; Intoxicating Liquors, 6, 10; Witnesses, 3.

HEIRS. See Mortgages, 2; Rule in Shelley's Case, 4; Railroads, 1; Wills, 4, 6.

HIGHWAYS. See Roads and Highways; Injunction, 1; Appeal and Error, 33; Assault and Battery, 1.

1. *Highways—County Commissioners—Notice to Owner—Principal and Agent—Roads.*—One who has an agent present before the board of county commissioners resisting the relocation of a county highway upon his lands has notice, implied from the agency, of the action of the board in taking his additional lands in determining the matter contrary to his contentions. *Cotton Mills v. Comrs.*, 227.

2. *Highways—County Commissioners—Discretionary Powers.*—The judgment of the county commissioners in taking the land of one adjoining owner in preference to that of another in relocating and widening a highway will not be reviewed by the courts, unless bad faith or manifest abuse of discretion has been established, or it is clearly made to appear that the commissioners have acted in the promotion of some personal or private end, and not in the interest of the public. *Ibid.*

3. *Same—Injunction—Evidence.*—Where the plaintiff seeks injunctive relief against the commissioners of the county for taking additional land from him in the location of a public highway, and alleges that the commissioners have acted solely in the interest of an adjoining owner, which the commissioners deny, and there is no evidence to support the plaintiff's allegation, it is insufficient in impeachment of the action of the board, and a permanent injunction should be denied. *Ibid.*

4. *Same—Contracts.*—Where the board of county commissioners, acting within their sound discretion and for the public interest, have determined upon widening a public highway, in its relocation, so as to take in an additional width of the plaintiff's land, injunctive relief will not be granted the plaintiff upon the ground that it had entered on a contract with the commissioners, upon a consideration that the road should be located at a certain place when there is nothing in the contract to sustain such contentions, or to limit the powers of the board accordingly. *Ibid.*

5. *Same—Surveyor—Principal and Agent.*—The county engineer has no implied authority from the board of county commissioners, by virtue of his position, to bind it in the exercise of its reasonable discretion as to relocation or widening a county highway. *Ibid.*

HOMESTEAD. See Judgments, 20.

HOMICIDE. See Appeal and Error, 51; Criminal Law, 12; Instructions, 16.

1. *Homicide—Murder—Justification—Evidence—Burden of Proof—Nonsuit.*—Where the killing of a human being by the use of a deadly

HOMICIDE—*Continued.*

weapon is shown, the jury will be justified in rendering a verdict of murder in the second degree, at least, and the burden of proof being upon the prisoner to show matters in mitigation or to justify the jury in rendering a verdict in a less degree, or of acquittal, as they may be satisfied upon the evidence; a motion for a judgment as of nonsuit thereon cannot be sustained. *S. v. Johnson*, 637.

2. *Homicide—Murder—Justification—Evidence—Reasonable Apprehension —Questions for Jury—Trials.*—Where there is evidence in justification, on the trial of a homicide, that the prisoner was without fault in bringing about the fight that resulted in the death, had fought unwillingly, and had committed the act with a deadly weapon while being attacked with one by the deceased, with murderous intent, it is not required that the prisoner show that it was actually necessary for him to have taken the deceased's life in order to preserve his own, but only whether in the judgment of the jury upon the evidence he had reasonable grounds to believe that it was necessary to do so under the circumstances. *Ibid.*

3. *Homicide—Murder—Justification—Murderous Intent.*—Where justification is set up as a defense on a trial for murder, and it is proved by the prisoner that the deceased had attacked him with murderous intent, and that he had killed deceased without fault on his part, the prisoner was under no obligation to fly, but could stand his ground and kill his adversary, if need be. The distinction between assaults with and without felonious intent shown by WALKER, J. *Ibid.*

4. *Homicide—Denfense—Insanity—Appeal and Error.*—Upon this trial for homicide: *Held*, the verdict of the jury finding adversely to the defendant's plea of insanity will not be disturbed, on appeal. *S. v. Terry*, 173 N. C., 761. *S. v. Campbell*, 765.

5. *Homicide—Murder—Premeditation — Instructions — Prejudice—Appeal and Error.*—Where, upon the trial of a homicide, there is evidence tending to convict the prisoner of murder in the first degree and of the less degrees of the crime, and that also would sustain his plea of self-defense, an instruction that if the prisoner, at the time, had a spite, or fancied wrong, against the deceased, it would constitute murder in the first degree, is reversible error in leaving out an essential principle of law, that though the prisoner may have had such spite or fancied wrong, premeditation or deliberation was yet necessary to constitute murder in the first degree. *S. v. Bush*, 778.

6. *Homicide—Murder — Self-defense — Justification—Instructions—Prejudice—Questions for Jury—Trials—Appeal and Error.*—A person is justified in killing another when the act is committed under circumstances that would justify a man of ordinary firmness in reasonably believing that it was necessary to save his own life, or to save himself from serious bodily harm, this being for the jury to determine from the evidence and the facts and circumstances as they appeared to him at the time, and an instruction that requires the defendant to show an actual necessity for the killing is reversible error. *Ibid.*

7. *Same — Manslaughter — Conflicting Instructions—New Trials.—Where*, upon the trial for a homicide, the judge has deprived the prisoner of a charge of an essential principle in the definition of manslaughter by

HOMICIDE—*Continued.*

his erroneous instruction as to the principle that would constitute murder, and the prisoner has been convicted of murder, the error will not be held as cured by a correct charge upon the same principle appearing elsewhere in his charge, the assumption on appeal being that the jury was influenced by the erroneous charge, and a new trial will be ordered. *Ibid.*

8. *Homicide—Manslaughter—Instructions—Prejudice—Appeal and Error.* Where, upon a trial for a homicide, the trial judge has omitted to charge upon the defense of manslaughter separately, where there was evidence of it, and has incorrectly charged the jury upon the degrees of murder, as to what constituted manslaughter, of which there was evidence, it constitutes reversible error. *Ibid.*

9. *Homicide—Evidence—Reputation—Character of Deceased—Appeal and Error.*—The evidence upon the material and determinative facts in this trial of a homicide tended to show no self-defense or excuse: *Held*, the trial judge properly excluded the answers to questions on defendant's cross-examination of the State's witness for the purpose of showing the general reputation of the deceased for shooting and cutting men when he was under the influence of whiskey, or his general reputation for gambling, or his reputation for carrying a pistol, under the authority of *S. v. Canup*, 180 N. C., 739. *S. v. Baldwin*, 789.

10. *Homicide—Self-defense—Evidence—Appeal and Error.*—An exception is untenable, upon the trial for a homicide, that the judge failed to charge the jury upon the principles of self-defense, when it appears that the prisoner entered willingly and aggressively into the fight that resulted in the death, and thus continued therein until he had killed the deceased, under the decision in the case of *S. v. Evans*, 177 N. C., 564, and other cases, also cited in the opinion of the Court. *Ibid.*

11. *Homicide — Manslaughter — Evidence — Verdict—Appeal and Error.*— Where, upon the trial for homicide, it appears that the prisoner provoked a fight with the deceased, entered willingly, and continued unlawfully therein, if the death had not resulted the prisoner would have been guilty of a misdemeanor, and, where death has resulted, a verdict convicting him of manslaughter will not be disturbed. *Ibid.*

HUSBAND AND WIFE. See Trusts, 2; Divorce, 1; Employer and Employee, 5; Wills, 12; Statutes, 11.

INCRIMINATION. See Intoxicating Liquors, 13.

INDEMNITY. See Criminal Law, 15; Insurance, 6, 9.

INDICTMENT. See Constitutional Law, 21; Criminal Law, 8; Intoxicating Liquors, 4.

Indictment—Motion to Quash—Jurors—Selection—Qualification—Statutes, Directory—Grand Jury.—The board of county commissioners, in drawing the names for the grand jury, placed the scrolls with the names of the qualified jurors separately in envelopes, as to each precinct, with the name of the precinct marked on each envelope, and proceeded to draw the jurors apportioned to each precinct from the scrolls of names of the jurors therefrom, placed in box No. 1, and drawn by

INDICTMENT—*Continued.*

a child under ten years of age, with the purpose and effect of thus drawing from each and every of the precincts of the county its proportionate number of qualified jurors. In other respects the directions of the statute, C. S., 2212, 2213, 2214, were complied with, and this having been done in good faith, and without the opportunity for fraud: *Held*, these statutes being directory upon the matter excepted to, except as to the qualification required of jurors, the irregularity complained of did not invalidate the indictment of the defendant in this case, and his motion to quash it for irregularity was properly denied. The importance of conforming to the directory provisions of these statutes emphasized by WALKER, J. *S. v. Mallard*, 667.

IMPEACHMENT. See Verdict, 1.

INJUNCTION. See Appeal and Error, 4, 33; Mortgages, 6; Highways, 3; Judgments, 18; School Districts, 8; Schools, 5; Usury, 1.

1. *Injunction—Evidence—Highways—Discretion of Commissioners.*—The exercise of a sound discretion by a county highway commission is a legislative power delegated to it, with which the courts will not interfere by injunction or otherwise upon the mere allegation that the commissioners were acting for the private benefit of some of them, and not in the public interest, without evidence or proof thereof. *Peters v. Highway Commission*, 30.

2. *Injunction—Equity—Incompleted Ground Shown for Relief.*—Where a sale under the power of a first mortgage or deed of trust is sought to be enjoined by the first mortgagor upon the ground that the first mortgagee had agreed to bid in the land to be sold by his trustee, then lease it for a year to the second mortgagor, a purchaser from the first mortgagor, and give the first mortgagor a certain option of purchase, etc.: *Held*, the carrying out of the alleged plan necessitates the sale by the trustee in the first mortgage which is sought to be enjoined in the instant suit, and there being no present equity of the plaintiff shown in accordance with the contract he has set out, it was error to continue the preliminary restraining order to the final hearing. *Grantham v. Sloan*, 146.

3. *Injunction—Taxation—Acts Accomplished—Statutes—Remedy of Taxpayer.*—Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to this suit. *Semble*, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. C. S., 7979. *Galloway v. Board of Education*, 245.

4. *Injunction—Taxation — School Districts — Final Judgment—Hearing—Trials.*—On this appeal: *Held*, the trial judge properly dissolved a temporary order restraining the county board of education from levying a special tax for school purposes pursuant to an election held upon the question in the district; but erred in adjudging that the defendants "go without day," such being permissible only when the facts are fixed and established at the final hearing. *Davenport v. Board of Education*, 183 N. C., 570. *Owen v. Board of Education*, 267.

INJUNCTION—*Continued.*

5. *Injunction—Issues of Fact—Bills and Notes—Acceptance for Cash—Innocent Holder—Due Course—Questions for Jury—Trials.*—Plaintiffs executed notes for the purchase of certain patent rights to I., and afterwards they mutually agreed to cancel them, but I. had hypothecated them with the defendant, and there was conflicting evidence in the plaintiff's application for an injunction, whether the defendant was to return the notes to I., if not accepted as a cash credit on the debt owed it by I., which had not been done, or whether the defendant was a holder for value without notice of the plaintiff's equity: *Held*, the preliminary restraining order obtained in the suit should have been continued to the final hearing for the determination of the jury of the fact at issue. *Glover v. Guano Co.*, 621.

6. *Injunction—Mortgages—Sales—Deed in Trust—Parties.*—It appears in this case that plaintiff had mortgaged his land to secure balance of purchase money by deed of trust to the defendant and her trustee, and the controversy depends upon whether the defendant had agreed to cancel the trust deed and the notes it secured in consideration of the payments she had already received, with evidence that a part of one of the notes had been purchased by a stranger to the transaction: *Held*, the sale under the power contained in the trust deed should be enjoined until the final hearing, and that the part purchaser of one of said notes be made a party. *Byrd v. Hicks*, 628.

INSANITY. See Homicide, 4.

INSTRUCTIONS. See Appeal and Error, 2, 3, 5, 7, 9, 13, 25, 32, 36, 41, 45, 51, 53, 54; Carriers, 2; Railroads, 5; Contracts, 14; Deeds and Conveyances, 6; Bills and Notes, 5; Judgments, 6; Negligence, 3, 7; Attachment, 8; Employer and Employee, 6; Criminal Law, 12; Ejectment, 1; Homicide, 5, 6, 7, 8; Intoxicating Liquors, 2, 7.

1. *Instructions—Statutes—Expression of Opinion of Judge—Prejudice—Racial Distinctions.*—Where the presiding judge instructs the jury, who are all white men, of their duty to give exact justice between a colored plaintiff and a white defendant, without considering the color line, but specifically and clearly disclaims any opinion of his own upon the facts in evidence, it is not objectionable, as an expression of an opinion by the judge, forbidden by the statute. *Wilson v. Sewing Machine Co.*, 41.

2. *Instructions—Fraud—Issues—Evidence—Appeal and Error.*—It is not required of the judge to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of C. S., 564. *Williams v. Hedgepeth*, 114.

3. *Instructions—Prayers for Instruction—Requests for Instructions—General Charge—Appeal and Error.*—Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case, and of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. *Ibid.*

INSTRUCTIONS—*Continued.*

4. *Instructions—Adverse Possession—Deeds and Conveyances—Color—Boundaries—Appeal and Error.*—Where a party to an action of trespass claims title under color by adverse possession, a requested prayer for instruction that disregards the essential element of possession up to known and visible lines and boundaries is properly refused. *Berry v. Cedar Works*, 187.

5. *Instructions—Prejudicial Omissions—Appeal and Error—Statutes.*—Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it will be held for reversible error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. C. S., 564. *Bowen v. Schnibben*, 248.

6. *Same—Prayer for Instruction.*—Where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent on the trial judge, in his charge to the jury, to apply to the various aspects of the statute such principles of the law of negligence as may arise under the evidence in the case. *Ibid.*

7. *Same—Negligence—Automobiles.*—An instruction in an action to recover damages for the alleged negligence of the defendant in running upon and killing the plaintiff's intestate while a pedestrian upon the highway that fails to charge specifically as to the speed, the lookout, the signal or control of the machine, or the other requirements of the driver of the automobile prescribed by the statutes, C. S., 2116, 2118, and arising from the evidence in the case, is not cured by a general charge upon the rule of the prudent man, as to speed, or lookout, or the management of the car; and the omissions to charge specifically upon the statutory obligations is reversible error, without the tender of a prayer for more specific instructions by the plaintiff. *Ibid.*

8. *Instructions—Damages—Punitive Damages—Appeal and Error—Prejudice.*—There was evidence on the trial tending to show, in plaintiff's behalf, that the defendant railroad company's agent at its station assaulted the plaintiff without provocation, while he was on the defendant's depot premises to purchase a ticket as a passenger on its train; and, in defendant's behalf, that the plaintiff was there as an idler and loafer, making himself a general nuisance, and grossly insulted the defendant's agent, upon being ordered from the premises, in a manner well calculated to provoke the assault complained of; *Held*, a charge to the jury that they might award punitive damages in their discretion is reversible error, without the further instruction upon the conflicting evidence on the principle that such are allowable only in instances of malice, gross negligence, or other cause of aggravation in the act which caused the injury. *Ham v. R. R.*, 322.

9. *Instructions—Evidence—Issues—Verdict Directing.*—Requested prayers for instruction that the jury find the issues of negligence, contributory negligence, and assumption of risk in defendant's favor, "if they should find the facts from all the evidence considered in the light most favorable to the plaintiff," are properly refused, if the

INSTRUCTIONS—*Continued.*

evidence on the issues is conflicting and sufficient to sustain verdicts in plaintiff's favor, in his action to recover damages for the wrongful killing of his intestate. *Springs v. Power Co.*, 425.

10. *Instructions—Trials — Stenographer's Notes — Evidence—Appeal and Error.*—It is not error for the judge to permit a part of the evidence transcribed by the official stenographer to be read to the jury at the request of the jurors upon their returning to the court from their deliberation of the case submitted to them, under instruction that it was only for the purpose of refreshing their minds, and objection that the corresponding evidence for the adverse party had not been read, is untenable, especially when his counsel were present and remained silent at the time. *S. v. Dill*, 645.

