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NORTH CAROLINA REPORTS
VOL. 186

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1923

REPORTED BY
ROBERT C. STRONG

RALEIGH
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1924

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" Eq.	"	45	"
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4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
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2 " "	"	55	"
3 " "	"	56	"
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1923

CHIEF JUSTICE:

WALTER CLARK

ASSOCIATE JUSTICES:

WILLIAM A. HOKE, W. J. ADAMS,
W. P. STACY, HERIOT CLARKSON.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
Thos. W. Pittman	Third	Vance.
F. A. Daniels	Fourth	Wayne.
J. Loyd Horton	Fifth	Pitt.
Henry A. Grady	Sixth	Sampson.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
N. A. Sinclair	Ninth	Cumberland.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
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A. M. Stack	Thirteenth	Union.
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.

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EASTERN DIVISION

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Donnell Gillam	Second	Edgecombe.
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Clawson L. Williams	Fourth	Lee.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
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J. Will Pless, Jr.	Eighteenth	McDowell.
J. E. Swain	Nineteenth	Buncombe.
George C. Davis	Twentieth	Haywood.

LICENSED ATTORNEYS

FALL TERM, 1923

The following were licensed to practice law by the Supreme Court, Fall Term, 1923:

ASHBY, ROSS LAFAYETTE	Mount Airy.
BAILEY, JOSEPH WALTER	Everett.
BANZET, JULIUS EDMOND, JR.	Ridgeway.
BATTLE, JAMES SMITH	Tarboro.
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DANIELS, JONATHAN WORTH	Raleigh.
DEES, GEORGE COLUMBUS	Grantsboro.
DENNIS, WILLIAM ALPHONSUS	Durham.
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GRIFFIN, EDWARD FOSTER	Louisburg.
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HENDERSON, TYRE GLENN	Greensboro.
HENDERSON, WORTH DEWEY	Greensboro.
HOLMES, CLAYTON CARR	Council.
HOLMES, GABE	Goldsboro.
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HOPE, ROBERT ALLISON	Madison.
JAMES, JOHN	Charlotte.
JENNINGS, ROMULUS CALL	Winston-Salem.
JORDAN, ARCHIBALD CURRIE	Durham.
JOYNER, JOHN COUNCIL	LaGrange.
KENDALL, JOHN WALDO	Norwood.
KERR, JOHN, JR.	Warrenton.
KISER, HENRY LESTER	Bessemer City.
LUNDY, CLARENCE ELWOOD	Raleigh.
LYON, JAMES EDWIN	High Point.
MACRAE, JAMES	Fayetteville.
MALONE, JAMES ELLIS	Louisburg.

MILLS, JOHN GARLAND, JR.---Wake Forest.
MONROE, PAUL EUGENE---Salisbury.
MONTAGUE, PAUL NISSEN---Winston-Salem.
MOSER, WILL EUSTACE---Randleman.
MYRICK, FRED FLETCHER---Greensboro.
NICHOLSON, CYRUS HERBERT---Cowarts.
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PARSONS, PAUL GRIER---Grassy Creek.
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PRICE, JOHN HAMPTON, JR.---Stoneville.
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STRAITS, LLOYD ANDREW---Columbia, S. C.
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WAGENHEIM, PHILIP---Norfolk, Va.
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WELLONS, WILLIAM BRYANT---Smithfield.
WEST, NORMAN MARTIN---Council.
WILSON, JOSEPH VON---Lumberton.
WOLTZ, HOWARD OSLER---Mount Airy.

The following were admitted under the recent Comity Act:

DAVIS, HUELING (from Kentucky)---Charlotte.
DODGEN, JAMES C. (from Georgia)---Raleigh.
MOTTE, LEON LOUIS (from South Carolina)---Wilmington.
SIMS, CHARLES PICKETT (from South Carolina)---Asheville.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1924

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, 1924
First District	February 5
Second District	February 12
Third and Fourth Districts	February 19
Fifth District	February 26
Sixth District	March 4
Seventh District	March 11
Eighth and Ninth Districts	March 18
Tenth District	March 25
Eleventh District	April 1
Twelfth District	April 8
Thirteenth District	April 15
Fourteenth District	April 22
Fifteenth and Sixteenth Districts	April 29
Seventeenth and Eighteenth Districts	May 6
Nineteenth District	May 13
Twentieth District	May 20

SUPERIOR COURTS, SPRING TERM, 1924

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

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Devin.*

Camden—Mar. 10.
Beaufort— Jan. 14*; Feb. 18† (2); April 7†; May 5; May 12†.
Gates—Mar. 24;
Tyrrell—Jan. 28 (2); April 21; June 2†.
Currituck—Mar. 3; April 28†.
Chowan—Mar. 31.
Pasquotank—Dec. 31† (2); Feb. 11†; Mar. 17; June 9† (2).
Hyde—May 19.
Dare—May 26.
Perquimans—Jan. 21; April 14.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Bond.*

Washington—Jan. 7 (2); April 14†.
Nash—Jan. 28; Feb. 18† (2); Mar. 10; April 21† (2); May 26.
Wilson—Feb. 4*; Feb. 11†; May 12*; May 19†; June 23†.
Edgecombe—Jan. 21; Mar. 3; Mar. 31† (2); June 2 (2).
Martin—Mar. 17 (2); June 16.

THIRD JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Connor.*

Northampton—Mar. 31 (2).
Hertford—Feb. 25; April 14 (2).
Halifax—Jan. 28 (2); Mar. 17 (2); June 2 (2).
Bertie—Feb. 11 (2); April 28† (2).
Warren—Jan. 14 (2); May 19 (2).
Vance—Mar. 3 (2); June 16 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Pittman.*

Lee—Mar. 24 (2); May 5.
Chatham—Jan. 14; Mar. 17†; May 12.
Johnston—Feb. 18† (2); Mar. 10; April 21† (2).
Wayne—Jan. 21 (2); April 7† (2); May 26 (2).
Harnett—Jan. 7; Feb. 4† (2); May 19.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Daniels.*

Pitt—Jan. 14† (1); Jan. 21; Feb. 18†; Mar. 17 (2); April 14 (2); May 19†; May 26†.
Craven—Jan. 7*; Feb. 4† (2); April 7‡; May 12†; June 2*.
Carteret—Jan. 28; Mar. 10; June 9 (2).
Pamlico—April 28 (2).
Jones—Mar. 31.
Greene—Feb. 25 (2); June 23.

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Horton.*

Onslow—Mar. 3; April 14† (2).
Duplin—Jan. 7† (2); Jan. 28*; Mar. 24† (2).
Sampson—Feb. 4 (2); Mar. 10† (2); April 28 (2).
Lenoir—Jan. 21*; Feb. 18† (2); April 7; May 19*; June 9† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Grady.*

Wake—Jan. 7*; Jan. 28†; Feb. 4*; Feb. 11†; Mar. 3*; Mar. 10† (2); Mar. 24† (2); April 7*; April 14† (2); April 28†; May 5*; May 19† (2); June 2*; June 9† (2).
Franklin—Jan. 14 (2); Feb. 18† (2); May 12.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Calvert.*

New Hanover—Jan. 14*; Feb. 4† (2); Mar. 3†; (2); Mar. 17*; April 14† (2); May 12*; May 26† (2); June 9*.
Pender—Jan. 21; Mar. 24† (2); May 19.
Columbus—Jan. 28; Feb. 18† (2); April 28 (2).
Brunswick—Jan. 7†; April 7; June 16†.

NINTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Cranmer.*

Robeson—Jan. 28*; Feb. 4; Feb. 25† (2); Mar. 31 (2); May 12† (2).
Bladen—Jan. 7‡; Mar. 10*; April 21†.
Hoke—Jan. 21; April 14.
Cumberland—Jan. 14*; Feb. 11† (2); Mar. 17† (2); April 28† (2); May 26*.

TENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Sinclair.*

Alamance—Feb. 25*; Mar. 31†; May 5†; May 26† (2); June 16*.
Durham—Jan. 7† (2); Feb. 18*; Mar. 3† (2); April 28†; May 19*.
Granville—Feb. 4 (2); April 7 (2).
Orange—Mar. 17; May 12†.
Person—Jan. 28; April 21.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Bryson.*

Ashe—April 7 (2).
Forsyth—Jan. 7 (2); Feb. 11† (2); Feb. 25† (A); Mar. 10† (2); Mar. 24*; May 19† (3); June 23† (A).
Rockingham—Jan. 21*; Feb. 25† (2); May 12; June 16†.
Caswell—Mar. 31.
Alleghany—May 5.
Surry—Feb. 4; April 21 (2); June 23† (2).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Lane.*

Davidson—Jan. 28*; Feb. 18† (2); May 5*; May 26†; June 23*.
Guilford—Jan. 7 (2); Jan. 21*; Feb. 4† (2); Mar. 3* (2); Mar. 17† (2); April 14† (2); April 28*; May 12† (2); June 2† (2); June 16*.
Stokes—Mar. 31*; April 7†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Shaw.*

Stanly—Feb. 4†; Mar. 31; May 12†.
Richmond—Dec. 31*; Jan. 7†; Mar. 17†; April 7*; May 26†; June 16†.
Union—Jan. 28*; Feb. 18† (2); Mar. 24; May 5†.
Anson—Jan. 14*; Mar. 3†; April 14; April 21†; June 9†.
Moore—Jan. 21*; Feb. 11†; May 19†.
Scotland—Mar. 10†; April 28; June 2.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Stack.*

Mecklenburg—Jan. 7*; Feb. 4† (3); Feb. 25*; Mar. 3† (2); Mar. 31† (2); April 28† (2); May 12*; May 19† (2); June 9*; June 16†.
Gaston—Jan. 14*; Jan. 21† (2); Mar. 17† (2); April 14*; June 2*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Harding.*

Montgomery—Jan. 21*; April 7† (2).
Randolph—Mar. 17† (2); Mar. 31*; May 26†; June 16* (2).
Iredell—Jan. 28 (2); Mar. 10; May 19 (3).
Cabarrus—Jan. 7 (2); Feb. 25†; April 21 (2).
Rowan—Feb. 11 (2); Mar. 3†; May 5 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Long.*

Catawba—Feb. 4 (2); May 5† (2).
Lincoln—Jan. 28.
Cleveland—Mar. 24 (2).
Burke—Mar. 10 (2).
Caldwell—Feb. 25 (2); May 19† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Webb.*

Alexander—Feb. 18.
Yadkin—Feb. 25.
Wilkes—Mar. 3; June 2† (2).
Davie—Mar. 17; May 26†.
Watauga—Mar. 24 (2).
Mitchell—April 7 (2).
Avery—April 21 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Finley.*

Transylvania—April 7.
Henderson—Jan. 7†(2); Mar. 3 (2); May 26†(2).
Rutherford—Feb. 4† (2); May 12 (2).
McDowell—Feb. 18 (2); June 9† (2).
Yancey—Mar. 24 (2).
Polk—April 21 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge Ray.*

Buncombe—Jan. 14† (2); Jan. 28; Feb. 4† (2); Feb. 18; Mar. 3† (2); Mar. 17; April 7† (2); April 21; May 5† (2); May 19; June 2† (2); June 16 (2).
Madison—Feb. 25; Mar. 24; April 28; May 26.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1924—*Judge McElroy.*

Haywood—Jan. 7† (2); Feb. 4 (2); May 5† (2).
Cherokee—Jan. 21 (2); Mar. 31 (2); June 16†.
Jackson—Feb. 18 (2); May 19† (2).
Swain—Mar. 3 (2).
Graham—Mar. 17 (2); June 2† (2).
Clay—April 14.
Macon—April 21 (2).

*Criminal cases only.
†Civil cases only.
‡Civil and jail cases.
(A) Emergency Judge to be assigned.

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. S. A. ASHE, Clerk, Raleigh.

Wilson, first Monday in April and October. S. A. ASHE, Clerk, Raleigh.

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 time and place as follows:

Greensboro, first Monday in June and December. R. L. BLAYLOCK, Clerk; MYRTLE DWIGGINS, Chief Deputy; DELLA BUTT, 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.