11. *Instruction—Evidence—Credibility—Rape.*—In an action for rape, a charge of the court that the delay of the prosecutrix in making known the offense does not necessarily discredit her testimony is not reversible error when, construed with the charge as a whole, it appears that the judge had properly instructed the jury as to the effect of such delay upon the credibility of her testimony. *Ibid.*

12. *Same—Appeal and Error—Requests for Instruction—Prayers for Instruction.*—Where there is evidence that the prosecutrix in an action for rape did not make known the offense for several days thereafter, and has testified that it was in fear of her assailant, etc., an instruction that upon the credibility of her evidence the jury should consider her environment, etc., and ascertain from the evidence whether her conduct was attributable to her temperament or some other cause, is not objectionable as emphasizing the State's contention when it appears from the charge that the prisoner clearly received the benefit of his defense thereto, and did not ask for a more definite statement of his contention. *Ibid.*

13. *Instructions—Criminal Law—Reasonable Doubt—Appeal and Error.*—It is not reversible error for the trial judge, in his instructions in a criminal action, to charge the jury, in several parts thereof, to convict the defendant if certain phases of the evidence satisfies them as to certain facts, leaving out the requirement of the State's showing guilt beyond a reasonable doubt, when construing the charge as a connected whole it appears that he has clearly and unmistakably charged them elsewhere that the State must satisfy them of the defendant's guilt beyond a reasonable doubt, and upon its failure to have done so, to give the defendant the benefit thereof and acquit him. *S. v. Schoolfield*, 721.

14. *Instructions—Expression of Court's Opinion—Statutes—Appeal and Error—Intoxicating Liquors—Spirituous Liquors.*—Where the defendant, on trial for violating our prohibition laws, has not admitted his guilt, and the trial judge, in his charge to the jury, has assumed that he was guilty upon the evidence of a State's witness, it is an expression by the judge of his opinion whether a fact has been fully or sufficiently proven, and constitutes reversible error. C. S., 564. *S. v. Sparks*, 745.

15. *Same.*—Where the verdict of the jury has acquitted the defendant indicted for violating our prohibition laws under the count charging an

INSTRUCTIONS—*Continued.*

unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes reversible error. *Ibid.*

16. *Instructions — Evidence — Criminal Law — Homicide — Murder—Manslaughter.*—Where the defendant is being tried for homicide and the State has introduced evidence of his admission of the crime and circumstantial evidence tending to show his guilt, a defense solely upon the ground that the deceased was killed by an accident to herself wherein the defendant was not at all involved, does not present any evidence coming within the definition of manslaughter, and the trial judge commits no error in refusing to charge the law relating thereto. *S. v. Myrick*, 171 N. C., 791, cited and distinguished. *S. v. Wingler*, 747.

17. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.*—Where a party objects to the statement of the judge of his contentions as being incorrect, he must do so in time to afford the judge a fair opportunity to correct it, and an exception after verdict is too late to be considered on appeal. *S. v. Baldwin*, 789.

18. *Instructions—Requests for Special Instructions—General Charge—Appeal and Error.*—The refusal of the judge to give special requests for instruction is not erroneous when it appears that he has substantially done so in his own language in the general charge to the jury. *Ibid.*

INSURANCE.

1. *Insurance—Benevolent Societies—Evidence—Prima Facie Case—Nonsuit.*—In the widow's action to recover upon a life insurance policy under which she is a beneficiary, evidence that the insured had died, and that she was the widow named in the policy, which she introduced in evidence, makes out a *prima facie* case, and defendant's motion to nonsuit should be overruled. *Blackman v. Woodmen*, 75.

2. *Same—Rules of Benevolent Societies.*—The production by the beneficiary of a life insurance policy, the subject of the action, is *prima facie* evidence of its delivery to the insured; and on its face *prima facie* proof that the insured was inducted into the order, as therein recited, requiring of the defendant proof to the contrary, and a motion as of nonsuit is properly disallowed. *Ibid.*

3. *Same—False Representations—Fraud.*—Upon the defendant's motion to nonsuit the beneficiary in an action to recover upon the certificate of a life insurance order, wherein the plaintiff has made out a *prima facie* case, the burden is on the defendant to show that the insured had made false representations that would avoid its liability, when relied on, and a motion as of nonsuit is properly disallowed. *Ibid.*

4. *Insurance, Life — Contracts — Policies — Provisions — Time of Action Agreed Upon—Limitation of Actions—Disabilities.*—Provisions in a policy of life insurance requiring that no suit shall be commenced thereon within ninety days from the receipt of the proof of death of the insured, by the insurer, or not more than a year thereafter, are

INSURANCE—*Continued.*

valid and binding as a definite time fixed and agreed upon by the parties to the contract, and not to be regarded as a statute of limitation which is stayed in its operation by the minority of the party; and a failure to comply with these contractual restrictions will work a forfeiture of the right of the beneficiary to recover upon the contract made for him by the parties. *Beard v. Sovereign Lodge*, 154.

5. *Insurance, Life—Contracts—Policies—Agreements—Conditions—Commencement of Actions—Statutes—Presumptions of Death.*—The provisions of our statute raising the presumption of the death of the person, after a period of seven years, etc., cannot be successfully shown as a compliance with the terms of a life insurance policy, requiring that proof of death of the insured should be furnished the insurer within a year, etc., and made a requisite as to the time within which suit shall be commenced, whether the presumption of death is considered as of the commencement of the absence of the insured, the end of the period of seven years, or at some intermediate period, when it appears that the action has been commenced more than a year after allowing the full statutory period of seven years. *Ibid.*

6. *Insurance—Accident—Indemnity—Risks Covered.*—A policy indemnifying the owner against loss on account of injuries received by a workman while engaged in the erection of a building covers only accidents occurring in the work described, and cannot be construed to apply to those incurred in the process but not described in the application, or within the terms of the policy; and an injury to a workman caused by the tearing down of a dividing wall between an old building and an addition thereto, the latter only being the one covered by the policy, does not come within the terms of the policy expressly excluding injuries received in wreckage. *Byrd v. Ins. Co.*, 224.

7. *Insurance, Fire — Automobiles — Dealers — Possession—Principal and Agent.*—An open dealer's policy, insuring automobiles the insured has for sale against loss by fire, etc., from the time such automobiles "become the property of the assured, and continues (unless canceled) until said property is delivered to the purchaser, or until the same otherwise passes out of the possession of the assured," does not include within its intent and meaning an automobile that had been stolen and destroyed by fire when in the possession of the thief, but only those when so destroyed while in the possession of the assured, or some of his employees or agents having control thereof in the prosecution of the business of the assured. *Williams v. Ins. Co.*, 268.

8. *Same—Larceny.*—A policy against the dealer's loss of automobiles by fire, while in his possession, etc., does not include within its protective terms a stolen automobile which was destroyed while in the possession of the thief, the essential feature of larceny being a felonious transfer of possession, and contradictory to the intent and meaning of the terms of policy contract. *Ibid.*

9. *Insurance—Indemnity—Accident—Health—Contracts.*—Where the insured is indemnified under his policy for disability by injury or sickness for more than thirty days, upon report of his attending physician of his condition every thirty days, he must show that he has complied with the terms of the policy requiring the physician's continued report; and where he has introduced evidence tending only to show

INSURANCE—*Continued.*

that the first or preliminary report had been so made, he may not recover an amount that will extend beyond the thirty days period. *Semble*, the issue submitted was insufficient to sustain a verdict for the full period of disability. *Morton v. Ins. Co.*, 619.

INTENT. See Contracts, 2; Rule in Shelley's Case, 4; Appeal and Error, 12; Wills, 4, 7, 8, 15, 17, 20; Arbitration and Award, 1; Homicide, 3.

INTEREST. See Banks and Banking, 1, 5.

INTERPLEADER. See Banks and Banking, 6; Attachment, 7.

Interpleader—Title—Parties—Merits—Right of Interpleader—Appeal and Error.—An intervener, claiming title to the funds in litigation, is only interested in the question of title as it affects his claim, and cannot be prejudiced upon the refusal of the court to permit him to interfere in the matter in litigation as it affects only the rights of the original parties. *Temple v. LaBerge*, 252.

INTERPRETERS. See Rule in Shelley's Case, 2.

INTERSTATE COMMERCE. See Carriers, 19.

INTERVENER. See Contracts, 15; Bills and Notes, 3.

INTESTACY. See Wills, 9.

INTOXICATING LIQUORS. See Instructions, 14; Witnesses, 3.

1. *Intoxicating Liquors—Spirituous Liquors—Transportation—Automobiles—Forfeitures—Mortgages—Registration of Instruments.*—C. S., 3403, creating a forfeiture of an automobile used in the unlawful transportation of intoxicating liquors, and providing for its sale, etc., by its express terms relates only to the interest therein of the violator of the law upon his conviction, and cannot be extended by legal construction to include the interest of a mortgagee of the automobile who is entirely ignorant and innocent of the unlawful act of which the defendant has been convicted; nor will the failure of registration of the mortgage affect the matter under our registration laws enacted for the protection of creditors and purchasers for a valuable consideration, etc. *Motor Co. v. Jackson*, 328.

2. *Intoxicating Liquor—Spirituous Liquor—Evidence—Instruction. S. v. Faulkner*, 632.

3. *Intoxicating Liquor—Spirituous Liquor—Statutes—Evidence—Possession—Criminal Law.*—Evidence that half a gallon of whiskey, in a fruit jar, and one pint thereof, in a bottle, were found concealed in defendant's overcoat, hanging in his store, and of his breaking the jug and bottle in the officer's presence, and saying, "Damn it, if I can't drink it, I guess you won't get to drink it either," is sufficient to sustain a verdict that the defendant was guilty of receiving more than one quart of spirituous liquor at one time, or in a single container or package, as prohibited by C. S., 3385. *S. v. Bradshaw*, 680.

4. *Intoxicating Liquor—Spirituous Liquor—Indictment—Manufacturing—Aiding and Abetting—Issues—Verdict—Evidence—Nonsuit—Trials.*—Where there is circumstantial evidence tending to show that the defendant had free access to the cellar in a house in the country where

INTOXICATING LIQUORS—*Contniued.*

spirituous liquor was unlawfully manufactured, and was present at the time, and that he carried whiskey in cans from thence to a place of business he had in a nearby city, and had brought several persons out from the city, etc., it is sufficient for conviction under a count in the indictment charging the unlawful manufacture of intoxicants; and where the jury have rendered a verdict of guilty upon an issue as to aiding and abetting therein, though no such offense was specifically charged, he would be equally guilty with those who had actually done the illicit manufacturing, and a motion as of nonsuit was properly disallowed. C. S., 3409. *S. v. Grier*, 723.

5. *Intoxicating Liquors—Spirituous Liquors—Possession—Evidence—Questions for Jury—Criminal Law.—Held*, the evidence in this case was sufficient to sustain a conviction of the defendant for having in his possession spirituous liquors for the purpose of sale, and of receiving more than one quart thereof within fifteen days time. *S. v. Beam*, 730.

6. *Intoxicating Liquors — Spirituous Liquors — Evidence—Declarations—Hearsay Evidence.*—Upon the trial of defendant for having spirituous liquor in his possession for the purpose of sale, the defendant may not show, on cross-examination of the officer who had made the arrest, what the son of the defendant had said as to the ownership of the whiskey, at that time, it being objectionable as a mere declaration of a third party, and hearsay. *Ibid.*

7. *Intoxicating Liquors — Spirituous Liquors — Evidence—Instructions—Harmless Error.*—Where there is evidence tending to show that the defendant's son was the real culprit, though the defendant was on trial for having the possession of spirituous liquor for the purpose of sale, etc., the exclusion of the defendant's testimony that he was not implicated in the unlawful act, and had forbidden his son to do it, is harmless error when it appears that the same evidence had been introduced at the trial, and had been submitted to the jury under a correct and clear instruction of the trial judge. *Ibid.*

8. *Intoxicating Liquor—Spirituous Liquor—Evidence—Questions for Jury—Constitutional Law.*—The evidence in this case *held* sufficient on appeal to sustain a verdict convicting the defendant of the unlawful manufacture of intoxicating liquor, and our State statute on the subject does not contravene the XVIII Amendment to the Federal Constitution. *S. v. Baker*, 752.

9. *Intoxicating Liquor—Spirituous Liquor—Constitutional Law—Statutes—Conviction in Federal Courts—State Courts—Concurrent Authority—Distinct Offenses.*—The language of the second paragraph of the XVIII Amendment to the Constitution of the United States delegates to the Federal Government authority over the manufacture, sale, etc., of intoxicating liquor, as being concurrent with the authority reserved in the State upon the subject; and the same act violating an act of Congress and of a state statute is a distinct offense against the two Governments, punishable in the courts of each; and a conviction under the Volstead Act is no bar to a conviction by the state courts for an offense against a state statute on the subject. *S. v. Harrison*, 762.

INTOXICATING LIQUORS—*Continued.*

10. *Intoxicating Liquor—Spirituous Liquor—Criminal Law—Evidence—Hearsay Evidence—Statutes.*—Hearsay evidence, with certain recognized exceptions, is not admissible in the trial of issues determinative of substantial rights, unless coming within certain recognized exceptions or expressly made so by statute, and particularly is this rule applicable in criminal cases, where the life or liberty of the individual is put in jeopardy, such testimony being essentially liable to abuse, and not being the direct testimony of the witness himself upon oath, subject to cross-examination, but the alleged declarations of one who is absent and not subject to these requirements of the law. *S. v. McNeill*, 182 N. C., 853, cited and overruled. *S. v. Springs*, 768.

11. *Same.*—Upon the criminal trial for having in possession spirituous liquor for the purposes of sale, C. S., 3379, and for unlawfully receiving more than one quart within fifteen consecutive days, C. S., 3385, evidence of the reputation of the defendant's place as being bad for selling liquor is unauthorized by statute, C. S., 3383, and it is purely hearsay and incompetent; and testimony of this character, admitted on the trial over the defendant's objection, and submitted in the charge as an independent circumstance to show guilt, under defendant's exception, constitutes reversible error. *S. v. Mills, ante*, 694. *Ibid.*

12. *Intoxicating Liquor—Spirituous Liquor—Statutes—Local Law—Repealing Statutes.*—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law, except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder being guilty of a felony, C. S., 4171, the two-year statute of limitations is not a bar to the prosecution. C. S., 4512. *S. v. Burnett*, 783.

13. *Intoxicating Liquor — Spirituous Liquor — Evidence—Admissions—Incrimination—Statutes.*—Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify, it is competent for witnesses to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of C. S., 3406. *Ibid.*

14. *Intoxicating Liquor—Spirituous Liquor—Evidence—Nonsuit—Motion to Dismiss—Appeal and Error.—Held*, the evidence introduced upon this trial for the unlawful manufacture and sale of intoxicating liquors was sufficient to sustain a verdict of conviction, and the defendant's motion to nonsuit, or that the action be dismissed, was properly overruled. *Ibid.*

INVITATION. See Negligence, 5.

ISSUES. See Appeal and Error, 11, 35, 37; Instructions, 2, 9; Judgments, 5; Attachment, 6; Principal and Agent, 6; Jury, 1; Contracts, 34; Intoxicating Liquors, 4; Injunction, 5; Verdict, 3.

JUDGE. See Instructions, 1; Appeal and Error, 55.

JUDGMENTS. See Limitation of Actions, 3; Pleadings, 1; Liens, 1; Reference, 1; Appeal and Error, 14, 16, 26, 38, 40, 48; Courts, 2, 4; Railroads, 1; Criminal Law, 6.

1. *Judgments—Justices' Courts—Appeal—Superior Courts—Trials de Novo—Railroads—Federal Control—Director General.*—On appeal from a judgment of a justice of the peace to the Superior Court, in an action to recover damages for the loss of a shipment of goods, brought against the Government Railroad Administration and the carrier over the lines of which the shipment was to have been transported, the judgment appealed from is vacated, and a trial *de novo* had in the Superior Court and a motion to dismiss as against the carrier is properly allowed. *Bagging Co. v. R. R.*, 73.

2. *Judgment—Default—Pleadings—Admissions.*—A judgment by default final for the want of an answer is permissible under the provisions of our statute, C. S., 575, when the complaint alleges one or more causes of action, each consisting of the breach of an express or implied contract to pay absolutely or upon contingency, a sum or sums of money fixed by the terms of the contract, or computable therefrom. *Beard v. Sovereign Lodge*, 154.

3. *Same—Courts.*—Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, C. S., 595, and also heard on appeal in the Superior Court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside. *Ibid.*

4. *Judgments—Claim and Delivery—Actions—Mortgages—Liens—Vendor and Purchaser—Damages—Statutes.*—Where it is established by the verdict in claim and delivery that the mortgagor had sold to the defendant an automobile subject to the plaintiff's registered mortgage, without express or implied waiver of the plaintiff's lien, and that the note procured by the mortgage was tainted with usury, C. S., 2306, the judgment should direct a sale of the mortgaged automobile, and payment of principal without interest to the plaintiff, and surplus, if any, to defendant after deducting costs; and, also, to plaintiff, any reduction in the payment of the amount of his note caused by the defendant's use of the car held by him under replevy bond, after the bond of plaintiff in claim and delivery was given by him. *C. S.*, 836. *Rogers v. Booker*, 183.

5. *Judgments—Issues—Verdict—Carriers of Goods—Bills of Lading—Notice—Agreement as to Action.*—Where, in an action by the consignor against the carrier to recover in an intrastate shipment of livestock, the issues are raised whether the provisions of a livestock bill of lading, under which the shipment was made, had been complied with by the consignor, as to giving written notice, etc., to the carrier of the damages he claims in his action, or whether he has instituted his action within the time specified in the bill of lading, it is required that both of these issues be answered by the jury upon the evidence in order that a judgment may be rendered in the consignor's favor. *Dixon v. Davis*, 207.

JUDGMENTS—*Continued.*

6. *Same—Instructions.*—In an action to recover damages upon a livestock intrastate shipment, the necessity of the jury to answer the issues relating to notice to the carrier of the damages claimed, and the time of bringing the action under the agreement therein set out, is not eliminated by the jury's answer to another issue upon which the judge has instructed the jury that the defendant had waived these requirements of the shipping contract. *Ibid.*

7. *Judgments.*—A judgment against the bidder on lands at a public sale for the purchase price, who has failed to respond, adjudging the amount of the judgment a lien upon the lands and ordering foreclosure, is a final judgment as to matters therein embraced, and conclusive between the parties. *Boseman v. McGill*, 215.

8. *Judgments—Liens—Vendor and Purchaser — Sales — Bidders—Supplementary Proceedings—Foreclosure—Examination of Debtor.*—Where a judgment orders the foreclosure of lands to pay the purchase price, and the plaintiff makes it to appear in proceedings supplementary to execution that the value of the land is insufficient, and that the defendant has funds in the hands of a third party, it is not required of the plaintiff that he await the result of the foreclosure sale before an order can be made that the holder of defendant's funds pay the same into court to await the court's further orders respecting it, it being made to appear that the defendant had no other funds subject to the payment of the balance that would be due on the judgment after applying the proceeds from the foreclosure sale of the lands. *Ibid.*

9. *Same—Evidence.*—Where, upon the report of commissioners to sell land at a judicial sale subject to a lien, it appears that the land brought a fair and reasonable price, which was found as a fact by the clerk, and the order of sale confirmed by the judge, and it further appears that the price so obtained was less than the amount of the judgment, the judgment creditor may obtain an order, in proceedings supplementary to execution, upon proper affidavit, by showing that execution had been issued, though not then returned, and that the judgment debtor had property available in the hands of a third person, subject to the payment of the judgment debt, and which he unjustly refuses to apply thereto. C. S., 712, 719. C. S., 711, does not apply to the facts of this case. *Ibid.*

10. *Same—Actions—Remedies.*—Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor *in personam*, may compel payment by proceedings *in rem*, or pursue both remedies at the same time. C. S., 663. *Ibid.*

11. *Same—Order Upon Third Persons.*—Where it appears, in proceedings supplementary to execution, that a third person has funds of defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the fund. *Ibid.*

12. *Same—Statutes.—Held*, under the facts of this case, an order for the examination of the judgment debtor and others, in proceedings supplementary to execution, was properly made under the provisions of C. S., 721. *Ibid.*

JUDGMENTS—*Continued.*

13. *Same—Execution.*—Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the returns of the execution does not affect. *Ibid.*

14. *Same—Property Available.*—Objection that the plaintiff, in proceedings supplementary to execution has not shown, in support of the order to examine the defendant and others, that the defendant had no other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit, without denial. *Bank v. Burns*, 109 N. C., 105, cited and approved. *Ibid.*

15. *Judgments—Appeal and Error—Tenants in Common—Owelty—Parties.* Under the facts of this case, it appearing that a personal judgment was properly entered against the defendants to equalize in value the lands voluntarily partitioned among themselves and the plaintiff as tenants in common, for mutual mistake, but erroneously allowed a charge or lien for owelty against the tracts of greater value, where a proper or necessary party had not been brought in, the judgment, on appeal, is accordingly modified that such party be made in the Superior Court, or the matter proceeded with by independent action, as the parties may be advised. *Outlaw v. Outlaw*, 255.

16. *Judgments by Consent—Contract—Consideration—Pleadings.*—A consent judgment may be made effective and extended to any matters that may be agreed upon by the parties that are within the general jurisdiction of the court, and the position is untenable that, as in case of an adversary judgment, it is restricted to the matters presented in the pleadings. *Horner v. R. R.*, 270.

17. *Judgments—Term—Presumptive Date—Signed Out of Term—Consent.* The provisions of C. S., 613, that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. *Chemical Co. v. Long*, 398.

18. *Judgment—Estoppel—Parties—School Districts—Taxation—Bonds—Injunction.*—The taxpayers of a school district, except where some special private interest is shown, are real parties in interest in a suit by a resident and taxpayer of the district to enjoin the levy and collection of a special tax for school purposes therein; and where the final judgment of the Superior Court, unappealed from, has been rendered against the plaintiff in such suit, without suggestion of fraud or collusion, the subject-matter is *res adjudicata* as to all the taxpayers and residents of the district, whether they have been made nominal

JUDGMENTS—*Continued.*

parties to the suit or otherwise, and they are estopped from independent suits concerning the matters adjudicated. *Eaton v. Graded School*, 471.

19. *Judgments—Liens—Priorities—Lis Pendens.*—The question of *lis pendens* does not arise in considering the priority of liens between judgments obtained and docketed at different times. *Sugg v. Pollard*, 494.

20. *Judgments—Liens—Material Men—Laborers—Homestead—Waiver.*—A debtor may not claim his homestead (Const., Art. X, sec. 4) against the lien of a judgment in favor of the furnishers of material, etc.; and were it otherwise, he must claim it in apt time or he will be deemed to have waived it; and this right being personal to him, it may not be successfully claimed by his other creditors. *Ibid.*

21. *Judgments—Suspended Judgments—Sentence—Criminal Law—Inquiry—Court's Jurisdiction. S. v. Mehaffey*, 766.

JUDICIAL SALES. See Appeal and Error, 30.

JURISDICTION. See Appeal and Error, 16, 20; Courts, 2, 4; Constitutional Law, 4; Intoxicating Liquors, 9; Divorce, 1; Pleadings, 5; Judgments, 21.

JURY. See Verdict, 1; Appeal and Error, 54; Constitutional Law, 17; Costs, 1; Indictment, 1.

Jury—Evidence—Facts at Issue—Appeal and Error.—The plaintiff was injured while employed by the defendant to operate a power-driven wood lathe machine, by a splinter of wood flying off therefrom, and striking and putting out the sight of his eye. There was conflicting evidence on the trial as to whether the machine was properly constructed as to its safety in this respect, or whether it was one known, approved, and in general use, etc.: *Held*, it was reversible error for the trial judge to admit the testimony of a witness who had testified to his previous knowledge of such matters, to further say that if a certain protective hood had been used on the lathe, the injury would not have occurred, this being the opinion of the witness upon the facts in evidence, within the sole province of the jury to determine, and not coming within the exception allowing nonexpert opinion evidence in certain cases. *Stanley v. Lumber Co.*, 302.

JUSTICES OF THE PEACE. See Judgments, 1; Statutes, 5.

JUSTIFICATION. See Slander, 4; Homicide, 1, 2, 3.

JUVENILE COURTS. See Divorce, 1.

KNOWLEDGE. See Limitation of Actions, 2; Banks and Banking, 4, 5; Criminal Law, 10; Witnesses, 3.

LABORERS' LIEN. See Judgments, 20.

LAKES. See Easements, 1.

LANDS. See Deeds and Conveyances, 7, 13; Wills, 1; Appeal and Error, 12; Evidence, 5; Limitation of Actions, 6; Constitutional Law, 13.

LARCENY. See Insurance, 8.

LEGISLATION. See Constitutional Law, 2.

LEGISLATIVE POWERS. See Elections, 3.

LEVY. See Taxation, 5, 6; Execution, 6.

LIABILITY. See Contracts, 29.

LICENSES. See Limitation of Actions, 10; Statutes, 5.

LIENS. See Receivers, 1; Judgments, 4, 8, 19, 20; Mortgages, 8.

1. *Liens—Material Men—Venue—Motions—Removal of Causes—Transfer of Causes—Waiver—Judgments—Statutes.*—An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of C. S., 469, making the venue where the plaintiffs or defendants reside, etc.; and where the venue is improper, the action may nevertheless be proceeded with to judgment, unless demand for a change of venue is made on motion, the failure to do so being a waiver of the right; where a judgment establishing a lien of this character has been obtained by timely procedure in a different county from that wherein the building is situate, and the defendant debtor has appeared and has entered no objection, upon docketing the judgment in the county of the situs of the property, the court may appoint a commissioner to sell the property in subjection to the lien. *Semble*, this applies to instances where the statutes specify the venue. *Sugg v. Pollard*, 494.

2. *Liens—Material Men—Removal of Causes—Transfer of Causes—Docket—Entries.*—Where a judgment establishing a lien for material furnished and used in a building has been transferred and docketed in the county wherein the building is situated, the mere fact that the entry on the judgment docket in the latter county does not specify this kind of lien is immaterial when the judgment filed therein specifically does so. *Ibid.*

LIMITATION. See Taxation, 5; Deeds and Conveyances, 13; Carriers, 20; Constitutional Law, 21.

LIMITATION OF ACTIONS. See Carriers, 6, 16; Adverse Possession, 1; Insurance, 4; Mortgages, 2; Pleadings, 1; Appeal and Error, 12.

1. *Limitation of Actions—Statutes—Trusts—Fraud—Executors and Administrators.*—Where the testator creates his executor as trustee of a part of the estate "to collect and apply, the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life, and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated. *Latham v. Latham*, 55.

2. *Same—Knowledge—Notice.*—In order to repel the bar of the statute of limitations, by showing action commenced within three years from the discovery of the fraud, and bring it within the provisions of

LIMITATIONS OF ACTIONS—*Continued.*

C. S., 441 (9), it is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. *Ibid.*

3. *Same—Judgments—Deeds and Conveyances—Registration.*—A testator devised to his executor to hold in trust for his son and his family a certain part of his estate for his son's wife, and then convey the same to his son's child or children, etc. The executor obtained, in proceedings before the clerk, with all the parties represented, an order to sell the testator's land, including that of the trust estate, to pay the debts of the deceased, and conveyances were made by him to the purchasers and registered. In an action alleging fraud on the part of the executor in procuring the lands in trust through third parties bidding at the sale, gross inadequacy of price, etc., *it is held*, that the proceedings before the clerk to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the *cestuis que trustent*, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. *Ibid.*

4. *Same—Confidential Relations.—Held*, under the facts of this case, there were no such confidential relations existing between the plaintiffs and the executor and trustee of their deceased ancestor as would repel the bar of the statute of limitations by reason of the failure of the executor or trustee to disclose the facts of the alleged fraud. *Ibid.*

5. *Limitation of Actions—Statutes—Nonresidents.*—The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. *Ibid.*

6. *Limitation of Actions—Statutes—Adverse Possession—Posting Lands—Title.*—The posting of land, without possession, is not equivalent to the *possessio pedis* against the owner, or more than a notice of a claim, and is not such adverse possession as will ripen the title to the claimant. *Berry v. Cedar Works*, 187.

7. *Limitation of Actions—Corporations—Merger—Novation.*—The formation of a new corporation, with the same stockholders, to take over the assets of an existing corporation and assume its obligations, does not, in assuming the debts, create a new contract or novation of the old debts in contemplation of the statute of limitations, but is only a continuation thereof; and a creditor in his action against the new corporation to recover the debt due by the former one with which it has merged, must show that he has commenced his action within the statutory three years, when the statute has been pleaded, and may only recover for such items as fall within the time therein limited. *McNeill v. Mfg. Co.*, 421.

8. *Limitation of Actions—Contracts—Debtor and Creditor—Novation.*—A novation to repel the bar of the statute of limitations contemplates a new debtor, and a contract in favor of the same or another creditor, and the statute in such instances begins to run from the date of the new promise. *Ibid.*

LIMITATIONS OF ACTIONS—*Continued.*

9. *Same—New Promise.*—Where the creditor has received a promise on behalf of his debtor that the amount owed him would be paid, when the former should have received sufficient funds, etc., the statute of limitations begins to run at the date when the promise, if sufficient, was made. *Ibid.*

10. *Limitation of Actions—Marriage—License.*—A summons was issued to recover the penalty against a justice of the peace, C. S., 2499, for performing the marriage ceremony without the delivery of the license therefor to him, C. S., 2498, within less than a year from the time he had performed it: *Held*, the plea of the statute of limitations, C. S., 443 (2), could not be sustained. *Worley v. Bruton*, 438.

11. *Limitation of Actions—Deceased Persons—Executors and Administrators—Creditors—Estates.*—C. S., 412, extending the time within which an action that has survived may be brought against representatives of deceased persons to one year after the issuance of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person, and that it is not necessary to bring an action upon a claim against the estate to prevent the bar which has been admitted by the personal representative, until after his final settlement, is an enabling statute, intending to enlarge to that extent the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. In this case the question of the custom of partners in making sealed and unsealed obligations is referred to the case of *Supply Co. v. Windley*, 176 N. C., 18. *Irwin v. Harris*, 547.

LIS PENDENS. See Judgments, 19.

LOCAL LAWS. See Constitutional Law, 9; Intoxicating Liquors, 12.

LOST INSTRUMENTS. See Evidence, 3.

MACHINERY. See Negligence, 5.

MAIL. See Carriers, 8; Contract, 12.

MALICE. See Criminal Law, 13.

MANDAMUS. See Elections, 2; Roads and Highways, 3; Constitutional Law, 16.

MANSLAUGHTER. See Criminal Law, 6; Homicide, 7, 8, 11; Instructions, 16.

MANUFACTURERS. See Intoxicating Liquors, 4.

MAPS. See Deeds and Conveyances, 13.

MASTER AND SERVANT. See Employer and Employee; Trespass, 2; Appeal and Error, 24, 25; Railroads, 2.

MATERIAL MEN. See Liens, 1, 2; Judgments, 20.

MENTAL CAPACITY. See Witnesses, 1; Evidence, 10.

MENTAL SUFFERING. See Carriers, 3; Slander, 1.

MERGER. See Limitation of Actions, 7.

MERITS. See Courts, 2; Interpleader, 1.

MINISTERS. See Statutes, 2.

MISJOINDER. See Actions, 11.

MISTAKE. See Pleadings, 2; Appeal and Error, 55.

MODIFICATION. See Appeal and Error, 16.

MORTGAGES. See Betterments, 1; Judgments, 4; Intoxicating Liquor, 1; Injunction, 6.

1. *Mortgages—Contract to Convey—Equity of Redemption—Dower.*—The grantee in possession of land under a contract to convey holds in the nature of an equity of redemption by mortgage, in which his wife, after his death, is entitled to dower. *Forbes v. Long*, 38.