CASES REPORTED

A

PAGE

Advertising Co. v. Warehouse Co. 197
Aldridge v. Dunn 786
Allen v. Saunders 349
Allen v. Stainback 75
Allen, S. v. 302
Allgood v. Ins. Co. 415
Allman v. Christopher 786
Archbell, Mann v. 72
Armstrong v. Spruill 18
Arthur, Elias v. 756
Artis, Hall v. 105
Atkins, Hunt v. 786
Austin v. Crisp 616
Austin, Turnage v. 266
Automotive Trade Assn. v. Sheriff 159
Ayscue, Branch v. 219

B

Ballew v. R. R. 704
Bank, Belton v. 614
Bank, Burwell v. 117
Bank, Cole v. 514
Bank, Cullom v. 345
Bank v. Dortch 510
Bank v. Mfg. Co. 744
Bank v. Pearson 609
Bank v. Scarboro 786
Bank v. Sherron 297
Bank v. Smith 635
Barnes, Barrett v. 154
Barnhill, S. v. 446
Barrett v. Barnes 154
Bartholomew v. Parrish 81
Batts v. Telephone Co. 120
Beal v. Coal Co. 754
Beasley, Wilson v. 786
Beck v. Wilkins-Ricks Co. 210
Belshe v. R. R. 246
Belton v. Bank 614
Berrier v. Comrs. of Davidson 564
Berry v. Durham 421
Bethea, S. v. 22
Biggerstaff, S. v. 784
Blackwelder, S. v. 561
Blackwell v. Mfg. Co. 779
Blakely v. Blakely 351
Blue v. Wilmington 321
Board of Education, Davis v. 227
Board of Education, School Committee v. 643
Boomer v. Oil Co. 765

PAGE

Bowman, S. v. 786
Boyd v. R. R. 786
Branch v. Ayscue 219
Briggs-Shaffner Co., Lbr. Co. v. 347
Brock v. Brock 54
Brown, Hubbard v. 96
Brown v. Moseley 768
Browning v. Knights of Pythias. 786
Bryant v. Furniture Co. 441
Bryant, Mercantile Co. v. 551
Bullock, Fleming v. 786
Bunn v. Dunn 786
Burger, Crisp v. 786
Burger v. Tatham 786
Burgess, S. v. 467
Burwell v. Bank 117
Butler, Edwards v. 200
Byers, S. v. 781
Byrd v. Hicks 242
Byrd v. Southerland 384

C

Cain v. Rouse 175
Carpenter, Faulkner v. 780
Carstarphen v. Plymouth 90
Carver, Farr v. 786
Castelloe v. Jenkins 166
Chair Co., Hall v. 469
Charlotte, Express Co. v. 668
Charlotte, Graham v. 649
Chemical Co. v. New Bern 765
Cherry v. R. R. 263
Chesson v. Lynch 625
Christopher, Allman v. 786
Clegg v. Clegg 28
Coal Co., Beal v. 754
Coble v. Medley 479
Coe, S. v. 776
Cohen v. Schwartz 786
Cohoon v. Cooper 26
Cole v. Bank 514
Cole v. Hutchings 786
Comrs. of Buncombe, Felmet v. 251
Comrs. of Buncombe Waters v. 719
Comrs. of Cabarrus, Slayton v. 690
Comrs. of Cumberland v. McNear 352
Comrs. of Davidson, Berrier v. 564
Comrs. of Davidson, Road Comrs. v. 202
Comrs. of Iredell, Lazenby v. 548
Comrs. of Lenoir, Parks v. 490

PAGE

Construction Co., Wallace v..... 778
Cooper, Cohoon v..... 26
Coppedge, Whitfield v..... 765
Creech, Smith v..... 187
Crisp, Austin v..... 616
Crisp v. Burger..... 786
Crow, Hospital v..... 741
Cullom v. Bank..... 345
Cunningham v. Long..... 526

D

Davis v. Board of Education..... 227
Davis, Evans v..... 41
Davis v. Faulkner..... 439
Davis, Kearns v..... 522
Davis, Satterthwaite v..... 565
Davis v. Storage Co..... 676
Dawkins v. Phillips..... 786
Dill v. Reynolds..... 293
Distributing Co. v. Edmunds..... 786
Dortch, Bank v..... 510
Doughton, Person v..... 723
Dowdy v. Jones..... 767
Duffy v. Greensboro..... 470
Dunn, Aldridge v..... 786
Dunn, Bunn v..... 786
Dunn v. Taylor..... 254
Durham, Berry v..... 421

E

Eatough, Tucker v..... 505
Edmonds, S. v.....623, 786
Edmunds, Distributing Co. v..... 786
Edwards v. Butler..... 200
Efird, S. v..... 482
Egerton, Richardson v..... 291
Elias v. Arthur..... 756
Esty v. Hardison..... 786
Evans v. Davis..... 41
Everett v. Sneed..... 766
Express Co. v. Charlotte..... 668
Express Co., Hosiery Co. v..... 556

F

Farr v. Carver..... 786
Faulkner v. Carpenter..... 780
Faulkner, Davis v..... 439
Faulkner v. Strickland..... 771
Felmet v. Comrs. of Buncombe..... 251
Ferrell v. R. R..... 770
Fields v. Rollins..... 221
Fleming v. Bullock..... 786
Florence Mills, Hospital v..... 554

PAGE

Flynn v. Lumber Co..... 782
Fox v. Ins. Co..... 763
Fox v. Realty Co..... 786
Furniture Co., Bryant v..... 441

G

Gardner v. R. R..... 64
Garner v. Harrison..... 786
Gentry v. Lumber Co..... 785
Gibson, Wade v..... 478
Godwin, Layton v..... 312
Gossett v. Gossett..... 786
Graham v. Charlotte..... 649
Green, S. v..... 774
Greensboro, Duffy v..... 470
Gulley, *In re* Will of..... 78
Gulley, S. v..... 786
Gunter v. Sanford..... 452

H

Hair v. McConnell..... 379
Hale v. Rocky Mount Mills..... 49
Hall v. Artis..... 105
Hall v. Chair Co..... 469
Hancock v. Southgate..... 278
Hardee, Overland Garage v..... 771
Hardin, Trivett v..... 776
Hardison, Esty v..... 786
Harris v. R. R..... 769
Harris v. Russell..... 786
Harrison, Garner v..... 786
Hart, S. v..... 582
Hartsfield v. New Bern..... 136
Harvey v. Hughes..... 236
Hasty, S. v..... 786
Hawley, S. v..... 433
Haywood, Power Co. v..... 313
Hedrick v. Kanoy..... 786
Hedrick, Ketchie v..... 392
Hicks, Byrd v..... 242
Hill v. R. R..... 475
Hillsboro, Tel. Co. v..... 786
Hollister Co., Overall Co. v..... 208
Holmes, Overall Co. v..... 428
Holmes v. R. R..... 58
Holton v. Holton..... 355
Hooker, S. v..... 761
Hopper, S. v..... 405
Horton v. Horton..... 332
Hosiery Co. v. Express Co..... 556
Hospital v. Crow..... 741
Hospital v. Florence Mills..... 554
Hotel Co. v. Latta..... 709

PAGE

Houtz, R. R. v. ... 46
Howell v. R. R. ... 239
Hubbard v. Brown ... 96
Huffman, Pope v. ... 775
Hughes, Harvey v. ... 236
Humphrey, S. v. ... 533
Hunt v. Atkins ... 786
Hutchings, Cole v. ... 786

I

In re Will of Gulley ... 78
In re Will of William Love ... 714
In re Will of Witherington ... 152
Ins. Co., Allgood v. ... 415
Ins. Co., Fox v. ... 763
Ins. Co. v. Lumber Co. ... 269
Ins. Co., Powers v. ... 336
Irvin v. Jenkins ... 752
Isam v. Jessie ... 786

J

Jenkins, Castelloe v. ... 166
Jenkins, Irvin v. ... 752
Jessie, Isam v. ... 786
Jessup v. Nixon ... 100
Johnson v. Jones ... 235
Jones, Dowdy v. ... 767
Jones, Johnson v. ... 235
Jones v. McKeel ... 786
Jones v. Winstead ... 536

K

Kanoy, Hedrick v. ... 786
Kearns v. Davis ... 522
Kee, S. v. ... 473
Kelly, S. v. ... 365
Ketchie v. Hedrick ... 392
Kinsland v. Kinsland ... 760
Kirby, Weaver v. ... 387
Knights of Pythias, Browning v. 786
Kluttz, Surratt v. ... 777

L

Lackey, Likas v. ... 398
Latta, Hotel Co. v. ... 709
Layton v. Godwin ... 312
Lazenby v. Comrs. of Iredell ... 548
Leak v. Wadesboro ... 683
Lee v. Martin ... 127
Lee, Reel v. ... 165
Leonard v. R. R. ... 773
Lerch v. McKinne ... 244
Likas v. Lackey ... 398

PAGE

Little, Tripp v. ... 215
Loftin, S. v. ... 205
Logan, S. v. ... 780
Long, Cunningham v. ... 526
Long, S. v. ... 516
Love, *In re* Will of William ... 714
Love, Rudisill v. ... 524
Lucas, Turlington v. ... 283
Lumber Co. v. Briggs-Shaffner Co. ... 347
Lumber Co., Flynn v. ... 782
Lumber Co., Gentry v. ... 785
Lumber Co., Ins. Co. v. ... 269
Lumber Co. v. Lumber Co. ... 769
Lumber Co., Lynn v. ... 784
Lumber Co., Murphy v. ... 746
Lumber Co., Rogers v. ... 783
Lumber Co., S. v. ... 122
Lumber Co., Stevens v. ... 749
Lumber Co., Wilson v. ... 56
Lynch, Chesson v. ... 625
Lynn v. Lumber Co. ... 784

M

McConnell, Hair v. ... 379
McDowell v. R. R. ... 571
McGregor, Weinstein v. ... 777
McKeel, Jones v. ... 786
McKinne, Lerch v. ... 244
McNair v. Yarboro ... 111
McNear, Comrs. of Cumberland v. ... 352
McNeill v. Whiteville ... 163
McRackan, Williams v. ... 381
Mann v. Archbell ... 72
Mfg. Co., Bank v. ... 744
Mfg. Co., Blackwell v. ... 779
Mfg. Co. v. Produce Co. ... 786
Martin, Lee v. ... 127
Martin, Mayo v. ... 1
May v. Menzies ... 144
Mayo v. Martin ... 1
Mayo, Sanders v. ... 108
Meadows, Taylor v. ... 353
Medley, Coble v. ... 479
Menzies, May v. ... 144
Mercantile Co. v. Bryant ... 551
Miller, Parlier v. ... 501
Mills, Newton v. ... 782
Mills, Pratt v. ... 396
Montgomery v. Ring ... 403
Moore v. R. R. ... 257
Moore v. Rosser ... 766
Moseley, Brown v. ... 768

PAGE

Motor Co. v. Reep 509
Motor Co. v. Sands 732
Motor Co. v. Whitford 786
Murphrey, S. v..... 113
Murphy v. Lumber Co..... 746

N

New Bern, Chemical Co. v..... 765
New Bern, Hartsfield v..... 136
Newton v. Mills..... 782
Nixon, Jessup v..... 100

O

Oakley, Suggs v..... 786
Oil Co., Boomer v. 765
Oil Co., Ramsey v. 739
Oliver, S. v..... 329
Overall Co. v. Hollister Co. 208
Overall Co. v. Holmes 428
Overland Garage v. Hardee..... 771

P

Paint and Lead Works v. Spruill 68
Parks v. Comrs. of Lenoir..... 490
Parlier v. Miller..... 501
Parrish, Bartholomew v..... 81
Pearce v. R. R..... 772
Pearson, Bank v..... 609
Person v. Doughton..... 723
Petition for Writ of *Habeas Corpus* by Dr. Paul Crumpler..... 786
Pettitt v. R. R..... 9
Phillips, Dawkins v..... 786
Plummer, S. v..... 261
Plymouth, Carstarphen v..... 90
Pope v. Huffman..... 775
Power Co. v. Haywood..... 313
Power Co. v. Power Co..... 179
Powers v. Ins. Co..... 336
Pratt v. Mills..... 396
Pritchard, Sawyer v..... 52
Produce Co., Mfg. Co. v..... 786

R

Ragan v. Ragan..... 461
R. R., Ballew v. 704
R. R., Belshe v. 246
R. R., Boyd v. 786
R. R., Cherry v. 263
R. R., Ferrell v. 770
R. R., Gardner v. 64
R. R., Harris v. 769

PAGE

R. R., Hill v. 475
R. R., Holmes v. 58
R. R. v. Houtz 46
R. R., Howell v. 239
R. R., Leonard v. 773
R. R., McDowell v. 571
R. R., Moore v. 257
R. R., Pearce v. 772
R. R., Pettitt v. 9
R. R., Rogers v. 86
R. R. v. Sanford 466
R. R., Sigmon v. 519
Ramsey v. Oil Co..... 739
Randolph v. Roberts..... 621
Ray v. Veneer Co..... 773
Realty Co., Fox v..... 786
Rector v. Rector..... 618
Reece, S. v..... 786
Reel v. Lee..... 165
Reep, Motor Co. v..... 509
Reynolds, Dill v..... 293
Richardson v. Egerton..... 291
Richardson, S. v..... 786
Ring, Montgomery v..... 403
Road Comrs. v. Comrs. of Davidson 202
Roberts, Randolph v..... 621
Rocky Mount Mills, Hale v..... 49
Rogers v. Lumber Co..... 783
Rogers v. R. R..... 86
Rollins, Fields v..... 221
Rosser, Moore v..... 766
Rouse, Cain v..... 175
Rudisill v. Love..... 524
Russell, Harris v..... 786

S

Sanders v. Mayo..... 108
Sands, Motor Co. v..... 732
Sanford, Gunter v..... 452
Sanford, R. R. v..... 466
Satterthwaite v. Davis..... 565
Saunders, Allen v..... 349
Sawyer v. Pritchard..... 52
Scarboro, Bank v..... 786
School Committee v. Board of Education 643
Schwartz, Cohen v..... 786
Sheriff, Automotive Trade Association v. 159
Sherron, Bank v..... 297
Sigmon v. R. R..... 519
Slayton v. Comrs. of Cabarrus.... 690

PAGE

Smith, Bank v. 635
Smith v. Creech 187
Smith v. Tobacco Co. 774
Sneed, Everett v. 766
Sorrell v. Stewart 237
Southerland, Byrd v. 384
Southgate, Hancock v. 278
Southgate, Woodland v. 116
Spruill, Armstrong v. 18
Spruill, Paint and Lead Works v. 68
Squires, Wallace v. 339
Stainback, Allen v. 75
S. v. Allen 302
S. v. Barnhill 446
S. v. Bethea 22
S. v. Biggerstaff 784
S. v. Blackwelder 561
S. v. Bowman 786
S. v. Burgess 467
S. v. Byers 781
S. v. Coe 776
S. v. Edmonds 623, 786
S. v. Efird 482
S. v. Green 774
S. v. Gulley 786
S. v. Hart 582
S. v. Hasty 786
S. v. Hawley 433
S. v. Hooker 761
S. v. Hopper 405
S. v. Humphrey 533
S. v. Kee 473
S. v. Kelly 365
S. v. Loftin 205
S. v. Logan 780
S. v. Long 516
S. v. Lumber Co. 122
S. v. Murphrey 113
S. v. Oliver 329
S. v. Plummer 261
S. v. Reece 786
S. v. Richardson 786
S. v. Vaughan 759
S. v. Wallin 786
S. v. Walton 485
S. v. Williams 627
Stevens v. Lumber Co. 749
Stevens v. Turlington 191
Stewart, Sorrell v. 237
Storage Co., Davis v. 676
Strickland, Faulkner v. 771
Suggs v. Oakley 786
Surratt v. Kluttz 777