2. *Same—Possession—Widows—Limitation of Actions—Heirs.*—The dower interest of the wife in the equity of redemption of lands formerly belonging to her deceased husband, held by her in continued possession after his death, is superior to the right of the husband's heirs at law, but not adverse in the sense that it would start the running of the statute of limitations against them. *Ibid.*

3. *Same—Children of First Marriage—Evidence.*—The husband was in the possession of land in the nature of a mortgage, and after his death his wife by a second marriage continued thereon. The mortgage was cancelled out of the estate of the deceased husband, after his death, and the mortgagee conveyed the land to his children as heirs at law, some of them by the first and some by the second marriage: *Held*, the possession of the wife after the death of her husband did not start the running of the statute of limitations, or ripen the title in her by adverse possession as against the children of the husband by the first marriage. The character of the wife's possession under the evidence in this case at least raised a question for the jury. *Ibid.*

4. *Mortgagor—Rights of Junior Mortgagee.*—The junior mortgagee has the right to have the amount due under the senior mortgage ascertained and definitely determined, and, upon paying the sum so ascertained, take an assignment of the first mortgage. *Broadhurst v. Brooks*, 123.

5. *Same—Usury—Statutes.*—Where the senior mortgage is affected with a charge of usury, the amount to be paid by the junior mortgagee, before requiring the assignment, is the principal sum due, without interest. C. S., 2306. *Ibid.*

6. *Same—Injunction.*—Where the junior mortgagor has temporarily restrained the sale of land under the senior mortgage, it is proper for the judge hearing the matter to continue the injunction to be dissolved if the mortgagor should pay the amount ascertained to be due thereunder by a certain date, and, otherwise, order that the first mortgagor may proceed to advertise and sell under the power of sale contained in his prior mortgage. *Ibid.*

7. *Mortgages—Rights of Junior Mortgagee—Title—Equity of Redemption.* A second mortgagee has the legal title to the lands, subject only to the amount legally due upon the first mortgage and the equity of redemption in the mortgagor. *Ibid.*

MORTGAGES—*Continued.*

8. *Mortgages—Registration—Notice—Automobiles—Vendor and Purchaser—Liens—Deeds and Conveyances.*—Where the mortgagor of an automobile has sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale: *Held*, an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he acquired the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which were left with the mortgagor for sale. *Rogers v. Booker*, 183.

MOTIONS. See Constitutional Law, 4; Carriers, 11; Evidence, 1; Trials, 2; Pleadings, 5, 6; Liens, 1; Verdict, 2; Appeal and Error, 40; Intoxicating Liquor, 14; Indictment, 1.

MULTIPLICITY OF SUITS. See Courts, 10.

MUNICIPAL CORPORATIONS. See Schools, 2.

1. *Municipal Corporations—Cities and Towns—Surface Water—Waters—Negligence—Drains—Damages.*—It is an actionable nuisance for a city or town, after receiving sufficient actual or implied notice, to permit its sewer or drain to fill up with debris and other obstructions so as to repeatedly cause the surface or rain water to flood the property of a resident owner, upon the street, and thereby damage his property. *Pennington v. Tarboro*, 71.

2. *Municipal Corporations—Cities and Towns—Condemnation—Eminent Domain—Streets and Sidewalks—Discretionary Powers—Courts.*—The courts will not interfere with the statutory discretionary powers given to the governing authorities of an incorporated town to take lands from adjoining owners in widening its streets for the public welfare, unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion. C. S., 2791, 2792. *Lee v. Waynesville*, 565.

3. *Same—Appeal and Error—Findings of Facts.*—Where it appears that the governing authorities of a town have taken plaintiff's adjoining lands to widen a street intersecting with other streets so as to lessen the danger to traffic thereon, and it is made to appear by affidavits and otherwise that doing so was a reasonable exercise of the discretion vested in them, the findings of the trial judge, upon opposing affidavits, that such course was unnecessary to a certain extent, and reducing the width of the land which should be appropriated for the purpose, is not binding on the Supreme Court on appeal, the question being, primarily, whether the administrative authorities of the town have so grossly and manifestly abused the exercise of their discretionary powers as to render their action ineffectual, which does not appear upon the facts of the instant case. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Condemnation—Eminent Domain—Estoppel.*—The governing authorities of a town are not estopped to condemn land for the widening or improving of its streets by reason of an owner having put extensive improvements on his land a long time prior to the time it was

MUNICIPAL CORPORATIONS—*Continued.*

condemned for that purpose, the power of condemnation, in cases of this character, being a continuing one to be exercised when and to the extent that the public good may require it. *Ibid.*

MURDER. See Appeal and Error, 51; Criminal Law, 12; Homicide, 1, 2, 3, 5, 6; Instructions, 16.

NECESSARIES. See Schools, 2.

NEGLIGENCE. See Banks and Banking, 2; Carriers, 2, 3, 19; Employer and Employee, 1, 6, 7; Municipal Corporations, 1; Instructions, 7; Appeal and Error, 25, 36; Damages, 4; Railroads, 2.

1. *Negligence—Contributory Negligence.*—The contributory negligence on the part of the plaintiff that will bar his recovery in an action for damages for a personal injury negligently inflicted is the plaintiff's failure to exercise due care, as a proximate cause or occasion for the injury sustained, occurring and coöperating with the negligent act of the defendant, and the defendant will not be held liable if its negligence would not have produced the injury but for the contributory negligence of the plaintiff. *Construction Co. v. R. R.*, 179.

2. *Same—Proximate Cause.*—The proximate cause of actionable negligence is the real, efficient cause, or that without which the injury would not have occurred. *Ibid.*

3. *Same—Instructions—Appeal and Error.*—An instruction upon the issue of contributory negligence in a personal injury action that makes the plaintiff's right to recover depend alone upon whether his negligence contributed to the injury, with a refusal of plaintiff's prayer for instruction that his contributory negligence must have been the proximate cause of the injury to bar his recovery, is reversible error. *Ibid.*

4. *Negligence—Contributory Negligence—Proximate Cause—Contributing Causes.*—In an action to recover damages for a personal injury, it is not necessary, to bar the plaintiff's right of recovery, that his negligence be the sole proximate cause of the injury, for it is sufficient if his negligence is a cause, or one of the causes, without which the injury would not have occurred. *Ibid.*

5. *Negligence—Dangerous Machinery—Vendor and Purchaser—Implied Invitation.*—A purchaser of cotton seed who enters upon the premises of the owner of a cotton gin for that purpose in accordance with the owner's arrangement, is upon the premises at the implied invitation of the owner. *Matthews v. Hudson*, 622.

6. *Same—Questions for Jury.*—Evidence that the owner of a cotton gin had left the ends of bolts dangerously projecting at a place they had connected power-driven shafting, and about eighteen inches from the place where a purchaser has to select the seed he wants and take them away, is sufficient to take the case to the jury, and for the jury to pass upon the question of the want of ordinary care upon the issues of defendant's actionable negligence in the purchaser's action. *Ibid.*

7. *Same—Instructions—Ordinary Care.*—Under the evidence of this case: *Held*, an instruction that makes the nearness of eighteen inches from

NEGLIGENCE—*Continued.*

the dangerous part of the shaft, if so found by the jury, negligence as a matter of law, and also leaves out the element of defendant's want of ordinary care on the issue of negligence, is reversible error. *Ibid.*

8. *Negligence—Personal Injury—Wrongful Death—Damages. Huffman v. Ingold*, 633.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 2, 3, 6; Contracts, 4, 7; Executions, 3; Attachment, 7.

NEGROES. See Constitutional Law, 6.

NEW PROMISE. See Limitation of Actions, 9.

NEWSPAPERS. See Schools, 11.

NEW TRIALS. See Judgments, 1; Actions, 3; Appeal and Error, 37; Constitutional Law, 18; Contracts, 34; Homicide, 7.

NEXT OF KIN. See Wills, 6.

NONRESIDENTS. See Evidence, 4; Limitation of Actions, 5.

NONSUIT. See Carriers, 11, 18; Contracts, 19, 37; Deeds and Conveyances, 9; Evidence, 1, 11; Insurance, 1; Trials, 2; Appeal and Error, 54; Criminal Law, 1, 2, 15; Employer and Employee, 8; Homicide, 1; Intoxicating Liquors, 4, 14.

NOTES. See Bills and Notes, 1, 2; Execution, 3.

NOTICE. See Betterments, 2; Schools, 6, 8, 9; Carriers, 2; Contracts, 7; Evidence, 3; Limitation of Actions, 2; Wills, 3; Banks and Banking, 5; Judgments, 5; Mortgages, 8; Schools, 12; Highways, 1; Constitutional Law, 4; Executions, 4.

NOVATION. See Limitation of Actions, 7, 8.

OATH. See Witnesses, 1.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 1, 5, 7, 9, 14, 27, 28, 31, 35, 36, 42, 52, 54; Criminal Law, 12; Instructions, 17.

OFFER. See Contracts, 11, 13, 16.

OFFICERS. See Fraud, 1; Actions, 6.

OPINION. See Appeal and Error, 6, 15; Instructions, 1, 14; Evidence, 10.

OPTIONS. See Carriers, 19.

ORDERS. See Trials, 1; Judgments, 11.

OVERDRAFTS. See Banks and Banking, 3, 5.

OWELTY. See Judgments, 15; Parties, 1; Tenants in Common, 1.

PARENT AND CHILD. See Divorce, 1; Criminal Law, 3; Statutes, 11.

PAROL EVIDENCE. See Contracts, 1, 4, 9, 21, 27; Corporations, 8; Evidence, 7; Wills, 20.

PARTIES. See Banks and Banking, 2; Carriers, 11; Contracts, 8, 32, 35; Damages, 2; Discovery, 1; Evidence, 4; Trusts, 2; Attachment, 2, 3; Interpleader, 1; Judgments, 15, 18; Appeal and Error, 22; Actions, 11; Injunction, 6.

Parties—Tenants in Common—Voluntary Partition—Purchasers for Value —Owelty.—Tenants in common made a voluntary division of their lands among themselves by metes and bounds, and in their mutual conveyances specified the number of acres of each division. There was nothing in the conveyances providing a payment of owelty to any one receiving a tract of less value. The plaintiff introduced evidence tending to show mistake by the surveyor and the mutual mistake of the parties whereby he had received an appreciably less number of acres than called for in his deed, amounting to a considerable decrease in value. There was evidence that one of the defendants had sold his tract to an innocent purchaser, for value and without notice of the plaintiff's claim of equitable interference: *Held*, such purchaser is a proper if not a necessary party in order to clear the title to the lands. The legal and equitable principles relating to owelty, under the circumstances of this case, discussed by WALKER, J. *Outlaw v. Outlaw*, 255.

PARTITION. See Parties, 1.

PARTNERSHIP. See Bills and Notes, 8.

PARTY WALLS. See Deeds and Conveyances, 12; Adjoining Landowners, 1.

PASSENGERS. See Carriers, 12, 14; Damages, 3.

PAYMENT. See Appeal and Error, 38.

PENALTIES. See Carriers, 7, 10; Statutes, 5.

PENITENTIARY. See Criminal Law, 16.

PETITION. See Supreme Court, 1.

PLACE. See Taxation, 4; Appeal and Error, 24.

PLATS. See Deeds and Conveyances, 13.

PLEAS. See Courts, 2; Bankruptcy, 1.

PLEADINGS. See Judgments, 2, 15; Slander, 2; Appeal and Error, 16; Courts, 6; Actions, 11; Contracts, 34.

1. *Pleadings—Admissions—Limitation of Actions—Statutes—Judgments—Appeal and Error.*—Where the statute of limitations to the action has been pleaded, and it appears from the face of the complaint and the uncontroverted facts that the plaintiff's cause of action is thereby barred, a judgment dismissing the cause of action on that ground as a matter of law will not be disturbed on appeal, though there may be valid exceptions for error in other phases of the trial, especially when the parties have requested the court to first determine that question. *Latham v. Latham*, 55.

2. *Pleadings—Allegation—Evidence—Fraud—Mistake—Carriers of Goods —Bills of Lading—Contracts.*—Where the plaintiff has signed a live-stock bill of lading for intrastate shipment, without stipulation as to

PLEADINGS—*Continued.*

time of the delivery of the shipment, and seeks to recover damages upon a contemporary verbal agreement made with him by the agent that the stock would be received at destination within a specified time, in the absence of allegation of fraud or mistake, he will not be permitted to show that he was induced to sign the livestock bill of lading by the agent instead of a different one, that he thought he was signing, and had thus signed the one excluding evidence of the parol agreement he relied upon by mistake. *Dixon v. Davis*, 207.

3. *Pleadings—Demurrer—Governmental Agencies—Torts.*—The plaintiff in this action sued the State Highway Commission for damages for the death of his intestate, alleged to have been caused by its failure to provide a safe place for the intestate to work in pursuance of his dangerous duties as defendant's employee: *Held*, a demurrer confined the scope of the inquiry to whether the action could be maintained against the defendant commission, in its capacity in which it was sued, if regarded as a general appearance, and was properly sustained. *Carpenter v. R. R.*, 401.

4. *Pleadings—Amendments—Courts—Discretion—Appeal and Error.*—It is within the sound discretion of the trial judge to allow amendments to pleadings, which will not be reviewed in the Supreme Court, when there is no suggestion that he had abused the discretionary powers he has exercised. C. S., 547. *Fay v. Crowell*, 416.

5. *Pleadings—Motion to Extend Time for Filing—Courts—Clerks of Court—Jurisdiction—Appeal and Error.*—Under the provisions of Revisal, sec. 466, before those of Public Laws 1921, ch. 304, went into effect, the latter being an act to restore the Code of Civil Procedure in regard to pleadings and practice, and to expedite and reduce the cost of litigation, it was discretionary with the judge of the Superior Court to allow extension of time for the filing of pleadings, and where the complaint in an action had not been filed in the time allowed by law, under the provisions of the former statute, and the later procedure is in effect at the time of the plaintiff's motion for time to file complaint, such motion should be made before the judge, and not before the clerk of the court; and where it has been made before the clerk, and the judge has erroneously held that the clerk has power to extend the time for filing the complaint, the case will be remanded, on appeal, in order that the judge may treat the appeal from the clerk as if the motion had originally been made before him, and pass upon it in the exercise of his sound discretion. *Campbell v. Asheville*, 492.

6. *Pleadings—Appeal and Error—Appeal—Motions—Permission to File Answer.*—*Held*, under the facts of this case the answer or affidavit of the defendant was in the nature of an answer to the plaintiff's motion, in the Superior Court, to dismiss the defendant's appeal from a judgment of a justice of the peace; and where the judge has erroneously dismissed the case on plaintiff's motion, on the ground that defendant's payment effected an abandonment by him of his right, plaintiff's contention, on appeal, that the court had not given its permission for the defendant to file the answer is without merit. *Bank v. Miller*, 594.

POLICE POWERS. See Constitutional Law, 5.

POLICY. See Insurance, 4, 5.

POLL TAX. See Constitutional Law, 3; School Districts, 13.

POSSESSION. See Mortgages, 2; Insurance, 7; Intoxicating Liquors, 3, 5.

POWERS. See Banks and Banking, 1; Elections, 1; Highways, 2; Taxation, 5; Constitutional Law, 4, 21; Statutes, 2; Municipal Corporations, 2.

POWER OF ATTORNEYS. See Wills, 14.

PRACTICE. See Courts, 11.

PRAYERS. See Appeal and Error, 5, 54; Instructions, 3, 6, 12.

PREJUDICE. See Instructions, 1, 8; Appeal and Error, 18, 19, 23; Criminal Law, 7; Homicide, 5, 6, 8.

PRELIMINARY HEARING. See Evidence, 12, 15, 16.

PREMEDITATION. See Homicide, 5.

PRESUMPTIONS. See Insurance, 5; Witnesses, 2; Appeal and Error, 21, 57; Wills, 7, 9; Corporations, 6; Rape, 1.

PRIMA FACIE CASE. See Carriers, 9; Insurance, 1; Bills and Notes, 4.

PRIMARY. See Elections, 1, 3, 4.

PRINCIPAL AND AGENT. See Actions, 9; Summons, 1; Vendor and Purchaser, 1; Wills, 14.

1. *Principal and Agent—Trespass—Torts of Agent—Damages.*—Where the defendant's agent authorized to collect deferred payment under a vendor's lien in the sale of a sewing machine, uses force in taking the machine away upon the nonpayment of the amount due, it is a tort performed in the course of the agent's employment for which the principal is answerable in damages. *Wilson v. Sewing Machine Co.*, 41.

2. *Principal and Agent—Implied Authority of Agent—Contracts.*—An agent has not the implied authority to bind his principal by contracts that are so unusual or improbable in agencies of that character as would put an ordinarily prudent man upon his guard that such authority did not exist; and the person thus dealing with the agent is required to ascertain from the principal the extent of the agent's authority with regard to the subject-matter. *Basnight v. Lumber Co.*, 51.

3. *Same—Timber.*—Where the defendant lumber corporation has an extensive plant for the cutting and hauling of its timber from large bodies of land, with a general agent in charge, a local agent with actual authority only to contract for the cutting, etc., over small parcels of land extending to periods of fifteen days, may not, by implied authority, bind his principal to a contract for the cutting of timber from a large body of timber requiring from three to eighteen years for its cutting, and the defendant, in the absence of an act of ratification, will not be bound thereby. *Chesson v. Cedar Works*, 172 N. C., 32, cited and applied. *Ibid.*

4. *Principal and Agent—Evidence—Questions for Jury—Established Facts—Questions of Law—Trials.*—Whether an agent has attempted to bind his principal by an act beyond his express or implied authority

PRINCIPAL AND AGENT—*Continued.*

is a question of fact for the jury, upon conflicting evidence; but whether the principal will be bound thereby is a question of law, under facts established or admitted. *Ibid.*

5. *Principal and Agent—Statute of Frauds—Deeds and Conveyances—Purchase Price—Money Advanced Agent.*—Where the agent, acting under verbal authority from his principal, purchases certain timber for the latter, and under his principal's instructions draws on him through the bank for the purchase price and commission, and under like authority the bank has cashed the draft, the question as to whether the statute of frauds requires that the principal execute a sufficient writing in order to be bound for the purchase of the timber, has no application, and the bank may recover from the principal the amount of the draft as money it had advanced him for the purchase of the timber, and which it has paid the agent upon the principal's verbal authority. *Bank v. Watson*, 148.

6. *Principal and Agent—Evidence—Ratification—Issues—Questions for Jury—Trials.*—Defendant, a storekeeper, denied the authority of his clerk to purchase goods from the plaintiff in his behalf, and refused to receive them upon their delivery at his store. The clerk sold a part of the shipment to a third person, turned the proceeds over to the defendant, who gave his clerk his check, which the latter mailed to the plaintiff, and it was returned because of the words written thereon "in full to date." The defendant had shipped the goods to the plaintiff. On the defendant's appeal, from the county court, from a judgment directed against him: *Held*, the Superior Court judge correctly set aside the judgment and ordered a jury trial upon the issues of agency and ratification, under the conflicting evidence in the case. *Frank v. Lefkowitz*, 273.

PRINCIPAL AND SURETY. See Appeal and Error, 20; Bankruptcy, 1; Contracts, 33.

1. *Principal and Surety—Supersedeas Bond—Execution—Bankruptcy—Discharge of Principal—Statutes.*—Where an undertaking to stay execution on appeal to the Supreme Court has been given by the defendant against whom judgment has been rendered, C. S., 650, and pending appeal he has been adjudicated a bankrupt in the Federal Court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute, according to the terms of the undertaking, which the bankrupt's subsequent discharge does not affect. *Laffoon v. Kerner*, 138 N. C., 281, cited and distinguished. *Murray v. Bass*, 318.

2. *Same—Federal Statutes.*—Where defendant's appeal to the State Supreme Court has been properly dismissed with judgment against the surety on defendant's undertaking to stay execution, C. S., 650, before discharge in bankruptcy in proceedings then pending, the defendant and his surety on the undertaking are codebtors within the meaning of the bankruptcy act, and thereunder the surety is not discharged from his obligation on the bond. *Ibid.*

PRIORITIES. See Judgments, 19.

PROBATE. See Wills, 2; Corporations, 5, 6, 8; Evidence, 7.

PROCEDURE. See Attachment, 5; Appeal and Error, 22, 47; Constitutional Law, 21.

PROCESS. See Attachment, 1; Courts, 1.

PROFITS. See Contracts, 35.

PROMISE. See Statutes, 12.

PROPERTY. See Taxation, 1; Judgments, 14.

PROXIMATE CAUSE. See Negligence, 2, 4.

PUBLICATION. See Schools, 6, 10.

PUBLIC POLICY. See Contracts, 5, 7.

PUIS DARREIGN CONTINUANCE. See Bankruptcy, 11.

PUNCTUATION. See Statutes, 9.

PUNISHMENT. See Criminal Law, 16.

PUNITIVE DAMAGES. See Appeal and Error, 2; Slander, 3, 5, 6; Instructions, 8; Contracts, 37.

PURCHASERS. See Betterments, 1, 3; Corporations, 1; Wills, 3; Bills and Notes, 6; Parties, 1; Deeds and Conveyances, 13.

QUALIFICATIONS. See Elections, 1; Witnesses, 1, 2; Appeal and Error, 15; Indictment, 1.

QUANTUM MERUIT. See Employer and Employee, 4.

QUASHING. See Indictment, 1.

QUESTIONS FOR JURY. See Appeal and Error, 39; Employer and Employee, 8; Homicide, 2, 6; Intoxicating Liquor, 5, 8; Injunction; Negligence, 6; Rape, 1; Trials, 3; Carriers, 9, 18; Contracts, 11, 19; Railroads, 2; Deeds and Conveyances, 9; Principal and Agent, 4, 6; Evidence, 5, 16; Attachment, 8.

QUESTIONS OF LAW. See Deeds and Conveyances, 2; Principal and Agent, 4; Banks and Banking, 6; Evidence, 16.

RACES. See Instructions, 1; Constitutional Law, 1, 6.

RAILROADS. See Carriers; Damages, 3, 4; Judgments, 1; contracts, 20; Courts, 6; Employer and Employee, 6.

1. *Railroads—Carriers—Right of Way—Consent Judgment—Depot Terminals—Heirs at Law—Reverter—Contracts.*—In plaintiff's action to recover from a railroad company upon a consent judgment entered in a suit brought by their ancestor to compel the running of trains over the lands of her predecessor in title, to an old depot, the terminal lands having been acquired by the defendant by *mesne* conveyances in fee, a judgment was entered by the court upon the consent of the

RAILROADS—*Continued.*

parties, that purported, in express terms, to apply to and include both the lands used for a right of way exclusively, and for the location of a station: *Held*, the term "right of way," applied to railroad companies, may include the depot site and grounds ordinarily used in the operation of a railroad; and the judgment in question evinced the intent of the parties that the depot site and grounds should revert upon the final cessation of its use for railroad purposes: and the plaintiffs in the present action, as heirs at law of the plaintiff in the former one, are entitled to recover it. This position is fortified by the fact that the *locus in quo* was the only land acquired by the defendant by *mesne* conveyances from the predecessor in title of the plaintiffs' ancestor. *Horner v. R. R.*, 270.

2. *Railroads—Employer and Employee—Master and Servant—Negligence—Sufficient Help—Evidence—Questions for Jury—Trials.*—In an action to recover damages for the negligent killing of plaintiff's intestate by the defendant railroad company, there was evidence tending to show that the intestate, in the course of his employment, had applied the brakes on two cars that had been "shunted" onto a sidetrack from the defendant's freight train, and that then the defendant's train "shunted" another car onto this track that came in contact with those to which the plaintiff had applied the brakes, connecting the automatic couplings so that the three cars, instead of remaining stationary, began to run back down grade; that the intestate got back upon the car and used a "brake stick" as a lever, which was fixed within the spokes of the brake wheel, for additional power, and upon the breaking of this "brake stick," the intestate was thrown between the cars to his injury and resultant death, there being no other employee than the intestate to act as brakeman under the circumstances: *Held*, sufficient evidence upon which the jury could find that the service required for stopping the cars under the circumstances was more than the intestate could singly perform with reasonable safety; that defendant had negligently failed in its duty to furnish him sufficient help, and that this negligence was the proximate cause of the intestate's death. *Strunks v. Payne*, 582.

3. *Same—Assumption of Risks.*—A brakeman on a freight train assumes the risks of his employment that are incident thereto and obvious, but not such as are caused by the negligence of the railroad company, or its employees, for whose acts it is liable, under such circumstances that the employee may not reasonably anticipate in time to avoid the result of an injury thereby caused, the rule not applying that the servant assumes the risk by remaining in the service after he knows it, or it is obvious, and he appreciates the danger arising from it. *Ibid.*

4. *Same—Rules of Employer.*—A rule of a railroad company that its employees shall not use a "brake stick" intended to be inserted between the spokes of the brake wheels for stopping its freight cars will not alone bar the recovery of such employee in his action to recover damages for the alleged negligence of the defendant railroad company when the rule has not been enforced, but habitually disregarded, if the use of the "brake stick" was reasonably required under the circumstances. *Ibid.*

RAILROADS—*Continued.*

5. *Same—Defects—Instructions.*—Under the evidence in this case, *it is held*, that the defendant railroad company could not reasonably object to a charge of the court instructing the jury that, where an employee knows of a defect that has caused the injury complained of, and appreciates the risk and the danger attributable to it, and continues in the employment without objection, or obtaining from his employer, or representative, an assurance that the defect would be remedied, the employee assumes the risk, even though it arises out of his employer's breach of duty, as the instruction is in its favor, if erroneous. *Ibid.*

RAPE. See Instructions, 11.

Rape — Outcry — Explanation — Evidence — Presumptions—Questions for Jury—Trials.—The failure of the prosecutrix to make outcry after the commission of rape on her by the prisoner raises only a presumption of the fact that she gave her consent, which she may explain by her testimony tending to show that she had remained silent for several days for shame, and for fear, under threats made on her life, etc., by the prisoner; and the presumption being one as to the fact, and not a rule of law, it presents a question of fact for the jury to decide by their verdict, under proper instructions from the court. *S. v. Dill*, 646.

RATIFICATION. See Schools, 2; Taxation, 6; Principal and Agent, 6; Schools, 15.

REASONABLE CARE. See Employer and Employee, 7.

REASONABLE DOUBT. See Criminal Law, 9; Instructions, 13.

REASONABLE TIME. See Contracts, 11.

RECEIVERS.

Receivers—Title—Chattel Mortgage—Registration—Liens.—The title to the property of the creditor passes to the receiver at the time of his appointment by the court, and the holder of an unregistered chattel mortgage on his goods does not have a specific lien thereon, superior to the rights of the general creditors, for which the receiver holds the title in trust. *Hardware Co. v. Garage Co.*, 125.

RECORD. See Appeal and Error, 41.

REDEMPTION. See Mortgages, 1, 7.

REFERENCE. See Appeal and Error, 39.

Reference—Findings—Judgments—Appeal and Error.—In passing upon the report of a referee, it is incumbent upon the judge to deliberate upon the evidence covered by the exceptions, and thereon find such facts as will sustain his own conclusion; and where the judge has found the same facts as those found by the referee, but has overruled the referee's conclusions thereon, which the referee's findings support, the judgment will be set aside in the Supreme Court, on appeal, so that the matter will be further passed upon in the Superior Court according to law. *Davis v. Davis*, 108.

REGISTRATION. See Limitation of Actions, 3; Receivers, 1; Mortgages, 8; Intoxicating Liquors, 1; Schools, 9.

REHEARING. See Supreme Court, 1.

RELIGIOUS PURPOSES. See Constitutional Law, 13.

REMAINDERS. See Wills, 4, 7, 17; Adverse Possession, 2.

REMAND. See Appeal and Error, 44.

REMEDIES. See Judgments, 10; Injunction, 3; Constitutional Law, 4.

REMOVAL OF CAUSES. See Liens, 1, 2.

REPUTATION. See Deeds and Conveyances, 3; Homicide, 9.

REQUESTS. See Appeal and Error, 3, 5; Instructions, 3, 5, 18.

RESERVATIONS. See Deeds and Conveyances, 8; Appeal and Error, 45.

RESIDENCE. See Taxation, 3.

RESIDUARY CLAUSE. See Wills, 9.

RES INTER ALIOS ACTA. See Appeal and Error, 18.

RETURNS. See Elections, 1.

REVERTER. See Railroads, 1.

REVIEW. See Appeal and Error, 4; Elections, 1.

RIGHTS OF WAY. See Railroads, 1.

RIGHTS. See Mortgages, 4, 7; Interpleader, 1; Contracts, 32; Criminal Law, 3; Evidence, 14.

RISKS. See Insurance, 6.

ROADS AND HIGHWAYS. See Appeal and Error, 33, 50; Highways.

1. *Roads and Highways—County Commissioners—Highway Commissioners — Bonds — Proceeds — Funds—Statutes.*—The commissioners of a certain county sold bonds, under authority of a statute, for the completion of the State highway through the county, and for certain designated purposes, with later enactment reciting that the costs of the State highway had been more than was estimated, and there were no available funds to pay the county quota for such expenditure, and provided for an additional sale of bonds, which was made for that and other specified purposes. Thereafter a county board of road commissioners was established by legislative enactment, by which complete control over the roads was given it, with direction that all road moneys for the purposes theretofore arising from taxation or sale of road bonds shall be turned over and belong to them by virtue of their office. It was made to appear that the county commissioners had borrowed money from certain banks in anticipation of the proceeds of the sale of the bonds, and for the purposes specified in the act, which was recognized by later legislation as valid, and

ROADS AND HIGHWAYS—*Continued.*

it was held, in a settlement between the two boards, the county commissioners were entitled to a credit of such amounts as had been paid by it for the designated purposes in the act, including such as had been borrowed from the banks for such purposes, but not for any amount that may have been used by it for general county purposes. *Comrs. v. Comrs.*, 463.

2. *Same.*—In an action by a county road commission to compel the county commissioners to pay over to the plaintiff board, under the provisions of a statute, the money received from the sale of bonds for road purposes, authorized separately under the provisions of two statutes, and thereunder the defendant board, before the establishment of the plaintiff board, had expended moneys for the purposes designated in the statutes, the mere fact that these two statutes, under which the defendant board had acted, had been subsequently consolidated by statute, recognizing the designated purposes for which the bonds had been issued by the defendant board, but for the stated purpose of avoiding "confusion and complications" from the different maturity dates of the separate issues, and the different interest rates of each, does not affect the question as to the credit the defendant was entitled to, in its settlement with the plaintiff board, for the money expended for the designated purposes. *Ibid.*

3. *Same—Mandamus.*—When the act of turning over by the county commissioners of certain funds arising from the sale of road bonds to a county board of road commissioners, entitled under the provisions of the act of its creation to receive them, is merely ministerial, *mandamus* will lie *(Board of Education v. Comrs.*, 150 N. C., 123), and it is not always essential to the maintenance of this remedy that it should be made to appear that the fund is still on hand, particularly where the question is one of bookkeeping between the parties to the action. *Ibid.*

4. *Same—Findings—Appeal and Error.*—An appeal from a writ of mandamus issued by the Superior Court to the defendant board of county commissioners to compel them to pay over to the county board of road commissioners the money on hand from the sale of road bonds, etc., as required by statute, it did not appear by the evidence to what extent the defendant had paid out moneys for certain purposes, authorized by the statutes, and to which it was entitled to a credit, and the case was remanded in order that it may be determined upon proper evidence how much of the proceeds of the bond issue, if any, has been expended contrary to the provisions of the statute affecting the question, with direction that a peremptory or alternate writ of *mandamus* issue as the facts may then appear. *Ibid.*

RULE IN SHELLEY'S CASE.

1. *Rule in Shelley's Case.—Shelley's case* gives a rule of property as well as of law, and obtains in the courts of this State, subject only to be changed or repealed by statute. *Hampton v. Griggs*, 13.