T

PAGE

Tatham, Burger v. 786
Taylor, Dunn v. 254
Taylor v. Meadows 353
Tel. Co. v. Hillsboro 786
Telephone Co., Batts v. 120
Tobacco Co., Smith v. 774
Transportation and Storage Co., Way v. 224
Tripp v. Little 215
Trivett v. Hardin 776
Tucker v. Eatough 505
Turlington v. Lucas 283
Turlington, Stevens v. 191
Turnage v. Austin 266
Tyndall v. Tyndall 272

V

Vaughan, S. v. 759
Veneer Co., Ray v. 773

W

Wade v. Gibson 478
Wadesboro, Leak v. 683
Wallace v. Construction Co. 778
Wallace v. Squires 339
Wallin, S. v. 786
Walton, S. v. 485
Warehouse Co., Advertising Co. v. 197
Waters v. Comrs. of Buncombe 719
Way v. Transportation and Storage Co. 224
Weaver v. Kirby 387
Weinstein v. McGregor 777
Whiteville, McNeill v. 163
Whitfield v. Coppedge 765
Whitford, Motor Co. v. 786
Wilkins-Ricks Co., Beck v. 210
Williams v. McRackan 381
Williams, S. v. 627
Wilmington, Blue v. 321
Wilson v. Beasley 786
Wilson v. Lumber Co. 56
Winstead, Jones v. 536
Witherington, *In re* Will of 152
Wood v. Wood 559
Woodland v. Southgate 116

Y

Yarboro, McNair v. 111

CASES CITED

A

Abbott v. Hancock....123 N. C., 99....507
Abernathy, Brewer v....159 N. C., 285....508
Abernethy v. Yount....138 N. C., 338....400, 401, 402, 403
Adams, McKinney v....184 N. C., 562....443, 444
Addington, S. v....143 N. C., 685....292
Addor, S. v....183 N. C., 687....467, 469
Akin, Lyon v....78 N. C., 258....276
Albertson, Ward v....165 N. C., 218....296
Alderman, School Comrs. v....158 N. C., 197....252
Aldridge, Robertson v....185 N. C., 292....342, 344
Alexander, Carr v....169 N. C., 665....74
Alexander v. Lowrance....182 N. C., 642....252
Alexander, Meisenheimer v....162 N. C., 235....170
Alexander v. Savings Bank....155 N. C., 124....713
Allen v. Gooding....173 N. C., 96....384
Allen, Johnson v....100 N. C., 131....85
Allen, Pugh v....179 N. C., 307....224
Allen v. R. R....102 N. C., 381....498
Allen v. Reidsville....178 N. C., 532....142
Allen, S. v....11 N. C., 356....308
Alley v. Pipe Co....159 N. C., 327....250
Alspaugh, Gorrell v....120 N. C., 362....196
Alspaugh v. Winstead....79 N. C., 526....683
Alston v. Lea....59 N. C., 27....391
Alston, S. v....113 N. C., 666....308, 312
Aman v. R. R....179 N. C., 310....13, 88, 240
Anderson v. Anderson....183 N. C., 141, 143....360, 362
Anderson, *In re*....132 N. C., 244....106
Anderson, Pool v....150 N. C., 624....8
Anderson, S. v....101 N. C., 758....146
Andrews, Improvement Co. v....176 N. C., 280....695
Andrews v. Jones....122 N. C., 666....475
Andrews, Thompson v....53 N. C., 453....173
Angel, S. v....29 N. C., 27....601
Apple, S. v....121 N. C., 585....451
Applicants for License, *In re*....143 N. C., 1....204
Armfield, R. R. v....167 N. C., 464....184
Armstrong v. Baker....31 N. C., 114....153
Armstrong v. Comrs. of Gaston....185 N. C., 405....375
Armstrong v. Spruill....182 N. C., 1....20
Arrowood, Garland v....177 N. C., 373....85
Arrowood v. R. R....126 N. C., 631....259
Asbury v. R. R....125 N. C., 568....421
Asheboro, Snyder v....182 N. C., 708....557
Asheville, Bailey v....180 N. C., 645....664
Asheville, Dayton v....185 N. C., 12....500
Asheville, Hilliard v....118 N. C., 845....455, 457
Asheville, Justice v....161 N. C., 62....688
Asheville v. Trust Co....143 N. C., 360....457, 688

Ashford, Jones v. ..... 79 N. C., 172..... 194
Assad, Kannan v..... 182 N. C., 77..... 61
Assurance Co., Cozart v..... 142 N. C., 522..... 535
Assurance Co., Mfg. Co. v..... 161 N. C., 96..... 432
Assurance Society, Schas v..... 170 N. C., 420..... 618
Assurance Society, Sloan v..... 169 N. C., 257..... 313
Atkinson v. Downing ..... 175 N. C., 244..... 37
Auditor, White v. ..... 126 N. C., 584..... 683
Austin, Cuthbertson v..... 152 N. C., 336..... 24
Austin v. Austin ..... 160 N. C., 368..... 190
Avery v. Stewart..... 136 N. C., 426..... 532

B

Baber v. Hanie..... 163 N. C., 588..... 194, 503, 504
Baggett v. Lanier ..... 178 N. C., 132..... 749
Bagley, St. James v..... 138 N. C., 384, 393 390
Bailey v. Asheville..... 180 N. C., 645..... 664
Bailey, Councill v..... 154 N. C., 54..... 382
Bailey, High v..... 107 N. C., 71..... 334
Bailey v. Rutjes..... 86 N. C., 517..... 432
Bailey, S. v..... 60 N. C., 137..... 588
Bailey v. Winston..... 157 N. C., 252..... 664
Baird, Lee v..... 146 N. C., 361..... 386
Baker, Armstrong v..... 31 N. C., 114..... 153
Baker v. Carter..... 127 N. C., 92..... 106
Baker, Discount Co. v..... 176 N. C., 546..... 299
Baker v. Edge..... 171 N. C., 100..... 716
Baker, S. v..... 63 N. C., 276..... 115
Balcum v. Johnson ..... 177 N. C., 213, 216..... 217, 740
Baldwin, Roberts v. ..... 155 N. C., 276..... 74
Baldwin, S. v..... 80 N. C., 390..... 330
Baldwin, S. v..... 152 N. C., 822..... 760
Baldwin, S. v..... 184 N. C., 787, 789, 791..... 450, 599, 602
Ball-Thrash v. McCormick ..... 162 N. C., 475..... 508
Bangert v. Lumber Co..... 169 N. C., 628..... 296
Bank v. Branson..... 165 N. C., 344..... 299
Bank, Comrs. of Ashe v..... 181 N. C., 347..... 374
Bank v. Dew..... 175 N. C., 79, 89..... 172, 324
Bank v. Drug Co..... 166 N. C., 99..... 299
Bank v. Exum ..... 163 N. C., 199..... 299
Bank v. Furniture Co..... 169 N. C., 180..... 53
Bank, Gooch v..... 176 N. C., 216..... 287
Bank, Havens v. ..... 132 N. C., 223..... 172
Bank v. Ins. Co..... 159 N. C., 200..... 745
Bank v. Johnston..... 161 N. C., 509..... 173
Bank v. Land Co. ..... 128 N. C., 194..... 465
Bank v. McArthur..... 168 N. C., 52..... 587
Bank v. McEwen..... 160 N. C., 414..... 361
Bank v. Moore ..... 138 N. C., 529..... 695
Bank v. Peregoy..... 147 N. C., 293..... 535
Bank v. Redwine..... 171 N. C., 569..... 642
Bank v. Vass ..... 130 N. C., 592..... 642
Bank v. Whilden ..... 175 N. C., 52..... 218
Banking Co. v. Walker ..... 121 N. C., 115..... 146

Barbee v. Barbee....108 N. C., 581.... 327
Barber v. Justice....138 N. C., 20.... 535
Barden, Groves v. ....169 N. C., 12.... 378
Barfield v. Carr....169 N. C., 574.... 716
Barger v. Smith....156 N. C., 323.... 563
Barham, Smith v. .... 17 N. C., 420.... 119
Barnes, Long v. .... 87 N. C., 329.... 285
Barnett v. Mills....167 N. C., 580.... 750
Barrett v. Brewer....153 N. C., 547.... 276
Barrett, S. v....123 N. C., 753.... 207
Barrus v. R. R....121 N. C., 504.... 535
Bason v. Mining Co.... 90 N. C., 417.... 612
Bass v. Bass.... 78 N. C., 374.... 390, 391
Bateman v. Lumber Co....154 N. C., 248.... 296
Bateman's Will, *In re*....168 N. C., 235.... 153
Battle v. Rocky Mount....156 N. C., 329, 339....231, 683
Baugham v. Trust Co....181 N. C., 406.... 398
Baxter, Humphries v.... 28 N. C., 437.... 141
Beam v. Bridgers....108 N. C., 277.... 276
Beam, S. v....181 N. C., 597....620, 762, 763
Beard v. R. R....143 N. C., 140.... 543
Beard v. Sovereign Lodge....184 N. C., 154.... 558
Beasley, Bland v....140 N. C., 628.... 622
Beasley, Parker v....116 N. C., 1.... 115
Beatty, Caldwell v.... 69 N. C., 365.... 6
Beauchamp, *In re*....146 N. C., 254.... 153
Beck, Bilyeu v....178 N. C., 481.... 342
Beck v. Tanning Co....179 N. C., 123, 127 748
Beck v. Wilkins....179 N. C., 231....215, 737, 738
Becton v. Dunn....137 N. C., 562.... 112
Belfer, Freeman v....173 N. C., 581, 586....285, 362
Belhaven, Swindell v....173 N. C., 1.... 164
Belk v. Belk....175 N. C., 69.... 24
Bell, Butler v....181 N. C., 91.... 154
Bell, Cunningham v.... 83 N. C., 328.... 276
Bell v. Greensboro....170 N. C., 179.... 664
Bell v. Harrison.... 179 N. C., 190.... 44, 110
Bell, S. v....184 N. C., 701.... 763
Belo v. Comrs. of Forsyth.... 82 N. C., 415.... 729
Bennett v. Tel. Co....168 N. C., 498.... 500
Bernhardt v. Brown....118 N. C., 700, 710 ....265, 555, 683
Berry v. Cedar Works....184 N. C., 187.... 764
Berry v. R. R....122 N. C.,1002.... 240
Bescher, Thomason v....176 N. C., 622.... 296
Best v. Best....161 N. C., 514.... 696
Best v. Mortgage Co....128 N. C., 351.... 151
Bethell v. Moore.... 19 N. C., 311.... 717, 718
Betts v. Raleigh....142 N. C., 229.... 724
Bickett v. Tax Commission....177 N. C., 436.... 675
Biggs, Green v....167 N. C., 422.... 438
Biles v. R. R....139 N. C., 528.... 249
Bilyeu v. Beck....178 N. C., 481.... 342
Bird v. Bradburn....131 N. C., 490.... 401
Blackman v. Woodmen....184 N. C., 75.... 282

Blackmore v. Winders....144 N. C., 215.... 626
Blacknall v. Hancock....182 N. C., 369, 373....78, 642
Blacknall v. Rowland....108 N. C., 555.... 110
Blacknall v. Rowland....116 N. C., 389.... 110
Blackwell, Ray v.... 94 N. C., 10....209, 695
Blades, Pate v....163 N. C., 267.... 110
Blake, *In re*....184 N. C., 278.... 35
Blalock v. Hodges....171 N. C., 134.... 296
Bland v. Beasley....140 N. C., 628.... 622
Bland v. Warren.... 65 N. C., 372.... 221
Blankenship, Bowman v....165 N. C., 519.... 24
Bleakley v. Candler....169 N. C., 21.... 172
Blomburg, Davies v....185 N. C., 496.... 55
Blount, Sullivan v....165 N. C., 7.... 218
Blue v. Ritter....118 N. C., 582.... 189
Board of Education v. Bray....184 N. C., 484.... 254
Board of Ed., Davenport v....183 N. C., 570.... 648
Board of Ed., Galloway v....184 N. C., 245....375, 426
Board of Ed., Gilliland v....141 N. C., 482.... 477
Board of Ed., Grant v....178 N. C., 329, 333....694, 700
Board of Ed., Key v....170 N. C., 123.... 549
Board of Ed. v. Makely....139 N. C., 31.... 174
Board of Ed. v. Remick....160 N. C., 568.... 456
Board of Elections, Jenkins v....180 N. C., 169.... 231
Boger, Turner v....126 N. C., 302.... 465
Bond v. Wilson....131 N. C., 505.... 28
Bonitz v. School Trustees....154 N. C., 375, 379....426, 725
Bonner, Comrs. of Beaufort v....153 N. C., 70.... 425
Bonsal, Houser v....149 N. C., 51.... 293
Boon, S. v.... 35 N. C., 244.... 306
Boon, S. v.... 82 N. C., 637.... 451
Boone v. Lee....175 N. C., 383.... 532
Boone, S. v....132 N. C.,1107.... 378
Boone, Sykes v....132 N. C., 200.... 531
Bordeaux, S. v.... 93 N. C., 560.... 484
Borden, Hollowell v....148 N. C., 256.... 722
Bostic, Woodcock v....118 N. C., 822.... 503
Bowen v. Hackney....136 N. C., 187.... 397
Bowen v. King....146 N. C., 385.... 194
Bowman v. Blankenship....165 N. C., 519.... 24
Bowman v. Howard....182 N. C., 662.... 146
Bowman, S. v.... 78 N. C., 509.... 477
Bowser v. Wescott....145 N. C., 57.... 174
Box Co., Ins. Co. v....185 N. C., 543.... 754
Boyd, Campbell v.... 88 N. C., 131.... 121
Boyd, Cooperative Assn. v....171 N. C., 184.... 713
Boyden, Cox v....167 N. C., 321.... 535
Boyer v. Teague....106 N. C., 571, 576.... 234
Boyett v. Vaughan.... 85 N. C., 364.... 106
Boyle v. Robbins.... 71 N. C., 130.... 6
Brabham, S. v....108 N. C., 793.... 24
Bradburn, Bird v....131 N. C., 490.... 401
Braddy, S. v....104 N. C., 737.... 401
Brady, Moore v....125 N. C., 35.... 523

Bragaw, Church v. ....144 N. C., 133 328
Braid v. Lukens .... 95 N. C., 123 401
Bramham v. Durham ....171 N. C., 196, 198 ....204, 252
Branch v. R. R. .... 88 N. C., 573 764
Branson, Bank v. ....165 N. C., 344 299
Brasfield v. Powell ....117 N. C., 141 642
Bray, Board of Education v. ....184 N. C., 484 254
Bray, Harrison v. .... 92 N. C., 489 235
Bray v. Ins. Co. ....139 N. C., 390, 393 ....338, 420
Breece, McLean v. ....113 N. C., 391 106
Brendle v. R. R. ....125 N. C., 474 708
Brewer v. Abernathy ....159 N. C., 285 508
Brewer, Barrett v. ....153 N. C., 547 276
Brewer, Dickson v. ....180 N. C., 403 229
Bridge Co., Isley v. ....143 N. C., 51 28
Bridgers, Beam v. ....108 N. C., 277 276
Bridges v. Pleasants .... 39 N. C., 26 .... 391, 463
Briggs v. Morris .... 54 N. C., 193 531
Briggs v. Raleigh ....166 N. C., 149 550
Brinson v. Wharton .... 43 N. C., 80 319
Brisco v. Norris ....112 N. C., 671, 677 ....276, 465
Britt v. Smith .... 86 N. C., 305 119
Brittain v. Mull .... 91 N. C., 498 107
Brittain v. R. R. ....167 N. C., 642 707
Brittain, S. v. .... 89 N. C., 481 85
Brittingham v. Stadiem ....151 N. C., 299, 302 ....342, 755
Broach, Hester v. .... 84 N. C., 253 761
Brock v. Ins. Co. ....156 N. C., 112 575
Brodnax v. Groom .... 64 N. C., 244 .... 498, 648
Brooks v. Brooks .... 90 N. C., 142 146
B. of L. F. and E., Robinson v. ....170 N. C., 548 270
Browder, Ramsey v. ....136 N. C., 251 213
Brown, Bernhardt v. ....118 N. C., 700, 710 ....265, 555, 683
Brown, Buie v. ....104 N. C., 335 626
Brown v. Carson .... 45 N. C., 272 531
Brown, Chavis v. ....174 N. C., 123 683
Brown v. Comrs. North Cove Tp. ....173 N. C., 598 .... 373, 376
Brown, Dalton v. ....159 N. C., 175 674
Brown v. Durham ....141 N. C., 252 664
Brown v. Hillsboro ....185 N. C., 370 690
Brown v. Jackson ....179 N. C., 363, 367, 371, 374 ....729, 731
Brown, McEwan v. ....176 N. C., 249 571
Brown v. Myers ....150 N. C., 443 757
Brown v. Power Co. ....140 N. C., 333 183
Brown, S. v. ....100 N. C., 524 601
Bruce v. Nicholson ....109 N. C., 204 .... 285, 361
Bruner v. Threadgill .... 88 N. C., 361 195
Brunhild v. Freeman .... 77 N. C., 128 432
Bryan v. Harper ....177 N. C., 309 119
Bryan, Hartsfield v. ....177 N. C., 166 626
Bryan v. R. R. ....174 N. C., 177 88
Bryan, Timber Co. v. ....171 N. C., 265 296
Bryson, S. v. ....173 N. C., 803 489
Buchanan v. Buchanan .... 99 N. C., 317 398

Buie v. Brown....104 N. C., 335.... 626
Building Co. v. Sanders....185 N. C., 328.... 209
Bullock, Holmes v....178 N. C., 376.... 106
Bullock, Sewing Machine Co. v...161 N. C., 1.... 110
Bullock, S. v....161 N. C., 225.... 371, 674
Bumgardner v. R. R....132 N. C., 442.... 26
Bunch v. Edenton.... 90 N. C., 431.... 664
Bunch, Newsome v....144 N. C., 15, 16.... 36
Bunker v. Bunker....140 N. C., 18.... 107
Bunn v. Dunn....185 N. C., 108.... 147
Bunting, Draughan v.... 31 N. C., 10.... 553
Bunting v. Jones.... 78 N. C., 242.... 77, 196
Burbage, S. v....172 N. C., 876.... 563
Burger, Sewing Machine Co. v...181 N. C., 241.... 106
Burgwyn v. Hall....108 N. C., 489.... 482
Burke, S. v.... 82 N. C., 551.... 115
Burnett, S. v....142 N. C., 581.... 410
Burney v. Comrs. of Bladen....184 N. C., 274, 277.... 375, 472
Burris v. Litaker....181 N. C., 376.... 57, 604
Burriss v. Starr....165 N. C., 662.... 213
Burton, Paul v....180 N. C., 45.... 265
Burwell v. Snead....104 N. C., 118.... 475
Butler v. Bell....181 N. C., 91.... 154
Buxton, Jones v....121 N. C., 285.... 235
Byers, S. v....100 N. C., 512.... 451
Bynum v. Powe.... 97 N. C., 374.... 536
Bynum v. Wicker....141 N. C., 96.... 287
Byrd v. Casualty Co....184 N. C., 226.... 465
Byrd v. Express Co....139 N. C., 273.... 282
Byrd, Long v....169 N. C., 659.... 603

C

Cab Co. v. Creasman....185 N. C., 556.... 178
Cain, S. v.... 8 N. C., 352.... 484
Caldwell v. Beatty.... 69 N. C., 365.... 6
Caldwell, S. v....127 N. C., 527.... 262
Caldwell v. Wilson....121 N. C., 425, 473.... 456, 683
Call, Shew v....119 N. C., 450.... 617
Calvert, Roberts v.... 98 N. C., 581.... 233
Campbell v. Boyd.... 88 N. C., 131.... 121
Campbell v. Crater.... 95 N. C., 156.... 154
Campbell v. Patton....113 N. C., 481.... 299
Campbell v. Power Co....166 N. C., 488.... 46
Campbell v. Sigmon....170 N. C., 351.... 326, 384
Canal Co., Cherry v....140 N. C., 422.... 217
Candler, Bleakley v....169 N. C., 21.... 172
Canton, Felmet v....177 N. C., 52.... 688
Capehart v. Dettrick.... 91 N. C., 344.... 195
Capps v. Capps.... 85 N. C., 408.... 106
Carpenter, R. R. v....165 N. C., 465.... 325
Carpenter, S. v....173 N. C., 769.... 484
Carpenter, Walker v....144 N. C., 674.... 174
Carpet Co., Stewart v....138 N. C., 60.... 574, 575
Carr v. Alexander....169 N. C., 665.... 74

Carr, Barfield v. ....169 N. C., 574 716
Carraway, S. v. ....181 N. C., 561 26
Carrol v. McMillan ....133 N. C., 140 112
Carroll, White v. ....146 N. C., 230 523
Carson, Brown v. .... 45 N. C., 272 531
Carson, Coxe v. ....169 N. C., 132 532
Carson v. Woodrow ....160 N. C., 144 150
Carter, Baker v. ....127 N. C., 92 106
Carter v. Reaves ....167 N. C., 132 154
Carter, S. v. ....126 N. C.,1011 330
Carter v. Strickland ....165 N. C., 69 391
Casey, Weil v. ....125 N. C., 356 196
Cash Reg. Co. v. Townsend ....137 N. C., 652 110
Casten, White v. .... 46 N. C., 197 717
Casualty Co., Byrd v. ....184 N. C., 226 465
Cauble, S. v. .... 70 N. C., 62 378
Caulk, McKinnon v. ....167 N. C., 411 .... 285, 362
Causey v. Davis ....185 N. C., 155 48
Cavenaugh v. Jarman ....164 N. C., 375 383
Cawfield v. Owens ....129 N. C., 286 103
Cecil, Finch v. ....170 N. C., 74, 75 ....287, 362
Cecil v. High Point ....165 N. C., 431 252
Cedar Co., Parish v. ....133 N. C., 484 456
Cedar Works, Berry v. ....184 N. C., 187 764
Chance v. Ice Co. ....166 N. C., 495 588
Charles, S. v. ....161 N. C., 287 450
Charlotte, Sehorn v. ....171 N. C., 541 664
Chavis v. Brown ....174 N. C., 123 683
Cheek v. Watson .... 90 N. C., 302 146
Cheese Co. v. Pipkin ....155 N. C., 395 106
Cherry v. Canal Co. ....140 N. C., 422 217
Cherry v. R. R. ....185 N. C., 90, 92 265
Chilton v. Smith ....180 N. C., 474 384
Chisenhall, S. v. ....106 N. C., 679 410
Christmas, S. v. ....101 N. C., 755 306
Chronicle, Paper Co. v. ....115 N. C., 143 743
Church v. Bragaw ....144 N. C., 133 328
Church, S. v. .... 63 N. C., 15 .... 630, 631
Church v. Young ....130 N. C., 8 324
Clapp v. Coble .... 21 N. C., 179 617
Clark, Odom v. ....146 N. C., 550 523
Clark v. Statesville ....139 N. C., 490 229
Clark v. Sweaney ....176 N. C., 529 342
Clayton, Cogdill v. ....170 N. C., 526 751
Clement v. Clement .... 54 N. C., 184 531
Clement, Gaither v. ....183 N. C., 455 747
Clifton v. Highway Com. ....183 N. C., 211 500
Cline, S. v. ....146 N. C., 640 .... 435, 438
Cline, S. v. ....150 N. C., 854 ....435, 437, 438
Cloninger, S. v. ....149 N. C., 572 596
Clothing Co. v. Stadiem ....149 N. C., 6 198
Cobb v. Edwards ....117 N. C., 245 .... 276, 532
Coble, Clapp v. .... 21 N. C., 179 617
Coble v. Comrs. of Guilford ....184 N. C., 342, 348, 351, 355 .... 375, 455, 472, 725

Cochran v. Smith....171 N. C., 369.... 756
Cogdell v. R. R....130 N. C., 314.... 477
Cogdell, Stokes v....153 N. C., 181.... 34
Cogdill v. Clayton....170 N. C., 526.... 651
Cole v. Laws....104 N. C., 651.... 28, 400
Cole, S. v....94 N. C., 958.... 477
Collie v. Comrs. of Franklin....145 N. C., 171.... 394
Collins, S. v....118 N. C.,1204.... 451
Colonial Club, S. v....154 N. C., 177.... 114
Combs, Kiser v....114 N. C., 640.... 195
Comrs. of Ashe v. Bank....181 N. C., 347.... 374
Comrs. of Beaufort v. Bonner....153 N. C., 70.... 425
Comrs. of Beaufort, Ward v....146 N. C., 534.... 498
Comrs. of Bladen, Burney v....184 N. C., 274, 277....375, 472
Comrs. of Brunswick, Headman v. ....177 N. C., 263.... 532
Comrs. of Brunswick, Robinson v. ....182 N. C., 590.... 375
Comrs. of Buncombe v. Malone..179 N. C., 110.... 254, 549
Comrs. of Buncombe, Wilson v..183 N. C., 638....252, 253, 254
Comrs. of Cabarrus, Mfg. Co. v.183 N. C., 553.... 703
Comrs. of Caldwell v. Spitzer....173 N. C., 147.... 701, 702
Comrs. of Carthage, McLeod v...148 N. C., 85.... 472
Comrs. of Columbus, Withers v. ....163 N. C., 341.... 724
Comrs. of Currituck, Leary v....172 N. C., 25.... 425
Comrs. of Davidson, Evans v....184 N. C., 328.... 564, 565
Comrs. of Davidson, Woosley v. ....182 N. C., 429.... 375
Comrs. of Durham v. Tob. Co...116 N. C., 446.... 729
Comrs. of Forsyth, Belo v.... 82 N. C., 415.... 729
Comrs. of Franklin, Collie v....145 N. C., 171.... 394
Comrs. of Franklin, Perry v....148 N. C., 521.... 722
Comrs. of Gaston, Armstrong v.185 N. C., 405.... 375
Comrs. of Gaston, Puitt v.... 94 N. C., 709.... 426
Comrs. of Greene, Edwards v....170 N. C., 448, 451....142, 498
Comrs. of Guilford, Coble v....184 N. C., 342, 348, 351, 355.... 375, 455, 472, 725
Comrs. of Guilford, Sechrist v...181 N. C., 511.... 254
Comrs. of Haywood, Tate v....122 N. C., 812.... 460
Comrs. of Hertford, Smith v....182 N. C., 149.... 472
Comrs. of Iredell, Mills v....175 N. C., 215....373, 374, 376
Comrs. of Johnston v. State Treasurer ....174 N. C., 141, 145, 148....473, 695, 725
Comrs. of Madison, Jones v....137 N. C., 579, 580, 599....231, 394, 460
Comrs. of Mecklenburg, Emery v. ....181 N. C., 420.... 374, 376
Comrs. of Nash, Proctor v....182 N. C., 59.... 498
Comrs. N. Cove Tp., Brown v....173 N. C., 598.... 373, 376
Comrs. of Polk, Williams v....176 N. C., 554.... 229
Comrs. of Robeson, McCormac v. ....90 N. C., 441.... 460
Comrs. of Rockingham, Cotton Mills v. ....184 N. C., 227.... 498
Comrs. of Scotland, Gibson v....163 N. C., 511.... 233