2. *Same—Interpretation.*—The perplexity in construing the rule in *Shelley's case* results in a measure from the want of appreciation of the full meaning and significance of some of the terms employed, and in the

RULE IN SHELLEY'S CASE—*Continued.*

expression "the word heirs is a word of limitation of the estate, and not a word of purchase," the word "limitation" is used in the sense of marking out the bounds or describing the extent or quality of the estate conveyed to the ancestor, or the first taker; and the words "not as a word of purchase" to refer to an estate acquired by the heirs, as such, in the ordinary course of descent, as distinguished from a class of persons to take the estate in remainder as the beginning of a new inheritance or the stock of a new descent. *Ibid.*

3. *Same—Requisites.*—In order to the application of the rule in *Shelley's case*, there are five requisites: there must be a grant of an estate in freehold in the ancestor or first taker; the ancestor must acquire this prior estate by, through, or in consequence of the same instrument which contains the limitation to his heirs; the words "heirs" or "heirs of the body" must be used in their technical sense as taking indefinitely under the canons of descent; the interest acquired by the ancestor and that limited to his heirs must be of the same quality, either both of them legal or equitable; the limitation to the heirs must be of an inheritance, in fee or in tail, by way of remainder. *Ibid.*

4. *Same—Intent—Heirs—Heirs of the Body—Technical Words.*—In construing a conveyance with reference to the application of the rule in *Shelley's case*, the general or paramount intent of the donor or grantor, in the use of the technical words "heirs" or "heirs of the body" should be first ascertained by construing the instrument as a whole, and should his intent, so found, be that these words should be taken with their technical or legal meaning, this meaning will control any particular intent he may have otherwise expressed; but should they be ascertained to have been used as denoting a particular class of persons, to take in remainder, as distinguished from those who would take in indefinite succession under the rules of descent, that meaning will prevail, and the first taker will acquire only an estate for life, and the rule in *Shelley's case* will not apply. *Ibid.*

5. *Same—Children.*—An estate to the lawful heirs of the testator's son after the death of the testator's wife, and should the son "die without a bodily heir then to the testator's family": *Held*, the words "lawful heirs of my son" should not be taken in their technical significance as heirs general, but in the sense of issue or children, and the limitation over to the testator's family was to designate certain persons of the testator's blood who should take to the exclusion of his general heirs, upon the happening of the contingency, directly from the testator, as the root of a new inheritance or the stock of a new descent, and the rule in *Shelley's case* does not apply. *Ibid.*

RULE OF THE PRUDENT MAN. See Employer and Employee, 2; Contracts, 35.

RULES. See Carriers, 12, 14; Deeds and Conveyances, 5; Insurance, 2; Railroads, 4; Supreme Court, 1; Appeal and Error, 1, 8, 31, 43, 47, 56.

SALES. See Betterments, 1; Judgments, 8; Contracts, 33; Injunctions, 6; Appeal and Error, 30.

SCHOOLS. See Constitutional Law, 2, 3, 6, 9, 13, 14, 15; Statutes, 2, 4; Injunctions, 4, 6; Taxation, 5; Judgments, 18; Appeal and Error, 44.

1. *Schools—Bonds—Taxation—Municipal Debts—Election—Board of Trustees of New Bern Academy—Statutes—Amendatory Act.*—The board of trustees of New Bern Academy, incorporated by 7 George III., and recognized by legislation in North Carolina by amendment from time to time, and given powers incident to boards of this character for issuing bonds, as well as plenary powers in the management of the school, found it necessary in stringent financial times to borrow money at various times from banks in order to keep the schools going. Upon the presentation of the matter to the board of aldermen of the city, an election was had upon the question of issuing bonds to take up the debt, in accordance with the Municipal Finance Act of 1921, and the proposition was approved: *Held*, the said board of trustees is an official board of said city, and its debts are the debts of the city, C. S., 2937; and the bonds issued by them to take up the indebtedness created before 5 December, 1921, and approved by the voters, are a valid obligation of the city, under the amendment of chapter 106, Extra Session of 1921, to C. S., 2937 (2), authorizing municipalities to fund or refund their indebtedness. See C. S., 2787, 2960 (2), 2937 (1). *Jones v. New Bern*, 131.

2. *Schools—Bonds—Taxation—Municipal Corporations—Necessaries—Elections—Ratification.*—Where a school board of trustees has borrowed money, and an election is regularly called to vote upon the question as to taking up the debt by a bond issue, the approval of the voters at the election afterwards so held is a ratification of the previous act of the school board, C. S., 2938, and renders unimportant the question as to whether the money had been borrowed for necessary purposes. *Ibid.*

3. *Schools—School Districts—Constitutional Law—Statutes—Amendments—Bonds—Taxation.*—Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, Art. II, sec. 29, and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendments, does not contravene the constitutional amendment as to "establishing or changing the lines of school districts," the lines established under the prior valid statute remaining the same. *Roebuck v. Trustees*, 144.

4. *Same—Elections—Approval of Voters.*—Where the only purpose of a statutory amendment to an act passed prior to the adoption of Article II, section 29, of our Constitution is to authorize an increase in the amount of bonds to be issued by a school district for school purposes, upon the adoption of the statutory amendment by the voters of the district, the act of the voters in approving the statutory amendment is a vote to authorize and approve the issuance of the bonds, and to vest power in the trustees of the school district for that purpose. *Ibid.*

5. *Schools—School Districts—Consolidation—Nontax Territory—Election—Taxation Bonds—Injunction.*—An exception to the issuance of bonds for school purposes by a district consolidated of special tax and non-

SCHOOLS—*Continued.*

special tax territory, on the ground that the question of taxation had not been separately submitted to the voters of the nontax territory, is untenable, when it appears from the record, on appeal, that the votes cast in the nontax territory had been separately counted, and found to be in favor of the proposition to issue the bonds, sought to be enjoined in the plaintiff's suit. *Board of Education v. Bray, post,* 484; *Barnes v. Comrs., ante,* 325. *Hechert v. Graded School,* 475.

6. *Same—Notice of Election—Publication—Appeal and Error.*—The issuance and sale of bonds for school purposes by a school district may not be successfully attacked on the ground that the notice of election was insufficient, when it is properly made to appear that, in accordance with the order of the board of commissioners, it had been previously advertised for four successive weeks in a newspaper published in the district; personal notice had been mailed to the individual electors therein; that wide publicity had been given it; that fair opportunity had been given the electors to cast their votes, and that practically a full registration had been obtained, which resulted in an overwhelming vote in favor of the proposition submitted. *Ibid.*

7. *Schools—Elections—Taxation—Statutes.*—An election held under the provisions of the act of 1920, ch. 87, authorizing the board of trustees of any school district to issue bonds for the erecting, enlarging, altering, and equipping of school buildings, acquiring lands therefor, etc., and annually to levy a tax, etc., sufficient in amount to pay the maturing principal and interest, will not be held invalid because the question was submitted upon levying a limited tax, when it appears that the levy submitted is at present sufficient to meet the requirements of the act authorizing the election, and there is no valid reason shown that it will ever be insufficient for the purposes intended. *Morris v. Trustees,* 634.

8. *Same—Notice—Purpose of Election.*—An election called under the provisions of the act of 1920, ch. 87, authorizing the trustees of any district to issue bonds for certain school purposes, will not be declared invalid upon the ground that the notice given had not stated the purpose for which the election was held, when it stated that it was for the purpose of issuing serial bonds not exceeding a certain amount, and of levying the special tax, specifying the act under which it was proposed to issue them; and there is nothing to indicate that any voter was misled or misinformed, and the election was carried with practical unanimity. *Ibid.*

9. *Schools—Elections—Taxation—Registration—Notice—Bonds.*—In this suit to enjoin the issue of bonds for certain school purposes in accordance with the act of 1920, ch. 87, *it is held,* that objection that a proper notice for the new registration of voters was not given cannot be sustained, it appearing that the notice thereof was previously published in a newspaper in the district for five successive weeks, and there was no evidence or finding of fact that any elector was prevented from registering on account of want of notice, or deprived of the right to vote on that account. *Ibid.*

10. *School Districts—Elections—Bonds—Taxation.*—A graded school district, maintained under the general statutory powers given the county board of education, having a duly appointed committee, secretary,

SCHOOLS—*Continued.*

and treasurer, etc., is one functioning by legislative authority, and comes within the privilege and power given by statute to hold an election on a specified bond issue and levy a special tax for school purposes. *Paschal v. Johnson*, 183 N. C., 129, cited and applied. *Miller v. School District*, 197.

11. *Same—Publication—Newspapers—Statutes.*—It is now made sufficient, by statutory amendment, so far as the newspaper publication is concerned, for a school district to publish a notice of an election to vote upon the issuance of bonds for school purposes and levy a tax therefor, in some newspaper published in the county, outside of the district, when no newspaper is published therein. Laws 1921, ch. 122. *Ibid.*

12. *Same—Preliminary Notice.*—The preliminary notice of twenty days for a new registration for an election provided by C. S., 5926, applies, under the general election law, to an election called by a school district to vote upon the issuance of bonds by the district for school purposes, and a tax levy to provide for the same. *Ibid.*

13. *Same.*—The failure of a school district to publish the preliminary notice for a new registration of an election to vote upon the issuance of school bonds and provide for the necessary tax levy according to C. S., 5926, does not invalidate the affirmative result of the election or affect the validity of the bonds or levy, when it appears that the new registration, as well as the election, had been given ample previous notice by publication in a newspaper circulating extensively in the district; by notice posted at the courthouse door, and three other public places therein; and that from a large vote polled only two electors had voted against the proposition, and it does not appear that any had been deprived of his opportunity to vote. *Ibid.*

14. *School Districts—Consolidation — Taxation — Elections—Constitutional Law.*—Where a school district has been made of consolidated special tax and nonspecial tax territory, by the county board of education, and thereafter at an election held for the purpose, according to law, the question of taxation for school purposes has been submitted to each of the old districts comprising the new or consolidated one, and they each have voted favorably upon the question, the result is not the levying a tax upon the nonspecial tax district without the legal approval of the voters therein, and the taxation so approved is constitutional and valid. *Burney v. Comrs.*, 274.

15. *Same—Statutes—Ratification—Curative Acts.*—A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by Article II, section 29, or the amendments of 1920 to the State Constitution, as to general legislation upon local or private affairs in "establishing or changing the lines of school districts"; and the Legislature, having the authority to enact a law of this character, when an election had been held approving this proposition, even if without warrant of law, may cure the defect by subsequent ratification and confirm the results of the election previously held. *Ibid.*

16. *School Districts — Consolidation — Taxation—Nontax Territory—Elections—Approval of Voters.*—Where special school tax districts have

SCHOOLS—*Continued.*

been consolidated with nonschool tax territory, it is, in effect, an enlargement of the special tax territory, and coming within the provisions of C. S., 5530, it is required for the validity of a special tax to be levied for school purposes in the enlarged territory that it be approved by the voters outside of the special tax district, or districts included in the consolidated territory, at an election to be held according to law. *Barnes v. Comrs.*, 325.

17. *School Districts—Consolidation—Taxation—Existing Districts—Collateral Attack—Actions—Injunction.*—Where nonspecial school tax territory is included in a consolidated school tax district with a school tax district that has theretofore voted and continued to levy a special tax, the question of the validity of the tax so levied by the existing district cannot be attacked collaterally in a suit to enjoin the levy of a special tax on the entire consolidated district, later attempted to be formed. *Ibid.*

18. *School Districts—Schools—Consolidation—Taxation—Bonds—Elections. Cole v. School Committee*, 480.

19. *School Districts—Schools—Consolidation—Statutes.*—It is not necessary to the valid consolidation of nonspecial school tax districts with special school tax districts that it be approved by the voters of the nonspecial school tax districts, when the questions of taxation and bond issues are not involved, C. S., 5473, and especially so when the consolidation has been made according to the provisions of a Public-Local Law applicable to the county wherein the consolidation has been made. *Board of Education v. Bray*, 484.

20. *Same — Taxation — Bonds — Nontax Territory — Elections.*—Where a Public-Local Law relating to a county wherein special school tax districts and nonspecial school tax territory have been consolidated into one district does not require a separate vote by the nonspecial tax territory upon the question of special taxation and the issuance of bonds for school purposes, objection to the validity of such taxation and bonds for the failure to vote separately thereon cannot be sustained; and after such consolidation, the consolidated district is authorized to vote special tax rates for schools in the entire district, under the general law. Laws 1921, ch. 179. *Ibid.*

21. *Same.*—Where special school tax districts and nonspecial school tax districts have been consolidated, and the district as a whole has voted, but separately as to each district, approving the question of special taxation for school purposes, and the election as to each, inclusive of the nontax territory, is upheld, counting the votes separately therein, the result of the election will be declared valid. C. S., 5530. *Ibid.*

22. *Same—Poll Tax—Property Tax.*—Since the adoption of the constitutional amendment of 1920, a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. *Ibid.*

SCHOOL DISTRICTS. See Schools.

SCIENTER. See Criminal Law, 10.

SEALS. See Corporations, 3, 4, 6, 8.

SELF-DEFENSE. See Homicide, 6, 10.

SENTENCE. See Criminal Law, 4, 11; Judgments, 21.

SERVANTS. See Wills, 19, 21.

SERVICE. See Courts, 1; Summons, 1.

SET-OFF AND COUNTERCLAIM. See Execution, 3.

SETTLEMENT. See Appeal and Error, 55.

SHAREHOLDERS. See Taxation, 7.

SHERIFFS. See Criminal Law, 5.

SIDETRACKS. See Contracts, 20.

SIGNATURE. See Contracts, 8; Judgments, 17.

SILENCE. See Contracts, 17.

SLANDER. See Appeal and Error, 2.

1. *Slander—Damages—Mental Suffering.*—In an action for slander, general damages, when recoverable, include actual or compensatory damages, embracing compensation for those injuries which the law will presume must naturally and proximately result from the utterance of words which are actionable *per se*, and may include injury to the feelings and mental suffering endured in consequence. *Baker v. Winslow*, 1.

2. *Same—Actionable Per Se—Pleadings—Proof.*—Where the words spoken and published in an action for slander are actionable *per se*, general damages need not be pleaded or proved. *Ibid.*

3. *Slander—Evidence—Punitive Damages.*—In an action for slander, words falsely charging the plaintiff, the defendant's tenant or cropper, with stealing a part of the defendant's crop raised by the plaintiff upon his lands, are actionable *per se*, when the words are spoken in the presence of others. *Ibid.*

4. *Slander—Malice—Damages — Compensatory Damages—Justification.*—Where the words spoken by the defendant of and concerning the plaintiff in an action for slander are actionable *per se*, the law will imply malice on the part of the defendant, which entitles the plaintiff to compensatory or actual damages; this kind of malice does not necessarily mean personal ill-will, but a wrongful act knowingly and intentionally done the plaintiff without just cause or excuse. *Ibid.*

5. *Same—Punitive Damages.*—Where the words uttered of and concerning the plaintiff in an action for slander are actionable *per se*, the finding of malice upon the issue does not alone establish the right of the jury to award punitive damages, unless there is actual malice, in the sense of personal ill-will, or there are features of aggravation, as when the wrong is done the plaintiff wantonly or under circumstances of rudeness or oppression, or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights. *Ibid.*

SLANDER—*Continued.*

6. *Slander—Damages—Punitive Damages—Evidence—Worth of Defendant.*—Where the matter published, in an action for slander, is actionable *per se*, and the verdict has been found against the defendant on the issue as to justification, upon further evidence tending to show actual malice, personal ill-will, or such aggravation of circumstances permitting the recovery of punitive damages, evidence concerning the defendant's worth or financial standing upon this element of damages is competent. The proper issues in actions for slander with or without the plea of justification, and the verdicts thereon, discussed by WALKER, J. *Ibid.*

SPECIAL LAWS. See Constitutional Law, 9.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STAKEHOLDER. See Attachment, 2, 3; Actions, 3.

STATES. See Actions, 4.

STATE COURTS. See Courts, 11.

STATE HIGHWAY COMMISSION. See Actions, 4; Summons, 1.

STATE PRISON. See Criminal Law, 16.

STATUTES. See Appeal and Error, 6, 20, 47; Indictment, 1; Carriers, 6, 7, 10; Contracts, 5, 7; Criminal Law, 2, 13; Discovery, 1; Costs, 1; Elections, 3, 4; Supreme Court, 2; Evidence, 1, 15; Instructions, 1, 5; Insurance, 5; Limitation of Actions, 1, 5, 6; Mortgages, 5; Pleadings, 1; Schools, 1, 3, 7; Wills, 2, 12; Judgments, 4, 12; Schools, 11, 15, 19; Trespass, 3; Attachment, 2, 3; Constitutional Law, 2, 5, 7, 9, 12, 20; Courts, 1, 2, 10; Injunctions 3; Taxation, 5; Principal and Surety, 1; Assault and Battery, 1; Execution, 1; Liens, 1; Actions, 4, 10, 12; Intoxicating Liquors, 3, 9, 10, 12, 13; Corporations, 3, 5, 6; Roads and Highways, 1; Trials, 2; Compromise and Settlement, 1.

1. *Statutes — Fertilizer—Analysis—Agricultural Department—Evidence—Actions—Counterclaims.*—In order to recover damages to the crops caused by the use of fertilizer containing a harmful deficiency of its ingredients, contrary to the seller's warranty, the statute, C. S., 4698, with its recent amendments, requires evidence of its analysis, showing the alleged deficiency, made by the State Agricultural Department, and whether sold upon a special contract, not waiving the benefit of the statute, or under the protection of the statute alone, such evidence is essential to defendant's recovery upon a counterclaim set up by him in plaintiff's action upon the note for the purchase price. *Pearsall v. Eakins*, 292.

2. *Statutes—Taxation—Schools—School Districts—Supplementary Powers.* Public Laws, Extra Session of 1920, ch. 87, applying to all school districts within the State, including incorporated cities and towns, requiring an election to be called upon the proposition of levying an additional special annual tax, etc., in the manner therein specified, is not a substitution of the existing powers of school districts, etc., and may be exercised independently of the provisions of C. S., 5523; nor is the statute of 1920, in its application to the town of Burlington,

STATUTES—*Continued.*

repealed by Public Laws of 1921, ch. 81, allowing that town from time to time to raise and appropriate money for erecting, enlarging, repairing, and equipping school buildings, and acquiring land for school purposes. *Story v. Comrs.*, 337.

3. *Statutes—Interpretation.*—The repealing of a statute by implication is not favored by the courts, and they will not do so if by any reasonable construction the statutes may be reconciled and repugnancy avoided. *Ibid.*

4. *Same—Schools—School Districts—Bonds.*—The general statutory inhibition against an election in a school district upon the issuance of bonds within two years after an election in which the question had been disapproved, C. S., 5533, does not apply to an election held under a public-local law applicable only to a certain city or district. *Ibid.*

5. *Statutes—Marriage—Penalties—License—Justices of the Peace—Ministers of the Gospel—Contracts.*—C. S., 2498, requiring that a minister or officer shall not perform the marriage ceremony "until there is delivered to him a license for the marriage," is in pursuance of a public policy and requires an actual and not a constructive delivery of the license to the officer or minister before he shall perform the ceremony, and a mailing of the license before the performance of the ceremony, though the officiating officer had been assured thereof by telephone from the register of deeds, is not such delivery as will protect the justice of the peace from the penalty imposed by C. S., 2499. *Wooley v. Bruton*, 438.

6. *Statutes—Sunday—Transaction of Business.*—An act which makes it a crime to expose for sale or selling, or offering for sale, on Sunday, any goods, etc., within four miles of an incorporated city, etc., and in the same sentence, divided by a semicolon, prohibits the keeping open of any store, etc., on Sunday, does not permit the keeping open of the store for the sole purpose of running a restaurant therein on Sunday, for the sale of food, etc., though the latter may not be of itself unlawful, when conducted in a separate place of business. *S. v. Pulliam*, 682.

7. *Statutes—Interpretation—Courts.*—The courts will observe the separation of the legislative and supreme judicial powers of the Government by the State Constitution, and will only interpret a statute to ascertain and give effect to the intention of the Legislature, or, if such intention cannot be discovered, to give the statute such reasonable construction as may be consistent with the general rules of interpretation, which the Legislature will be presumed to have recognized in connection with and as a part of the statute being construed; and to ascertain this legislative purpose, the spirit and reason of the law will prevail over its letter, especially where a literal construction would work an obvious injustice. *S. v. Bell*, 701.

8. *Same—Wife—Children—Divorce.*—Within the intent and meaning of C. S., 4447, the willful abandonment by the father of his children of the marriage is made a separate offense of like degree with that of his willful abandonment of his wife; and his duty to the children is not lessened by the fact that a decree of absolute divorcement has

STATUTES—*Continued.*

been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. *Ibid.*

9. *Same—Punctuation.*—Punctuation may now be considered as an aid in construing the purpose or intent of the Legislature in enacting a statute, especially when brought forward from time to time by legislative reënactment; and *it is held* that the placing of a comma after the words "such wife," in C. S., 4447, with regard to the husband's abandonment, evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with C. S., 4460, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." *Ibid.*

10. *Statutes—Interpretation—Captions—Reënactment.*—While the caption may not be considered in the interpretation of a statute when in conflict with the terms expressed in the body of the act, it will be given greater significance in its interpretation when the original act has been amended and the caption accordingly changed, and thus recognized by the Legislature in bringing the act with its amendment forward in the codified law; and this rule applies to the interpretation of C. S., 4447, as to the offense of the willful abandonment by the husband of his wife or children, fortified by C. S., 4449, authorizing the trial judge to provide for the support of the deserted wife, or children, or both. *Ibid.*

11. *Same—Husband and Wife—Descriptio Personæ—Parent and Child.*—C. S., 4449, uses the word "husband" as *descriptio personæ*, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorcement has been entered; and does not confine the offense to the willful abandonment of the wife. *Ibid.*

12. *Statutes—Abandonment of Children—Statute of Limitations—Support—Subsequent Promise.*—The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the same home with them or otherwise, in proceedings under our criminal statute for his willfully abandoning them. C. S., 4447. *Ibid.*

STATUTES OF FRAUD. See Principal and Agent, 5; Contracts, 23, 26, 27.

STATUTES OF LIMITATIONS. See Statutes, 12.

STENOGRAPHER'S NOTES. See Evidence, 13; Instructions, 10.

STIPULATIONS. See Carriers, 4; Contracts, 4.

STOCK. See Taxation, 7.

STOCKHOLDERS. See Corporations, 1.

STORAGE. See Carriers, 19.

STREETS AND SIDEWALKS. See Deeds and Conveyances, 13; Municipal Corporations, 2, 4.

SUBMISSION. See Costs, 1.

SUITS. See Appeal and Error, 33.

SUMMONS.

Summons—Service—Principal and Agent—Governmental Agencies—State Highway Commission—Actions.—A summons served on the chairman alone, and as such of the State Highway Commission, does not present in the action the question of the individual liability of its agents or employees for a tort alleged to have been committed by them. *Carpenter v. R. R.*, 401.

SUBSTITUTED AGENT. See Carriers, 11.

SUNDAY. See Statutes, 6.

SUPERIOR COURTS. See Judgments, 1; Constitutional Law, 18.

SUPERSEDEAS. See Appeal and Error, 20, 38; Principal and Surety, 1.

SUPPLEMENTARY PROCEEDINGS. See Appeal and Error, 14; Judgments, 8; Execution, 2.

SUPPORT. See Statutes, 12.

SUPPRESSION. See Contracts, 33.

SUPREME COURT. See Constitutional Law, 4.

1. *Supreme Court—Rules of Practice—Petition to Rehear—Appeal and Error.*—The requirement of Rule 52 that petition for rehearing be filed within forty days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. *Cooper v. Comrs.*, 615.

2. *Same—Statutes—Conflict—Constitutional Law.*—The Supreme Court is given, by Article I, section 8, of our Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed. *Ibid.*

SURFACE WATERS. See Municipal Corporations, 1.

SURVEYOR. See Highways, 5.

SUSPENSION OF JUDGMENT. See Criminal Law, 6; Judgments, 21.

TAXATION. See Schools, 1, 2, 3, 5, 7, 9, 10, 14, 16, 17, 19, 20, 21, 22; Injunction, 1, 2; Constitutional Law, 6, 9, 12, 14, 15; Statutes, 2; Judgments, 18.

1. *Taxation—Time of Listing Property.*—In 1919 the taxpayer was required to list his taxes on the first of May, and by Public Laws 1919, ch. 84, sec. 8, all property was required to have been listed as of 1 January for the years 1920, 1921, 1922, 1923, upon the valuation of May, 1919. By ch. 1, sec. 1, Extra Session of 1920, the valuation of 1 May, 1919, was approved and accepted for the years stated, and by sec. 8 of ch. 1, Extra Session of 1920, except for the purpose of taxation of the year 1920, the taxes were required to be listed 1 May, that is, those of 1921, etc.: *Held*, the language of these acts is unambiguous, leaving nothing open to construction, and requires that

TAXATION—*Continued.*

for the year 1920 the tax on property was to be charged on the tax books as of the first day of the year. *Roanoke Rapids v. Patterson*, 135.

2. *Same—Domicile.*—Under the provisions of our statutes, all personal property and all taxable polls shall be listed by the taxpayer in the township in which he resides, the residence in such instances being interpreted as the place of domicile. *Ibid.*

3. *Same—Residence—Animus Manendi.*—The words "domicile" and "residence" are not, in accuracy, convertible terms, the former being a person's fixed and established dwelling place, as distinguished from his temporary, although actual, place of "residence," the former implying both his physical presence in a particular locality and his intention to make this locality a permanent abiding place, both as to actual residence or occupancy and as to the *animus manendi*. *Ibid.*

4. *Taxation—Change of Domicile—Place Where Taxes Are Due.*—Where a taxpayer has listed his property for taxation in May, 1919, in the township of his domicile, and a few days prior to 1 January, 1920, has made arrangements and intends to move his domicile to another township, but does not actually reside there until 3 January, 1920, his taxes are due and payable at the place of his former domicile, or the township from which he has removed. *Ibid.*

5. *Taxation — School Districts — Statutes — Limitation of Powers—Void Levy.*—The power of the county board of education to levy a tax under an election called by the county commissioners, for the purpose of erecting, enlarging, altering, and equipping buildings, etc., for school purposes, under Public-Local Laws of 1920, ch. 87, sec. 1, Extra Session, is expressly therein limited, "unless or until" the qualified electors have voted for the proposition; and a levy of such tax contrary to this restriction as to the time thereof is void under the express statutory inhibition. *Galloway v. Board of Education*, 245.

6. *Same—Void Levies—Elections—Ratification.*—Where a levy of a tax by a county for school purposes is originally invalid because in violation of an express provision of the statute under which the levy is proposed to be made, requiring that the levy shall not be made unless and until the approval of the voters at an election held, etc., and which has never been modified or changed, the subsequent approval thereof by the voters cannot have the effect of relating back and curing the defect, or render the levy a valid one. *Ibid.*

7. *Taxation—Corporations—Shares of Stock—Shareholders—Constitutional Law.*—Art. V, sec. 3, of our State Constitution requires legislative enactment for the levy of taxes, and objection to a statute that requires corporations to pay the taxes on every element of value that goes to make up their taxable assets, and specifically excludes the payment of taxes upon the shares of stock by the individual owner is untenable, and *mandamus* to compel the State Tax Commissioner to enforce the payment of taxes by the individual owner on his shares, contrary to the provisions of the statute, will not lie. The relation of the shareholders to the corporation, as creditors discussed by ADAMS, J. *Person v. Watts*, 499.

TENANTS IN COMMON. See Estates, 1; Judgments, 15; Parties, 1.

Tenants in Common—Owelty.—Owelty of partition, when allowable, is a sum paid or secured, in case of partition in unequal portions, by him who received the larger and more valuable portion, to him who has received the less, in order to equalize values of the tracts apportioned among tenants in common of the lands in question. *Outlaw v. Outlaw*, 255.

TENEMENT. See Easements, 1.

TERMS. See Wills, 6.

TERRITORY. See Schools, 5, 16.

TIMBER. See Principal and Agent, 3; Appeal and Error, 45.

TIME. See Taxation, 1; Insurance, 4; Carriers, 16; Pleadings, 5.

TITLE. See Betterments, 3; Bills and Notes, 1, 2, 3; Receivers, 1; Appeal and Error, 12; Limitation of Actions, 6; Mortgages, 7; Trespass, 3; Attachment, 5; Interpleader, 1; Wills, 4, 16; Adverse Possession, 1; Deeds and Conveyances, 13.

TORTS. See Employer and Employee, 7; Damages, 1, 2; Principal and Agent, 1; Actions, 8, 9; Pleadings, 3.

TRANSPORTATION. See Intoxicating Liquors, 1.

TRESPASS. See Principal and Agent, 1; Adverse Possession, 2, 4.

TRIALS. See Rape, 1; Carriers, 9, 18; Instructions, 10; Contracts, 9, 11, 19, 37; Homicide, 2, 6; Deeds and Conveyances, 2, 9; Railroads, 2; Principal and Agent, 4, 6; Evidence, 5, 8, 11, 12, 16; Costs, 1; Fraud, 1; Employer and Employee, 8; Banks and Banking, 6; Criminal Law, 15; Injunction, 4, 5; Appeal and Error, 18, 19, 23, 39, 53, 54; Attachment, 8; Verdict, 2; Constitutional Law, 17, 22; Intoxicating Liquors, 4.

1. *Trials—Argument of Counsel—Depositions Withdrawn—Approval of Court—Orders.*—A party to an action may not withdraw depositions he has had taken from the files of the court without leave and an order from the court, and upon his so doing, the counsel for the adverse party may argue to the jury that the depositions were unsatisfactory to the party at whose instance they had been taken. *Forbes v. Long*, 38.

2. *Trials — Motions — Nonsuit — Evidence—Statutes—Waiver.*—The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence, and his failure to renew his motion on all the evidence, is a waiver of his right under the statute, C. S., 567. *Wooley v. Bruton*, 438.

3. *Trials—Evidence—Questions for Jury.*—The weight and credibility of the evidence are matters within the province of the jury to determine, under a proper instruction by the court of the law thereto applicable. *S. v. Wingler*, 747.

TRESPASS.

1. *Trespass—Evidence—Verdict.*—Upon the trial of an action for assault upon the person and trespass upon the property of the *feme* plaintiff,

TRESPASS—*Continued.*

there was evidence that the agent of the defendant called at the house to collect a deferred payment under a vendor's lien upon a sewing machine, refused to wait therefor until the return of the plaintiff's husband, and resisting her efforts in opposition: *Held*, sufficient to sustain a verdict awarding damages to the plaintiff. *Wilson v. Sewing Machine Co.*, 40.

2. *Trespass—Principal and Agent—Damages—Employer and Employee—Master and Servant.*—Where one has employed another to cut the timber from his own land, and the one so employed cuts timber from lands outside his employer's boundaries, ordinarily an action may be maintained against the employer for the trespass of his agent, especially when he has knowingly received a part of the consideration for the timber, or there is other evidence of his ratification of his employee's acts. *Hoge v. Lee*, 45.

3. *Trespass — Evidence — Title—Color — Adverse Possession—Statutes—Principal and Agent.*—In an action of trespass involving title to lands, the plaintiff relied on adverse possession under color, and the defendant also upon such possession. Both parties relied upon the possession of their respective agents occupying camps on the land about fifty yards apart. Evidence held competent, in plaintiff's behalf, to show that defendant's agent had offered money to plaintiff's agent to quit possession, during such occupancy, as a part of the *res gestæ*, and also competent under the circumstances of the case, as tending to show the defendant's agent afterwards acquired the possession of the land with the defendant's approval, and for the purpose of evicting the plaintiff's watchman peaceably, if possible, and forcibly, if necessary. *Berry v. Cedar Works*, 187.