Comrs. of Stanly v. Honeycutt..182 N. C., 319..... 374
Comrs. of Stokes, Jones v.....143 N. C., 60..... 460
Comrs. of Surry v. Trust Co.....178 N. C., 170..... 374
Comrs. of Union, Younts v.....151 N. C., 583..... 229
Comrs. of Vance v. Henderson..163 N. C., 114, 120.....372, 721
Comrs. of Wake, Gill v.....160 N. C., 181..... 549, 550
Comrs. of Wilkes v. Pruden.....178 N. C., 394..... 374
Concord, Fitzgerald v.....140 N. C., 112..... 664
Connor, S. v.....142 N. C., 700..... 411
Cook v. Mfg. Co.....182 N. C., 205, 213.....124, 779
Cook v. Redman..... 37 N. C., 623..... 531
Cook, S. v. .....162 N. C., 586..... 587
Cooke, S. v. .....176 N. C., 735..... 411
Cooper, Walker v. .....159 N. C., 536..... 212
Cooper, Whitesides v.....115 N. C., 570..... 397
Coöperative Assn. v. Boyd.....171 N. C., 184..... 713
Coor v. Smith.....101 N. C., 261..... 195
Copeland, Lamb v.....158 N. C., 136..... 218, 622
Copland v. Tel. Co.....136 N. C., 11..... 6
Coppersmith v. R. R.....184 N. C., 26..... 48
Corey, Lumber Co. v.....140 N. C., 462..... 296
Cornelius, Simonton v..... 98 N. C., 437..... 285
Corporation Com., Pullen v.....152 N. C., 553..... 728
Corprew, Etheridge v. ..... 48 N. C., 18..... 153
Cotton Mills v. Comrs. of Rockingham .....184 N. C., 227..... 498
Cotton Mills, Featherstone v.....159 N. C., 429..... 445
Cotton Mills, Marks v.....135 N. C., 287..... 57
Cotton Mills, Ross v.....140 N. C., 115..... 574
Cotton Mills, Thigpen v.....151 N. C., 97..... 55
Council, Davis v..... 92 N. C., 726..... 24
Councill v. Bailey.....154 N. C., 54..... 382
Cowan v. Cunningham.....146 N. C., 453..... 112
Cowles v. Hardin..... 79 N. C., 577..... 112
Cox v. Boyden .....167 N. C., 321..... 535
Cox v. Dowd.....133 N. C., 537..... 172
Cox, Ellis v. .....176 N. C., 616..... 560
Cox, Hargrove v.....180 N. C., 360..... 617
Cox v. R. R.....149 N. C., 87..... 28
Cox v. R. R.....149 N. C., 117..... 575
Cox v. Williams..... 39 N. C., 15..... 743
Coxe v. Carson.....169 N. C., 132..... 532
Cozart v. Assurance Co.....142 N. C., 522..... 535
Craft v. Lumber Co.....181 N. C., 31..... 21, 22
Craig v. Lumber Co.....185 N. C., 562..... 124, 125
Craig, S. v. ..... 81 N. C., 588..... 378
Craig v. Stewart .....163 N. C., 533..... 554
Cram v. Cram .....116 N. C., 288..... 620
Crane, S. v.....110 N. C., 535..... 602
Crater, Campbell v..... 95 N. C., 156..... 154
Creasman, Cab Co. v.....185 N. C., 556..... 178
Crews v. Crews .....175 N. C., 168..... 361
Croom, Freeman v.....172 N. C., 524..... 618
Crotts v. Winston-Salem.....170 N. C., 24..... 498
Crowell v. Crowell .....180 N. C., 516..... 153

Cruse, Sossaman v. 133 N. C., 470 ... 206, 207
Cunningham v. Bell 83 N. C., 328 ... 276
Cunningham, Cowan v. 146 N. C., 453 ... 112
Cunningham v. Davis 42 N. C., 5 ... 195
Cunningham v. R. R. 139 N. C., 434 ... 270
Cunningham, Wooten v. 171 N. C., 123 ... 74
Curl, Miller v. 162 N. C., 1 ... 112
Currie v. Malloy 185 N. C., 213 ... 110
Currie v. Mining Co. 157 N. C., 209 ... 151
Cuthbertson v. Austin 152 N. C., 336 ... 24
Cuthbertson v. Morgan 149 N. C., 72 ... 532
Cutler v. Cutler 130 N. C., 1 ... 716, 717

D

Dale v. Lumber Co. 152 N. C., 654 ... 554
Dalton v. Brown 159 N. C., 175 ... 674
Dancy, S. v. 78 N. C., 437 ... 587
Daniels, Parker v. 159 N. C., 518 ... 554
Daniel, S. v. 136 N. C., 571 ... 630, 631
Darden v. Plymouth 166 N. C., 492 ... 664
Darlington v. Tel. Co. 127 N. C., 448 ... 764
Darnell, S. v. 166 N. C., 300 ... 427
Davenport v. Bd. of Education 183 N. C., 570 ... 648
Davenport, Nobles v. 185 N. C., 162 ... 18
Davenport, Phelps v. 151 N. C., 22 ... 532
Davenport, Simmons v. 140 N. C., 407 ... 748, 749
Davenport, S. v. 156 N. C., 614 ... 585
Davidson, Lummus v. 160 N. C., 484 ... 516
Davidson v. Shuler 119 N. C., 582 ... 757
Davies v. Blomburg 185 N. C., 496 ... 55
Davis, Causey v. 185 N. C., 155 ... 48
Davis v. Council 92 N. C., 726 ... 24
Davis, Cunningham v. 42 N. C., 5 ... 195
Davis v. Davis 83 N. C., 71 ... 617
Davis, Dixon v. 184 N. C., 207, 209 ... 438, 557
Davis, Drewry v. 151 N. C., 295 ... 400
Davis, Gay v. 107 N. C., 269 ... 465
Davis, Hardin v. 183 N. C., 47 ... 411
Davis v. Keen 142 N. C., 502 ... 749
Davis v. Lenoir 178 N. C., 668 ... 374
Davis, Mottu v. 151 N. C., 237 ... 45, 696
Davis v. R. R. 172 N. C., 209 ... 240, 241
Davis, Reiger v. 67 N. C., 185 ... 588
Davis, S. v. 15 N. C., 612 ... 588
Davis, S. v. 79 N. C., 603 ... 763
Davis, S. v. 126 N. C., 1007 ... 484
Davis, S. v. 134 N. C., 633 ... 599
Davis, Weil v. 168 N. C., 298 ... 194, 196
Dayton v. Asheville 185 N. C., 12 ... 500
Deal v. Wilson 178 N. C., 605 ... 554
Deaver v. Deaver 137 N. C., 244 ... 553
DeBerry v. Nicholson 102 N. C., 465 ... 228, 233
Bebruhl v. Trust Co. 172 N. C., 839 ... 560
Dellinger v. Tweed 66 N. C., 206 ... 481, 482

Denby v. Hairston ..... 8 N. C., 316 49
Deppe v. R. R. ..... 154 N. C., 523 477
Dettrick, Capehart v. ..... 91 N. C., 344 195
DeVane v. Larkins ..... 56 N. C., 377 319
Development Co. v. R. R. ..... 147 N. C., 504 48
Devereux, Hyman v. ..... 63 N. C., 624 ..... 194, 195
Dew, Bank v. ..... 175 N. C., 79, 89 ..... 171, 172, 324
Dewey v. R. R. ..... 142 N. C., 392 425
Dewey, S. v. ..... 139 N. C., 560 603
Dick, S. v. ..... 60 N. C., 440 588
Dickerson, Moring v. ..... 85 N. C., 466 196
Dickerson, S. v. ..... 98 N. C., 708 760
Dickson v. Brewer ..... 180 N. C., 403 229
Dillon v. Raleigh ..... 124 N. C., 184 662
Discount Co. v. Baker ..... 176 N. C., 546 299
Dixon v. Davis ..... 184 N. C., 207, 209 ..... 438, 557
Dixon v. Stewart ..... 113 N. C., 410 617
Dobson v. Whisenhant ..... 101 N. C., 646 475
Donlan v. Trust Co. ..... 139 N. C., 214 465
Door Co. v. Joyner ..... 182 N. C., 521 641
Dorsett v. Mfg. Co. ..... 131 N. C., 261 470
Dorsey v. Kirkland ..... 177 N. C., 520 361
Doss, Hemmings v. ..... 125 N. C., 400 193
Douglass, S. v. ..... 63 N. C., 500 484
Douglass, Whitfield v. ..... 175 N. C., 46 189
Dowd, Cox v. ..... 133 N. C., 537 172
Dowell v. Raleigh ..... 173 N. C., 202 664
Downing, Atkinson v. ..... 175 N. C., 244 37
Drainage Comrs. v. Sparks ..... 179 N. C., 581 106
Draughan v. Bunting ..... 31 N. C., 10 553
Drewry v. Davis ..... 151 N. C., 295 400
Drug Co., Bank v. ..... 166 N. C., 99 299
Drum v. Miller ..... 135 N. C., 208 421
Dry-Kiln Co. v. Ellington ..... 172 N. C., 481, 484 613
Duckworth v. Mull ..... 143 N. C., 461 292
Dudley, Merrell v. ..... 139 N. C., 59 207
Dula v. School Trustees ..... 177 N. C., 426, 431, 498 648
Dunn, Becton v. ..... 137 N. C., 562 112
Dunn, Bunn v. ..... 185 N. C., 108 147
Dunn, Lee v. ..... 73 N. C., 605 134
Dunn, Patrick v. ..... 162 N. C., 19 113
Dupree's Will, *In re* ..... 163 N. C., 256, 259 ..... 153, 532
Durfey, Fellowes v. ..... 163 N. C., 313 ..... 189, 390
Durham, Bramham v. ..... 171 N. C., 196, 198 ..... 204, 252
Durham, Brown v. ..... 141 N. C., 252 664
Durham v. Ins. Co. ..... 104 N. C., 262 766
Durham v. Public Service Co. ..... 182 N. C., 333 ..... 457, 688
Durham v. Riggsbee ..... 141 N. C., 128, 131 ..... 498, 500

E

Early v. Early ..... 134 N. C., 258 ..... 275, 276, 277, 320
Earnhardt, Newsome v. ..... 86 N. C., 395 ..... 229, 233
Easeley v. Easeley ..... 173 N. C., 531 333
Edge, Baker v. ..... 174 N. C., 100 716

Edens, *In re* ....182 N. C., 398.... 557
Edenton, Bunch v.... 90 N. C., 431.... 664
Edenton, Small v....146 N. C., 527.... 498
Edgerton v. Kirby....156 N. C., 347.... 724
Edwards, Cobb v. ....117 N. C., 245.... 276, 532
Edwards v. Comrs. of Greene....170 N. C., 448, 451....142, 498
Edwards, Gill v.... 87 N. C., 76.... 481
Edwards, Francis v.... 77 N. C., 271.... 27
Edwards, Harper v. ....115 N. C., 246.... 77
Edwards, Humphries v....164 N. C., 158.... 630
Edwards, S. v. ....110 N. C., 511.... 292
Electric Co., Guarantee Corp. v....179 N. C., 406.... 421
Electric Co., Overcash v....144 N. C., 572, 582 ....573, 574, 575
Ellen, Trust Co. v....163 N. C., 45.... 299
Ellick, S. v.... 60 N. C., 450.... 115
Ellington, Dry-Kiln Co. v....172 N. C., 481, 484 613
Ellington, Mial v. ....134 N. C., 131.... 364
Elliott, Lowe v. ....107 N. C., 718.... 265
Elliott v. Tyson ....117 N. C., 114.... 106
Ellis v. Cox....176 N. C., 616.... 560
Ellis, Latham v....116 N. C., 30.... 37
Ellsworth, S. v....130 N. C., 690.... 306
Elwood v. Plummer .... 78 N. C., 392.... 319
Elwood, Simpson v....114 N. C., 528.... 6
Elwood, S. v.... 73 N. C., 189.... 115
Emerson, Ledford v....143 N. C., 527.... 481
Emery v. Comrs. of Mecklenburg....181 N. C., 420.... 374, 376
English, Ledbetter v. ....166 N. C., 125.... 666
English, S. v....164 N. C., 498.... 309
Ensley v. Lumber Co....165 N. C., 691.... 10, 12
Ervin, Taylor v....119 N. C., 277.... 556
Estes, S. v. ....185 N. C., 752.... 115
Etheridge v. Corprew.... 48 N. C., 18.... 153
Etheridge v. Vernoy .... 70 N. C., 717, 724 45
Eubanks, Sanford v....152 N. C., 697.... 174
Evans v. Comrs. of Davidson....184 N. C., 328.... 564, 565
Evans, Jernigan v. ....180 N. C., 89.... 286
Ewbank v. Turner....134 N. C., 77.... 106
Express Co., Byrd v....139 N. C., 273.... 282
Express Co., Furniture Co. v.....148 N. C., 88.... 48
Express Co., Hosiery Co. v.....184 N. C., 478, 480 ....345, 557, 577
Express Co., Morris v....183 N. C., 147.... 61
Express Co., Reynolds v....172 N. C., 487.... 61
Express Co., Zageir v....171 N. C., 692.... 666, 667
Exum, Bank v....163 N. C., 199.... 299
Exum, Park v....156 N. C., 231.... 586
Exum, S. v....138 N. C., 600.... 24

F

Fain, *In re*....172 N. C., 790.... 36
Faison v. Williams....121 N. C., 152.... 106
Falkner, S. v....182 N. C., 799.... 244
Fallin, Vaughan v. ....183 N. C., 318.... 382

Farmer, Watson v. ....141 N. C., 452 293
Farquhar Co. v. Hardware Co. ....174 N. C., 376 99
Faw v. Whittington .... 72 N. C., 321 ....193, 195, 197
Fawcett v. Mount Airy ....134 N. C., 125 394
Fayetteville, Lutterloh v. ....149 N. C., 65 460
Fayetteville, Malloy v. ....122 N. C., 480 293
Featherstone v. Cotton Mills ....159 N. C., 429 445
Feezer, Machine Co. v. ....152 N. C., 516 110
Fellowes v. Durfey ....163 N. C., 313 .... 189, 390
Felmet v. Canton ....177 N. C., 52 688
Ferebee v. Gordon .... 35 N. C., 350 754
Ferebee v. Pritchard ....112 N. C., 83 571
Ferebee v. Sawyer ....167 N. C., 199 325
Ferguson v. Haas .... 64 N. C., 773 531
Ferguson, S. v. ....107 N. C., 481 411
Ferrell v. Hales ....119 N. C., 212 556
Fertilizer Co. v. Grubbs ....114 N. C., 470 481
Fertilizer Co. v. Lane ....173 N. C., 184 641
Fertilizer Works, Proctor v. ....183 N. C., 153 766
Fidelity Co. v. Grocery Co. ....147 N. C., 513 270
Fidelity Co. v. Jordan ....134 N. C., 236, 244 46
Field, Sullivan v. ....118 N. C., 358 507
Finch v. Cecil ....170 N. C., 74, 75 ....287, 362
Fincher, Hise v. .... 32 N. C., 139 717
Fitzgerald v. Concord ....140 N. C., 112 664
Fitzgerald v. Furniture Co. ....131 N. C., 636, 639, 640 .... 10, 11, 12, 126
Fleming, Hoke v. .... 32 N. C., 263 24
Fleming v. R. R. ....160 N. C., 196 470
Fleming, Simmons v. ....157 N. C., 389 119
Fleming, S. v. ....107 N. C., 905 308
Fogleman, S. v. ....164 N. C., 461 451
Foot v. R. R. ....142 N. C., 52 705
Foote, Peebles v. .... 83 N. C., 102 481
Foote, Sprinkle v. .... 71 N. C., 441 588
Fort, Smith v. ....105 N. C., 446 107
Fortune v. Hunt ....152 N. C., 715 464
Foster, S. v. ....129 N. C., 704 305
Foster, S. v. ....185 N. C., 674 624
Fountain, Woody v. ....143 N. C., 66 75
Fowler v. Ins. Co. .... 74 N. C., 89 49
Fowler, S. v. ....151 N. C., 732 760
Fowler v. Webster ....173 N. C., 442 516
Fox v. Ins. Co. ....185 N. C., 121 764
Foy v. Foy .... 3 N. C., 131 531
Francis v. Edwards .... 77 N. C., 271 27
Francis, S. v. ....157 N. C., 612 484
Freeman v. Belfer ....173 N. C., 581, 586 ....285, 362
Freeman, Brunhild v. .... 77 N. C., 128 432
Freeman v. Croom ....172 N. C., 524 618
Freeman v. Freeman ....141 N. C., 97 397
Freeman, Hobby v. ....183 N. C., 240 617
Freeman, S. v. .... 86 N. C., 683 206
French, S. v. ....109 N. C., 722 262
Friedenwald Co. v. Tobacco Works ....117 N. C., 544 225

Frisbee v. Marshall....122 N. C., 760.... 216
Frizzle, Rives v.... 43 N. C., 237.... 319
Fry v. R. R. ....159 N. C., 362.... 748
Fry v. Utilities Co....183 N. C., 281.... 708
Fulp, Tillotson v....172 N. C., 500.... 74
Fulwood v. Fulwood....161 N. C., 601.... 618
Furniture Co., Bank v. ....169 N. C., 180.... 53
Furniture Co. v. Express Co....148 N. C., 88.... 48
Furniture Co., Fitzgerald v....131 N. C., 636, 639, 640.... 10, 11, 12, 126
Futch v. R. R. ....178 N. C., 282.... 749

G

Gaither v. Clement ....183 N. C., 455.... 747
Gallimore v. Grubb....156 N. C., 575.... 532
Galloway v. Bd. of Education....184 N. C., 245.... 375, 426
Galloway v. Goolsby....176 N. C., 635, 639....45, 696
Gambrill v. Wilcox....111 N. C., 42.... 158
Gammon v. Johnson....126 N. C., 64.... 158
Gant, Troxler v....173 N. C., 422.... 103
Gardner, Mayo v.... 49 N. C., 359.... 214
Garland v. Arrowood....177 N. C., 373.... 85
Garris v. Harrington ....167 N. C., 86.... 75
Garris, Whitfield v....131 N. C., 148.... 350
Garris, Whitfield v....134 N. C., 24.... 350, 398
Garsed v. Garsed....170 N. C., 672.... 333
Gas Co., Haynes v....114 N. C., 203.... 756
Gaskins, Ipock v....161 N. C., 678.... 757
Gay v. Davis....107 N. C., 269.... 465
Gaylord v. Gaylord....150 N. C., 222, 227....326, 327, 384, 531
Gaylord v. McCoy....161 N. C., 686.... 532
Gentry v. Wagstaff.... 14 N. C., 270.... 277
George, S. v.... 30 N. C., 324.... 24, 484
George, S. v.... 93 N. C., 567.... 410
Germanton, Riddle v....117 N. C., 388.... 475
Gibson v. Comrs. of Scotland....163 N. C., 511.... 233
Gill v. Comrs. of Wake....160 N. C., 181.... 549, 550
Gill v. Edwards.... 87 N. C., 76.... 481
Gilliland v. Bd. of Education....141 N. C., 482.... 477
Gilmer v. Hanks .... 84 N. C., 320.... 754
Gladden, Nichols v....117 N. C., 497.... 512, 513
Glasgow, Strong v.... 6 N. C., 290.... 531
Godwin, S. v....138 N. C., 582.... 28
Goldsboro, Rosenthal v....149 N. C., 128.... 498
Goldstein, Monk v....172 N. C., 516.... 756
Gooch v. Bank....176 N. C., 216.... 287
Goode v. Hearne....180 N. C., 475.... 398
Gooding, Allen v....173 N. C., 96.... 384
Goodman, Swain v....183 N. C., 531, 534 ....325, 327, 384
Goodwin, Hubbard v....175 N. C., 174.... 756
Goodwin, Weathersbee v. ....175 N. C., 234.... 194, 195
Goolsby, Galloway v....176 N. C., 635, 639....45, 696
Gordon, Ferebee v.... 35 N. C., 350.... 754
Gordon v. Sanderson.... 83 N. C., 1.... 106
Gornto, Greenville v....161 N. C., 341.... 285

Gorrell v. Alspaugh....120 N. C., 362.... 196
Grabbs v. Ins. Co....125 N. C., 393.... 420
Graham, S. v....133 N. C., 652.... 451
Graham v. Tate.... 77 N. C., 120.... 28
Grandy, Sawyer v....113 N. C., 42.... 571
Grant v. Bd. of Education....178 N. C., 329, 333....694, 700
Graves v. Howard....159 N. C., 594.... 154
Gray, Mfg. Co. v....124 N. C., 322.... 70, 71
Green v. Biggs....167 N. C., 422.... 438
Green, Moore v.... 73 N. C., 394.... 482
Green, S. v....126 N. C.,1032, 1034....254, 722
Green, S. v....134 N. C., 661.... 207
Green, Wiseman v....127 N. C., 288.... 757
Greenlee v. R. R....122 N. C., 977.... 15, 709
Greensboro, Bell v....170 N. C., 179.... 664
Greensboro, Hudson v....185 N. C., 502.... 393
Greensboro, Stratford v....124 N. C., 127.... 142
Greensboro, Tate v....114 N. C., 392.... 498
Greensboro, Taylor v....175 N. C., 423.... 550
Greenville v. Gornto....161 N. C., 341.... 285
Greenville, Jeffress v....154 N. C., 490.... 498
Griffice, S. v.... 74 N. C., 317.... 330
Griffin, Jenkins v....175 N. C., 184.... 103
Griffin v. Light Co....111 N. C., 438.... 683
Griffin v. R. R....150 N. C., 315.... 683
Griffin, Roberson v. ....185 N. C., 38.... 286
Griggs, Hampton v....184 N. C., 13, 16 ....223, 398, 512
Grimes, Harrington v....163 N. C., 76.... 512
Grisham, S. v.... 2 N. C., 13.... 308
Grocery Co., Fidelity Co. v....147 N. C., 513.... 270
Grocery Co., Stanford v....143 N. C., 419.... 268
Grocery Co., Womble v....135 N. C., 474.... 574, 575
Groom, Brodnax v.... 64 N. C., 244.... 498, 648
Groves v. Barden....169 N. C., 12.... 378
Grubb, Gallimore v....156 N. C., 575.... 532
Grubbs, Fertilizer Co. v....114 N. C., 470.... 481
Grubbs v. Ins. Co....108 N. C., 472.... 49, 271
Grubbs, Midyette v....145 N. C., 19.... 350
Guarantee Corp. v. Electric Co...179 N. C., 406.... 421
Guaranty Co., Knitting Mills v...137 N. C., 565.... 432
Gwaltney v. Timber Co....115 N. C., 579.... 217

H

Haas, Ferguson v.... 64 N. C., 773.... 531
Hackett v. Shuford.... 86 N. C., 144.... 276
Hackney, Bowen v....136 N. C., 187.... 397
Hairston, Denby v.... 8 N. C., 316.... 49
Hales, Ferrell v....119 N. C., 212.... 556
Hall, Burgwyn v....108 N. C., 489.... 482
Hall v. Misenheimer....137 N. C., 183.... 313
Hall v. Robinson.... 30 N. C., 56.... 553
Hall, Walsh v.... 66 N. C., 233....43, 45, 110
Hallsey, Norman v....132 N. C., 6.... 158
Hamilton, *In re*....182 N. C., 57.... 34, 35
Hammond v. McRae....182 N. C., 754.... 473

Hampton v. Griggs....184 N. C., 13, 16 ....323, 398, 512
Hampton, S. v.... 63 N. C., 13....629, 630, 631
Hampton v. Waldrop....104 N. C., 453.... 233
Hampton, Wofford v....173 N. C., 686.... 382
Hamrick v. Tel. Co....140 N. C., 151.... 764
Hancock, Abbott v....123 N. C., 99.... 507
Hancock, Blacknall v....182 N. C., 369, 373....78, 642
Hancock v. R. R....124 N. C., 222, 225 141
Hancock, S. v....151 N. C., 699.... 624
Handle Co. v. Plumbing Co....171 N. C., 502.... 554
Hanes v. Shapiro....168 N. C., 24.... 737
Hanie, Baber v....163 N. C., 588....94, 503, 504
Hanks, Gilmer v.... 84 N. C., 320.... 754
Hannon, S. v....168 N. C., 215.... 763
Hardin, Cowles v.... 79 N. C., 577.... 112
Hardin v. Davis....183 N. C., 47.... 411
Hardware Co., Farquhar Co. v...174 N. C., 376.... 99
Hardwood Co., Winslow v....147 N. C., 275, 276....174, 575
Hardy v. Mitchell....156 N. C., 76.... 299
Hardy v. Mitchell....161 N. C., 351.... 299
Hardy v. Ward....150 N. C., 385.... 296
Hargrove v. Cox....180 N. C., 360.... 617
Harper, Bryan v....177 N. C., 309.... 119
Harper v. Edwards....115 N. C., 246.... 77
Harper v. Lenoir....152 N. C., 723.... 425
Harper v. Supply Co....184 N. C., 205.... 282
Harrell, March v.... 46 N. C., 329.... 24
Harrill v. R. R....132 N. C., 655.... 26
Harrington, Garris v....167 N. C., 86.... 75
Harrington v. Grimes....163 N. C., 76.... 512
Harrington, McFarland v....178 N. C., 189.... 531
Harrington v. Rawls....131 N. C., 39.... 235
Harris v. Harris....178 N. C., 7.... 756
Harris, *In re*....183 N. C., 633.... 374
Harris v. Russell....124 N. C., 554.... 319
Harris v. Scarboro....110 N. C., 239.... 233
Harris, S. v....145 N. C., 456.... 435
Harris v. Turner....179 N. C., 325.... 748
Harrison, Bell v....179 N. C., 190.... 44, 110
Harrison v. Bray.... 92 N. C., 489.... 235
Harrison v. Ray....108 N. C., 215.... 285
Harrison, S. v....145 N. C., 408.... 475
Harrison, S. v....184 N. C., 762.... 624
Hart v. R. R....144 N. C., 91.... 49
Hartsfield v. Bryan....177 N. C., 166.... 626
Hasty, Huntley v....132 N. C., 279.... 481
Hauser v. Sain.... 74 N. C., 552.... 560
Havens v. Bank....132 N. C., 223.... 172
Hay Co., Temple v....184 N. C., 241.... 150
Hayden v. Hayden....178 N. C., 261, 262....325, 757
Haynes v. Gas Co....114 N. C., 203.... 756
Haywood, S. v.... 73 N. C., 437.... 330
Hazell, S. v.... 95 N. C., 624.... 555
Headman v. Comrs. of Brunswick ....177 N. C., 263.... 532