TRUSTS. See Limitation of Actions, 1; Contracts, 26; Injunction, 8; Schools, 1.

1. *Trusts—Equity—Deeds and Conveyances—Cancellation.*—Where, at the suit of the wife, it appears that a deed in trust, made by herself for her benefit and that of her children, was under a misapprehension of the facts, and that its enforcement had proven to be ill-advised, improvident, and impossible of fulfillment, and that its cancellation would be to the interest of all concerned, preventing an irreparable loss, its cancellation as prayed for may be adjudged in the equitable jurisdiction of the court; but where these allegations are not admitted or proven, the case on appeal will be remanded that the facts may be judicially ascertained. *Bell v. McCoin*, 117.

2. *Same—Divorce—Parties—Husband and Wife—Marriage.*—The divorced husband of the wife is a proper party to the suit of the wife to set aside her deed of trust to another for the benefit of herself and children, made during the existence of the marriage ties; and it appears in this suit that all the persons in interest have properly been made parties. *Ibid.*

UNITED STATES MAIL. See Carriers, 8; Contracts, 12.

USURY. See Mortgages, 5.

Usury—Injunction—Appeal and Error.—The action of the Superior Court judge in dissolving a temporary restraining order for the sale of

USURY—*Continued.*

certain collateral upon the ground of alleged usury is sustained on appeal under the authority of *Owens v. Wright*, 161 N. C., 131. *Ward v. Winston*, 613.

VALUE. See Deeds and Conveyances, 7; Wills, 3; Parties, 1; Appeal and Error, 36; Damages, 4.

VENDOR AND PURCHASER. See Contracts, 8, 16; Judgments, 4, 8; Mortgages, 8; Negligence, 5.

1. *Vendor and Purchaser—Contracts—Warranties—Return of Goods—Fraud—Principal and Agent—Evidence—Burden of Proof.*—Where the purchaser of machinery under a written contract has agreed that if he did not return the machine within thirty days it was to be regarded as an acceptance, shutting off all warranties, expressed or implied, and defends an action to recover the purchase price on the ground that the selling agent had fraudulently induced him, by his promise, upon which he relied and acted, not to return the machine within that time, the burden is on the defendant to establish the false representations, and that the plaintiff's agent was authorized to make them, by evidence *aliunde*, the agent's declarations, and his demurrer to the complaint is properly overruled. *Fay v. Crowell*, 415.

2. *Same—Declarations—Evidence Aliunde.*—While a vendor of goods may subsequently waive the stipulations of warranty in the written contract of sale, made in its behalf, the burden of proof is on the purchaser relying thereon to show that plaintiff's agent had the authority from his principal to waive these stipulations, either expressly or implied from the character of the agency. *Ibid.*

VENUE. See Liens, 1.

VERDICT. See Appeal and Error, 11, 32, 46, 49; Contracts, 14; Homicide, 11; Trespass, 1; Fraud, 1; Judgments, 5; Criminal Law, 8; Intoxicating Liquor, 4.

1. *Verdict—Impeachment—Jurors—Clerks of Court—Evidence—Hearsay Evidence.*—Jurors may not impeach, by direct testimony, their verdict after it has been rendered; nor may this be done indirectly upon testimony of the clerk, or another, of a conversation he had overheard between some of the jurors, after the verdict was rendered, the latter being further objectionable as hearsay; and where the trial judge has found the facts to be as set out in the clerk's affidavit, and overrules the motion as a matter of law, it is, in effect, a conclusion that evidence of this character was not admissible for the purpose, and would not, therefore, be considered by him. *Baker v. Winslow*, 2.

2. *Verdicts—Motion to Set Aside—Discretion of Court—Courts—Appeal and Error—Trials.*—A motion before the trial judge to set aside a verdict and award a new trial on the ground that the verdict was contrary to the weight of the evidence is addressed to the legal discretion of the judge, and his denying the motion is not reviewable on appeal when no abuse of discretion is shown. *Mica Co. v. Mining Co.*, 490.

3. *Verdict—Issues of Fact—Appeal and Error.*—*Cheese Co. v. Culbreth*, 631.

VESTED RIGHTS. See Wills, 4; Constitutional Law, 14.

VOTERS. See School Districts, 7.

WAIVER. See Contracts, 10; Courts, 2; Trials, 2; Carriers, 20; Liens, 1; Judgments, 20.

WAREHOUSES. See Contracts, 20; Carriers, 19.

WARRANT. See Courts, 1.

WARRANTY. See Contracts, 8; Vendor and Purchaser, 1.

WIDOWS. See Mortgages, 2.

WILLS. See Estates, 1.

1. *Wills—Devises—Land.*—The word "lend" used in the will construed in this case is held to have been used in the sense of the word "devise." *Hampton v. Griggs*, 14.

2. *Wills—Probate—Common Form—Conclusions—Statutes.*—A will duly admitted to probate is conclusive as to its validity until vacated on appeal or declared void by a competent tribunal. C. S., 4145. *Newbern v. Leigh*, 166.

3. *Same—Fraud—Caveat—Purchasers for Value, Without Notice.*—Where, under a will duly admitted to probate, a devisee of lands has sold the same to a third party, and thereafter, upon caveat entered, the will has been set aside, the proceedings are *in rem*, and the purchaser for value and without notice of the fraud acquires a good title against the heirs at law of the deceased owner. *Ibid.*

4. *Wills—Interpretation—Intent—Estates — Remainders—Heirs—Descent and Distribution—Vested Interests—Title.*—Under a devise of lands to the testator's wife for life in lieu of dower, and at her death, the lands to be sold at public sale, and the proceeds equally divided "among his lawful heirs," the title will immediately vest in the testator's children at the time of his death, and will not be postponed to the death of his widow, when the distribution of the proceeds of the sale is directed to be made; and where at the time of the vesting of the estate there were several children of the testator living, but all of them died during the continuance of the life estate of the widow, the title to the whole of the lands having vested in the last surviving child under the canons of descent will pass to the devisee under the will of such child. *Grantham v. Jennette*, 177 N. C., 229, cited and distinguished. *Witty v. Witty*, 375.

5. *Same—Canons of Descent.*—The law favors the early vesting of estates; and upon a devise of lands to the testator's wife for life, and at her death to be sold and the proceeds divided among "his lawful heirs," without qualifying words, the word "heirs" is to be taken in its natural and primary meaning as designating the ones on whom the law casts the estate immediately on the death of the ancestor, and the direction that the lands be sold and the proceeds divided does not affect this interpretation. *Ibid.*

6. *Wills—Interpretation—"Heirs"—"Next of Kin"—Synonymous Terms—Words and Phrases.*—In construing a will the courts will ordinarily consider the words "heirs at law" as having the same meaning as the words "next of kin," in dealing with real property. *Ibid.*

WILLS—*Continued.*

7. *Wills—Interpretation—Intent—Estates—Remainders—Inferences—Presumptions.*—A devise of lands to the testator's wife, in lieu of dower, and at her death to be sold "and the amount it brings equally divided among my heirs at law," cannot affect the interpretation that the title vested in his children upon his death, the enjoyment to commence after the falling in of the life estate, because of the fact that no gift in remainder by specific words had been used, the inference thereof being from the direction to sell the lands and divide the proceeds among his heirs. *Ibid.*

8. *Wills—Interpretation—Intent.*—The intent of the testator, as gathered from the words he has used in his will, will prevail in giving effect to the will, not so much depending upon what the testator intended to express as what he actually expressed therein, considering all its provisions in their related entirety; and while presumptions as to his meaning are usually subordinated to his intention, they are not to be disregarded as an aid to the discovery of such intention when such construction is reasonable and in accord with the language used. *McIver v. McKinney*, 393.

9. *Same—Presumptions—Residuary Clause—Intestacy.*—Where reasonably permissible, the law presumes that it was not intended by a testator to die intestate as to any part of his property, and the law will accordingly, in proper instances, presume that by a residuary clause the intestate intended to dispose of the property that he has not disposed of specifically in other parts of his will. *Ibid.*

10. *Same.*—In one item of his will a testator devised his home lands to his wife for life, therein not specifically designating those to take in remainder; and in another item thereof disposed of the residue of his estate, if any, to his wife and daughter, in equal proportions, share and share alike: *Held*, it was the testator's intent that the remainder of his estate devised in the first item should vest under the residuary clause. *Ibid.*

11. *Same—Equity—Conversion.*—Where a testator directs that his real estate be sold and the proceeds first applied to the payment of his debts, and should any surplus remain, it should be divided among certain beneficiaries, such beneficiaries take the surplus as personalty under the doctrine of equitable conversion, subject to the law of descent applicable to property of that character. *Ibid.*

12. *Same—Statutes—Husband and Wife.*—Where a daughter takes the lands of her father, after the death of her mother, as residuary legatee under his will, but as personalty under the equitable doctrine of conversion, and then dies intestate, without child or the representative of such child, leaving a husband surviving, the daughter acquires her mother's interest, under the provisions of C. S., 137, and her husband, upon her death, is entitled to the estate as her personalty under the provisions of C. S., 7, subject to the rightful demands of creditors; and C. S., 137 (8), relating to instances where a married woman dies intestate, leaving a husband and a child, or the representative of such child, has no application. Public Laws of 1921, ch. 54. *Ibid.*

13. *Wills—Animo Testandi.*—A paper-writing to constitute a valid will must by the written terms show, among other things, the intent of the

WILLS—*Continued.*

maker to dispose of his property to take effect after his death, and when such intent does not so appear, extraneous evidence is inadmissible for that purpose. *In re Seymour*, 418.

14. *Same—Disposition of Estate—Powers of Attorney—Principal and Agent.* A paper-writing signed by the wife under seal stating that she was of "sound mind and body," and "investing" her husband "with full power of attorney over all moneys, real estate, liberty bonds, and all other property owned by me at this date, for the purpose of acting for me in all business matters," etc., designating the property specifically, is but the appointment of her husband as her agent or attorney in fact, without any disposition to him, and ineffectual as a will; and its interpretation otherwise cannot be upheld by the added words, "this also constitutes my last will," for this can only refer to the paper that is in itself ineffectual as a will. *Ibid.*

15. *Wills—Interpretation—Intent—Irreconcilable Provisions.*—In construing a will, the intent of the testator, as embodied in the entire instrument, must prevail, and each and every part must be given effect if it can be done by fair and reasonable intendment; and where, under this rule, it appears that a later item of a devise or bequest therein is irreconcilable with a former one, the general rule is that the last expression will prevail. *Ledbetter v. Culberson*, 488.

16. *Same—Title—Contracts to Convey—Deeds and Conveyances.*—By the first item of the will a testator devised and bequeathed to his wife "all of my property whatever and wherever found, . . . during her natural life only, the returns, income, and dividends accruing upon such stock as I may own at the time of my death" in a certain manufacturing concern; and provided in a later item that at the death of the wife the designated stocks and real estate not specifically including the *locus in quo* shall go to certain named collateral relations, with "remainder of my estate, both real and personal, not otherwise disposed of" to his wife, the title to vest in her absolutely and unconditionally at his death. After the testator's death the defendant contracted to purchase the *locus in quo* from the widow, and refused to accept her deed, denying her title under the will: *Held*, under a proper construction of the will, it was the intent of the testator that the fee-simple title to the lands in question should go to the widow under the later item of the will, which was reconcilable with the first thereof, and that the defendant comply with his contract of purchase. *Ibid.*

17. *Wills—Devise—Estates—Remainders—Intent.*—A devise to testator's wife of all his personal and real property, to use as she may see proper for the balance of her life, and should there be any at her death, it was the testator's "preference" that it should go to a charitable institution, giving indication, or otherwise some institution his wife would designate: *Held*, the wife acquired only a life estate in the lands included in the devise to her, and could not convey a fee-simple title to a purchaser. *Herring v. Williams*, 158 N. C., 1, cited and approved. *Miller v. Scott*, 556.

18. *Wills—Interpretation.*—In interpreting a will to ascertain a testatrix's intention, the court should place itself as near as may be in her position, and when the language she has therein used is ambiguous

WILLS—*Continued.*

or doubtful, it should take into consideration the situation of the testatrix at the time and the relevant facts and circumstances surrounding her at the time the will was executed, the first rule of construction being to give effect to the testatrix's intention as found in the terms of the will and within the limits which the law prescribes; and the predominant and controlling purpose of the testatrix must prevail when ascertained from the general provisions of the instrument over particular and apparently inconsistent expressions to which, unexplained, a technical force may be given. *Raines v. Osborne*, 599.

19. *Same—Devises—Domestic Servants—Employees.*—A bequest in a will "to any servant or any other household employee" of the testator should be construed as if expressed "to any household servant or any other household employee," and does not include within its meaning those who worked upon the testator's farm, occasionally doing carpenter's work in the home, laying cement in the house, or laying rock on the premises, making flower boxes, etc., though occasionally, or at rare instances, they may have performed some slight service that may come within the letter of the definition though not within its spirit, and the clear intention of the testatrix. *Ibid.*

20. *Wills—Interpretation—Intent—Evidence—Parol Evidence.*—Parol evidence of a testator's declarations of his intent in making a will, made before or at the time he executed it, is incompetent, the rule being that the intent as gathered from the written instrument, under the established rules of interpretation, will prevail. *Ibid.*

21. *Wills—Interpretation—Servants—Employees—"Household."*—A bequest "to any servant or other household employee who may be in my (the testatrix's) employment at the time of my death," is construed to imply the words "household" between the word "any" and the word "servant"; and one employed around the house, sleeping in a servant's room on the premises, eating in the servant's quarters, and hired to cut and bring in wood, for use in the testatrix's dwelling, and to take care of the testatrix's greenhouse, to cut the grass on her lawn, to dust her rugs, etc., is within the intent and meaning of the words "domestic servant." This interpretation is illustrated by a specific devise in another item of the will to one employed as a companion by the testatrix, living as a member of her household, and whose duty was not that of a servant, the testatrix not intending to call her a servant, and therefore using the words "household employee" to spare her feelings, although she performed in some respects a servant's work. *Raines v. Osborne*, 603.

WITHDRAWAL. See Trials, 1.

WITNESSES. See Appeal and Error, 15, 54; Evidence, 12, 16.

1. *Witnesses—Qualification—Oath—Mental Capacity—Courts—Discretion—Appeal and Error.*—It is the question of the mental capacity of a witness to understand and appreciate the solemn obligation imposed on him by oath to tell the truth, and his ability to correctly narrate the facts involved in the controversy, that determines his eligibility as a witness; and his youth and adjudged imbecility of mind are

WITNESSES—*Continued.*

only evidentiary in the determination of the question by the judge; and his decision thereon, in the absence of a special finding of the facts, is not reviewable on appeal. *Lanier v. Bryan*, 235.

2. *Witness — Qualification — Courts—Rulings — Evidence—Findings—Presumptions.*—Where the trial judge has heard competent evidence sufficient to sustain his ruling, and adjudges that the witness is competent to testify in the action, it will be presumed, on appeal to the Supreme Court, that he has found facts sufficient to sustain his rulings, when it is silent in that respect. *Ibid.*

3. *Witnesses — Character — Knowledge — Intoxicating Liquor—Spirituous Liquor—Evidence—Hearsay Evidence.*—Before a witness may testify to the bad character of the defendant on trial for the unlawful sale of liquor, he must qualify himself by first saying under oath that he knows what such character is, before giving the information he has received thereon from others, and thus prevent a conviction by rumors that were mere hearsay declarations on the principal question of guilt or innocence; and an admission of testimony, in behalf of the State, that all the witness could say was what people had said to him, that the defendant was a man who handled liquor, is reversible error, when unsupported by the sworn testimony by the witness of his own knowledge of the defendant's bad character. *S. v. Mills*, 794.

WORDS AND PHRASES. See Rule in *Shelley's case*, 4; Wills, 6.

WRITTEN INSTRUMENTS. See Evidence, 3; Contracts, 27; Evidence, 7.

WRITS. See Constitutional Law, 4.

WRONGFUL DEATH. See Appeal and Error, 36; Damages, 4; Negligence, 8.