Hearne, Goode v. ....180 N. C., 475 398
Hedgecock, S. v. ....185 N. C., 714 435
Hedgepeth, Williams v. ....184 N. C., 114 110
Heiser v. Mears ....120 N. C., 443 199
Helms v. Helms ....137 N. C., 206, 209 324
Hemmings v. Doss ....125 N. C., 400 193
Hemphill v. Hemphill .... 99 N. C., 436 ....85, 531, 622
Hemphill v. Lumber Co. ....141 N. C., 487 .... 124, 125
Hemphill v. Ross .... 66 N. C., 477 195
Henderson, Comrs. of Vance v. ...163 N. C., 114, 120 ....372, 721
Henderson, Hoke v. .... 15 N. C., 1 .... 364, 581
Hendersonville v. Jordan ....150 N. C., 35 233
Hendren v. Hendren ....153 N. C., 505 532
Hendricks, Stanly v. .... 35 N. C., 87 553
Hendrix, Ross v. ....110 N. C., 403 .... 276, 277
Herring v. Williams ....158 N. C., 1 120
Hester v. Broach .... 84 N. C., 253 761
Hester v. Hester .... 37 N. C., 330 391
Hewitt, Lehew v. ....130 N. C., 22 532
Hicks, Hinton v. ....156 N. C., 24 .... 77, 196
Hicks, Kerr v. ....154 N. C., 268 507
Hicks v. Mfg. Co. ....138 N. C., 331, 333 ....470, 709
Hicks, Markham v. .... 90 N. C., 1 106
High v. Bailey ....107 N. C., 71 334
High Point, Cecil v. ....165 N. C., 431 252
High Point, Ridge v. ....176 N. C., 421 664
Highway Com., Clifton v. ....183 N. C., 211 500
Highway Com., Jennings v. ....183 N. C., 68 500
Highway Com., Peters v. ....184 N. C., 30 648
Highway Com., Road Com. v. ....185 N. C., 56 .... 377, 500
Higly, Woodford v. .... 60 N. C., 234 285
Hildreth, S. v. .... 31 N. C., 429, 440 ....115, 585
Hill v. Lenoir ....176 N. C., 572 550
Hill v. R. R. ....180 N. C., 493 748
Hill, Register Co. v. ....136 N. C., 277 199
Hill v. Skinner ....169 N. C., 409 233
Hill, S. v. ....141 N. C., 769, 770 ....114, 115
Hilliard v. Asheville ....118 N. C., 845 .... 455, 457
Hillsboro, Brown v. ....185 N. C., 370 690
Hines, White v. ....182 N. C., 276 .... 574, 576
Hinnant v. Wilder ....122 N. C., 149 464
Hinson, S. v. ....150 N. C., 827 26
Hinton v. Hicks ....156 N. C., 24 .... 77, 196
Hinton v. Leigh ....102 N. C., 28 .... 78, 642
Hinton v. Pritchard ....107 N. C., 128 531
Hinton v. R. R. ....172 N. C., 587 667
Hise v. Fincher .... 32 N. C., 139 717
Hobby v. Freeman ....183 N. C., 240 617
Hodges, Blalock v. ....171 N. C., 134 296
Hodges, McNeil v. .... 99 N. C., 248 536
Hodges, Robeson v. ....105 N. C., 40, 51 106
Hoge v. Lee ....184 N. C., 44, 50 ....218, 622
Hoke v. Fleming .... 32 N. C., 263 24
Hoke v. Henderson .... 15 N. C., 1 .... 364, 581
Holder, S. v. ....133 N. C., 710 330

Holland, Kirkman v.....139 N. C., 185..... 743
Holleman v. Trust Co.....185 N. C., 49..... 302
Holley, Jenkins v.....140 N. C., 380..... 553
Holloman, S. v.....139 N. C., 648.....371, 674
Holloway, S. v.....117 N. C., 730..... 451
Hollowell v. Borden.....148 N. C., 256..... 722
Hollowell v. Manly.....179 N. C., 265..... 324
Holmes v. Bullock.....178 N. C., 376..... 106
Holmes, Kirkpatrick v.....108 N. C., 206..... 277
Holt v. Mfg. Co.....177 N. C., 170, 175.....12, 445
Holt, Shore v.....185 N. C., 312, 313.....46, 55, 391, 560
Holt, S. v..... 90 N. C., 751..... 85, 589
Honeycutt v. Comrs. of Stanly....182 N. C., 319..... 374
Honeycutt, Williams v.....176 N. C., 103..... 531
Hontz, Rogerson v.....174 N. C., 27.....443, 444
Hood v. Mercer.....150 N. C., 699..... 361
Hood, Mullinax v.....174 N. C., 607..... 477
Hooker, James v.....172 N. C., 780..... 397
Horn, S. v.....116 N. C.,1037..... 760
Horne v. Power Co.....144 N. C., 375..... 756
Horne, S. v.....171 N. C., 787..... 588
Hosiery Co. v. Express Co.....184 N. C., 478, 480.....345, 557, 577
Horton v. Ins. Co.....122 N. C., 503..... 270
Horton, S. v.....100 N. C., 448..... 411
Hoskins, Tinsley v.....111 N. C., 340..... 465
Hotel Co., Smathers v.....168 N. C., 69..... 299
Houck v. Somers.....118 N. C., 607..... 276
Houser v. Bonsal.....149 N. C., 51..... 293
Howard, Bowman v.....182 N. C., 662..... 146
Howard, Graves v.....159 N. C., 594..... 154
Howard v. Ross..... 3 N. C., 333..... 49
Hubbard v. Goodwin.....175 N. C., 174..... 756
Hudson v. Greensboro.....185 N. C., 502..... 393
Hudson v. Hudson.....144 N. C., 449, 454..... 540
Huff v. R. R.....171 N. C., 203..... 426
Humphrey v. Lumber Co.....174 N. C., 520..... 196
Humphrey, Thompson v.....179 N. C., 44..... 397
Humphries v. Baxter..... 28 N. C., 437..... 141
Humphries v. Edwards.....164 N. C., 158..... 630
Hunt, Fortune v.....152 N. C., 715..... 464
Hunter, S. v.....106 N. C., 796..... 206
Huntley v. Hasty.....132 N. C., 279..... 481
Hussey v. Kirkman..... 95 N. C., 63..... 571
Hutton, Lumber Co. v.....159 N. C., 445..... 134
Hyatt v. Walston.....174 N. C., 55..... 93
Hyman v. Devereux..... 63 N. C., 624.....194, 195
Hyman, S. v.....164 N. C., 413, 414.....435, 438
Hyman, Whitehurst v..... 90 N. C., 490..... 553

I

Ice Co., Chance v.....166 N. C., 495..... 588
Improvement Co. v. Andrews.....176 N. C., 280..... 695
Improvement Co., Rumbough v...112 N. C., 751..... 746
Industrial Siding Case.....140 N. C., 244..... 683
In re Anderson .....132 N. C., 244..... 106

In re Applicants for License.....143 N. C., 1..... 204
In re Bateman's Will .....168 N. C., 235..... 153
In re Beauchamp .....146 N. C., 254..... 153
In re Blake .....184 N. C., 278..... 35
In re Dupree's Will .....163 N. C., 256, 259.....153, 532
In re Edens .....182 N. C., 398..... 557
In re Fain .....172 N. C., 790..... 36
In re Hamilton .....182 N. C., 57..... 34, 35
In re Harris .....183 N. C., 633..... 374
In re Johnson .....182 N. C., 527..... 154
In re Jones .....153 N. C., 312..... 36
In re Knowles .....148 N. C., 461, 466 119
In re Lewis ..... 88 N. C., 31..... 36
In re Means .....176 N. C., 307..... 36
In re Ross .....182 N. C., 477.....57, 313, 604
In re Will of Saunders.....177 N. C., 156..... 716
In re Shelton's Will .....143 N. C., 218..... 717
In re Smith's Will .....163 N. C., 464..... 598
In re Stone .....176 N. C., 337.....74, 464, 465
In re Turner .....151 N. C., 474..... 36
In re Wellborn's Will .....165 N. C., 636..... 716
Institute v. Mebane.....165 N. C., 644, 650 542
Ins. Co., Bank v. .....159 N. C., 200..... 745
Ins. Co. v. Box Co.....185 N. C., 543..... 754
Ins. Co., Bray v. .....139 N. C., 390, 393.....338, 420
Ins. Co., Brock v. .....156 N. C., 112..... 575
Ins. Co., Durham v. .....104 N. C., 262..... 766
Ins. Co., Fowler v. ..... 74 N. C., 89..... 49
Ins. Co., Fox v. .....185 N. C., 121..... 763
Ins. Co., Grabbs v. .....125 N. C., 393..... 420
Ins. Co., Grubbs v. .....108 N. C., 472..... 49, 271
Ins. Co., Horton v. .....122 N. C., 503..... 270
Ins. Co., Johnson v. .....172 N. C., 147..... 270
Ins. Co., Modlin v. .....151 N. C., 43..... 270
Ins. Co., Penn v. .....158 N. C., 20..... 336, 339
Ins. Co., Penn v. .....160 N. C., 400..... 337
Ins. Co. v. R. R.....132 N. C., 75..... 270
Ins. Co. v. R. R.....165 N. C., 136..... 270
Ins. Co., Sanders v. .....183 N. C., 66..... 766
Ins. Co., Schiele v. .....171 N. C., 426..... 201
Ins. Co., Trust Co. v.....173 N. C., 558..... 338
Ins. Co., Underwood v. .....185 N. C., 540..... 421
Ins. Co., Whitehurst v. .....149 N. C., 273..... 44
Ipock v. Gaskins.....161 N. C., 678..... 757
Isley v. Bridge Co.....143 N. C., 51..... 28

J

Jackson, Brown v.....179 N. C., 363, 367, 371, 374.....729, 731
Jackson, Kochs v. .....156 N. C., 328..... 508
Jackson, Motor Co. v.....184 N. C., 328..... 735
Jackson, S. v. ..... 82 N. C., 566..... 331
Jackson, S. v. .....183 N. C., 695..... 231
Jacobs, S. v.....106 N. C., 695..... 602
James v. Hooker.....172 N. C., 780..... 397
Jarman, Cavenaugh v.....164 N. C., 375..... 383

Jarrell, S. v. ..... 141 N. C., 722, 725 ..... 585, 596
Jarrett v. Trunk Co. ..... 142 N. C., 466, 469 ..... 400, 412, 596
Jeffress v. Greenville ..... 154 N. C., 490 498
Jeffreys, S. v. ..... 117 N. C., 743, 746 ..... 630, 631
Jenkins v. Bd. of Elections ..... 180 N. C., 169 231
Jenkins v. Griffin ..... 175 N. C., 184 103
Jenkins v. Holley ..... 140 N. C., 380 553
Jenkins v. Lambeth ..... 172 N. C., 466 397
Jennings v. Highway Com. ..... 183 N. C., 68 500
Jernigan v. Evans ..... 180 N. C., 89 286
Jim, S. v. ..... 12 N. C., 142 306
Johnson v. Allen ..... 100 N. C., 131 85
Johnson, Balcum v. ..... 177 N. C., 213, 216 ..... 217, 740
Johnson, Gammon v. ..... 126 N. C., 64 158
Johnson, *In re* ..... 182 N. C., 527 154
Johnson v. Ins. Co. ..... 172 N. C., 147 270
Johnson, Paschal v. ..... 183 N. C., 130 375
Johnson v. Patterson ..... 9 N. C., 183 24
Johnson v. R. R. ..... 163 N. C., 431, 451 ..... 122, 251, 748, 767
Johnson v. Raleigh ..... 156 N. C., 271 664
Johnson, S. v. ..... 170 N. C., 688 252
Johnson, S. v. ..... 182 N. C., 888 ..... 411, 414
Johnson, S. v. ..... 184 N. C., 637 759
Johnson v. Whilden ..... 166 N. C., 104 194
Johnson v. Whilden ..... 171 N. C., 153 194
Johnston, Bank v. ..... 161 N. C., 509 173
Johnston v. McRary ..... 50 N. C., 369 701
Johnston v. Pate ..... 95 N. C., 68, 70 ..... 231, 620
Johnston v. Rankin ..... 70 N. C., 555 499
Johnston, S. v. ..... 118 N. C., 1188 378
Johnston, S. v. ..... 119 N. C., 883, 897 ..... 308, 312
Jones, Andrews v. ..... 122 N. C., 666 475
Jones v. Ashford ..... 79 N. C., 172 194
Jones, Bunting v. ..... 78 N. C., 242 ..... 77, 196
Jones v. Buxton ..... 121 N. C., 285 235
Jones v. Comrs. of Madison ..... 137 N. C., 579, 580, 599 ..... 231, 394, 460
Jones v. Comrs. of Stokes ..... 143 N. C., 60 460
Jones, *In re* ..... 153 N. C., 312 36
Jones v. Jones ..... 80 N. C., 247 24
Jones v. Jones ..... 164 N. C., 321, 322 ..... 326, 383, 531
Jones, Pendleton v. ..... 82 N. C., 249 432
Jones, S. v. ..... 95 N. C., 588 760
Jones, S. v. ..... 139 N. C., 616 500
Jones, Stith v. ..... 119 N. C., 428 181
Jones v. Williams ..... 155 N. C., 179 158
Jones, Wilson v. ..... 176 N. C., 207 384
Jordan, Fidelity Co. v. ..... 134 N. C., 236, 244 46
Jordan, Hendersonville v. ..... 150 N. C., 35 233
Jordan, S. v. ..... 75 N. C., 27 308
Journegan, S. v. ..... 185 N. C., 700 311
Journigan, Roe v. ..... 181 N. C., 183 465
Joyner, Door Co. v. ..... 182 N. C., 521 641
Joyner v. Stancill ..... 108 N. C., 154 195
Justice v. Asheville ..... 161 N. C., 62 688
Justice, Barber v. ..... 138 N. C., 20 535

K

Kannan v. Assad....182 N. C., 77.... 61
Kearney v. Vann....154 N. C., 311.... 204
Keen, Davis v....142 N. C., 502.... 749
Keith v. Lockhart....171 N. C., 451, 455....394, 550
Kennedy v. Williamson.... 50 N. C., 284.... 7
Kerner v. R. R....170 N. C., 97.... 57
Kerr v. Hicks....154 N. C., 268.... 507
Kesler, School Committee v.... 67 N. C., 443.... 327
Key v. Bd. of Education....170 N. C., 123.... 549
Killian, S. v....173 N. C., 792.... 282
Killian, Winkler v....141 N. C., 575, 578....540, 560
Kincaid, S. v....183 N. C., 709, 710....450, 599, 769
Kindley, Satterfield v....144 N. C., 461.... 553
King, Bowen v....146 N. C., 385.... 194
King v. R. R.... 66 N. C., 277.... 455
King v. R. R....174 N. C., 39.... 443
Kinney v. Kinney....149 N. C., 321.... 352
Kinney v. Laughenour.... 97 N. C., 325.... 482
Kinston v. Loftin....149 N. C., 255....457, 459, 500
Kinston v. R. R....183 N. C., 14.... 425, 457
Kinston v. Wooten....150 N. C., 296.... 457, 459
Kirby, Edgerton v....156 N. C., 347.... 724
Kirkland, Dorsey v....177 N. C., 520.... 361
Kirkman v. Holland....139 N. C., 185.... 743
Kirkman, Hussey v.... 95 N. C., 63.... 571
Kirkman v. Smith....175 N. C., 579.... 398
Kirkman, S. v....104 N. C., 911.... 437
Kirkpatrick v. Holmes....108 N. C., 206.... 277
Kiser v. Combs....114 N. C., 640.... 195
Kivett, Sheldon v....110 N. C., 410.... 151
Knights of Honor, Lindsey v....172 N. C., 818.... 535
Knights of Honor v. Selby....153 N. C., 207.... 465
Knitting Mills v. Guaranty Co...137 N. C., 565.... 432
Knowles, *In re*....148 N. C., 461, 466.... 119
Kochs v. Jackson....156 N. C., 328.... 508
Krachanake v. Mfg. Co....175 N. C., 441.... 750
Kramer, Morris v....182 N. C., 87.... 587
Kress, Strickland v....183 N. C., 537.... 214
Krout, S. v....183 N. C., 804.... 24

L

LaBerge, Temple v....184 N. C., 253.... 151
Lackey v. Martin....120 N. C., 391.... 195
Lacy v. Packing Co....134 N. C., 572.... 675
Lamb v. Copeland....158 N. C., 136.... 218, 622
Lamb v. Lamb....177 N. C., 150.... 21, 22
Lamb v. Littman....132 N. C., 978.... 250
Lambeth, Jenkins v....172 N. C., 466.... 397
Lance, S. v....149 N. C., 555.... 599
Lance, S. v....166 N. C., 413.... 451
Land Co., Bank v. ....128 N. C., 194.... 465
Land Co., Phillips v. ....174 N. C., 542.... 212

Land Co. v. Traction Co.....162 N. C., 314..... 182
Land Co. v. Traction Co.....162 N. C., 503..... 183
Lane, Fertilizer Co. v.....173 N. C., 184..... 641
Lane, Withers v.....144 N. C., 192..... 588
Langford, S. v..... 12 N. C., 253..... 305
Lanier, Baggett v.....178 N. C., 132..... 749
Lanier, S. v..... 90 N. C., 714..... 484
Larkins, DeVane v..... 56 N. C., 377..... 319
Lasater, Oakley v.....172 N. C., 96..... 481
Lassiter v. Lassiter..... 92 N. C., 129..... 333, 351
Lassiter, McCoy v..... 95 N. C., 88..... 173, 523
Latham v. Ellis.....116 N. C., 30..... 37
Lattimore, Quinn v.....120 N. C., 426..... 233
Laughenour, Kinney v..... 97 N. C., 325..... 482
Lawrence v. Pitt..... 46 N. C., 344.....275, 276, 320
Laws, Cole v.....104 N. C., 561..... 28, 400
Lawton, McNeill v..... 97 N. C., 20..... 27
Laxton, S. v..... 78 N. C., 564..... 603
Lea, Alston v..... 59 N. C., 27..... 391
Leak, S. v. .....156 N. C., 643..... 489
Leary v. Comrs. of Currituck....172 N. C., 25..... 425
Leary v. Lenoir.....152 N. C., 723..... 425
Leathers v. Tobacco Co.....144 N. C., 350..... 11
Ledbetter v. English.....166 N. C., 125..... 666
Ledbetter v. Pinner.....120 N. C., 455..... 106
Ledford v. Emerson.....143 N. C., 527..... 481
Ledford v. Lumber Co.....183 N. C., 614, 617 .....122, 251, 748
Lee v. Baird.....146 N. C., 361..... 386
Lee, Boone v.....175 N. C., 383..... 532
Lee v. Dunn..... 73 N. C., 605..... 134
Lee, Hoge v.....184 N. C., 44, 50.....218, 622
Lee v. Lee.....180 N. C., 86..... 216
Lee v. R. R. .....136 N. C., 533..... 48
Lee, S. v.....121 N. C., 546..... 451
Lee v. Upton.....178 N. C., 198..... 128
Lee v. Waynesville.....184 N. C., 565, 568 .....143, 498, 647
Lefkowitz v. Silver.....182 N. C., 339..... 532
Leggett, Whedbee v..... 92 N. C., 469..... 27
Lehew v. Hewitt.....130 N. C., 22..... 532
Leigh, Hinton v.....102 N. C., 28..... 77, 642
Lemons, S. v.....182 N. C., 828..... 484
Lenoir, Davis v.....178 N. C., 668..... 374
Lenoir, Harper v.....152 N. C., 723..... 425
Lenoir Hill v.....176 N. C., 572..... 550
Lenoir, Leary v.....152 N. C., 723..... 425
Leonard v. Power Co.....155 N. C., 10..... 110
Lewark v. R. R.....137 N. C., 384..... 48
Lewis, *In re*..... 88 N. C., 31..... 36
Lewis, May v.....132 N. C., 115..... 223
Lewis v. Nunn.....182 N. C., 119..... 18
Lewis, Wilson v.....170 N. C., 47..... 299
Light Co., Griffin v.....111 N. C., 438..... 683
Liles, S. v.....134 N. C., 735..... 292
Lindsey v. Knights of Honor....172 N. C., 818..... 535

Linville v. Nissen....162 N. C., 95, 96....341, 344
Lipsey, S. v....14 N. C., 485....586
Litaker, Burris v....181 N. C., 376....57, 604
Littman, Lamb v....132 N. C., 978....250
Lloyd v. R. R....151 N. C., 536....667
Loane, Marcus v....133 N. C., 54....11
Lockhart, Keith v....171 N. C., 451, 455....394, 550
Loftin, Kinston v....149 N. C., 255....457, 459, 500
Logging Co., Worley v....157 N. C., 499....241
Long v. Barnes....87 N. C., 329....285
Long v. Byrd....169 N. C., 659....603
Long v. McLean....88 N. C., 3....482
Long, Ray v....128 N. C., 90....276, 277
Long, S. v....76 N. C., 254....134
Loomis, May v....140 N. C., 350....43, 110
Love v. Raleigh....116 N. C., 296....423, 424
Love, Ziegler v....185 N. C., 40....398
Lovelace, S. v....178 N. C., 769....451
Lowe v. Elliott....107 N. C., 718....265
Lowery v. School Trustees....140 N. C., 33....426
Lowrance, Alexander v....182 N. C., 642....252
Lukens, Braid v....95 N. C., 123....401
Lumber Co., Bangert v....169 N. C., 628....296
Lumber Co., Bateman v....154 N. C., 248....296
Lumber Co. v. Corey....140 N. C., 462....296
Lumber Co., Craft v....181 N. C., 31....21, 22
Lumber Co., Craig v....185 N. C., 562....124, 125
Lumber Co., Dale v....152 N. C., 654....554
Lumber Co., Ensley v....165 N. C., 691....10, 12
Lumber Co., Hemphill v....141 N. C., 487....124, 125
Lumber Co., Humphrey v....174 N. C., 520....196
Lumber Co. v. Hutton....159 N. C., 445....134
Lumber Co., Ledford v....183 N. C., 614, 617....122, 251, 748
Lumber Co. v. Lumber Co....137 N. C., 431....432
Lumber Co. v. Lumber Co....150 N. C., 282....613
Lumber Co., Morton v....178 N. C., 166....296
Lumber Co., Owen v....185 N. C., 612....747
Lumber Co., Patton v....179 N. C., 103....147
Lumber Co., Powell v....168 N. C., 632....214
Lumber Co., R. R. v....114 N. C., 690....183
Lumber Co. v. R. R....151 N. C., 217....478
Lumber Co., Roberson v....154 N. C., 328....67
Lumber Co., Seawell v....172 N. C., 320....201
Lumber Co., Smith v....142 N. C., 26....200
Lumber Co., Tritt v....183 N. C., 830....747
Lumber Co., Turner v....119 N. C., 387....11
Lumber Co., v. Whitley....163 N. C., 47....296
Lumber Co., Williams v....174 N. C., 229, 230....296
Lumber Co., Younce v....155 N. C., 239....746
Lummus v. Davidson....160 N. C., 484....516
Lutterloh v. Fayetteville....149 N. C., 65....460
Lyda, Rector v....180 N. C., 577, 578....503, 554
Lyle, S. v....100 N. C., 497, 503....498, 499
Lyman v. R. R....132 N. C., 721....737

Lyon v. Akin..... 78 N. C., 258..... 276
Lyon v. R. R.....165 N. C., 147..... 240
Lytle, S. v.....117 N. C., 803..... 489
Lytton v. Mfg. Co.....157 N. C., 331..... 445

M

McAden, Printing Co. v.....131 N. C., 178..... 754
McAfee, S. v.....107 N. C., 812..... 206
McArthur, Bank v.....168 N. C., 52..... 587
McArthur, McDonald v.....154 N. C., 11..... 603
McBride, Sears v..... 70 N. C., 152, 153.....276, 277
McCabe, Wood v.....151 N. C., 458..... 755
McCallum v. McCallum.....167 N. C., 310..... 53, 191
McCaskill, R. R. v..... 94 N. C., 746..... 498, 500
McConnell v. R. R.....163 N. C., 507..... 240
McCormac v. Comrs. of Robeson 90 N. C., 441..... 460
McCormick, Ball-Thrash v.....162 N. C., 475..... 508
McCormick, Mfg. Co. v.....175 N. C., 277..... 695
McCourry, S. v.....128 N. C., 598..... 25
McCoy, Gaylord v.....161 N. C., 686..... 532
McCoy v. Lassiter..... 95 N. C., 88..... 173, 523
McCoy v. R. R.....142 N. C., 387..... 438
McCracken v. R. R.....168 N. C., 62..... 646
McCurry v. Purgason.....170 N. C., 463..... 560
McDaniel, S. v..... 60 N. C., 245..... 306
McDonald v. McArthur.....154 N. C., 11..... 603
McDonald, Page v.....159 N. C., 41..... 151
McDowell, S. v.....129 N. C., 532..... 451
McEwan v. Brown.....176 N. C., 249..... 571
McEwen, Bank v.....160 N. C., 414..... 361
McFarland v. Harrington.....178 N. C., 189..... 531
McGhee v. R. R.....147 N. C., 142..... 756
McGowan v. McGowan.....122 N. C., 145..... 268
McGowans, Randolph v.....174 N. C., 203, 206.....734, 737
McIntire v. R. R..... 67 N. C., 278..... 498, 500
McIntyre, McLaurin v.....167 N. C., 350..... 106
McIver v. McKinney.....184 N. C., 393..... 320
McIver, S. v..... 88 N. C., 690..... 500
McKesson v. Mendenhall..... 64 N. C., 502..... 28
McKinney v. Adams.....184 N. C., 562..... 443, 444
McKinney, McIver v.....184 N. C., 393..... 320
McKinney v. Patterson.....174 N. C., 483..... 481
McKinnon v. Caulk.....167 N. C., 411..... 285, 362
McLaurin v. McIntyre.....167 N. C., 350..... 106
McLaurin v. McLaurin.....106 N. C., 331..... 107
McLean v. Breece.....113 N. C., 391..... 106
McLean, Long v..... 88 N. C., 3..... 482
McLean, R. R. v.....158 N. C., 498..... 183
McLendon, Threadgill v..... 76 N. C., 24..... 553
McLeod v. Comrs. of Carthage....148 N. C., 85..... 472
McMath, Nall v.....177 N. C., 183..... 85
McMillan, Carrol v.....133 N. C., 140..... 112
McNeil v. Hodges..... 99 N. C., 248..... 536
McNeill v. Lawton..... 97 N. C., 20..... 27
McNeill v. R. R.....117 N. C., 642..... 535

McPhail, Parker v. 112 N. C., 502 536
McPherson, Rush v. 176 N. C., 567 554
McRae, Hammond v. 182 N. C., 754 473
McRae, Prince v. 84 N. C., 674 432
McRary, Johnston v. 50 N. C., 369 701
McWhirter v. McWhirter 155 N. C., 146 276
Machine Co. v. Feezer 152 N. C., 516 110
Makely, Board of Education v. 139 N. C., 31 174
Malloy, Currie v. 185 N. C., 213 110
Malloy v. Fayetteville 122 N. C., 480 293
Malone, Comrs. of Buncombe v. 179 N. C., 110 254, 549
Manly, Hollowell v. 179 N. C., 365 324
Manly v. Raleigh 57 N. C., 370 459, 460
Mann v. Transportation Co. 176 N. C., 105 61
Manning v. R. R. 122 N. C., 824 181
Mfg. Co. v. Assurance Co. 161 N. C., 96 432
Mfg. Co. v. Comrs. of Cabarrus. 183 N. C., 553 703
Mfg. Co., Cook v. 182 N. C., 205, 213 124, 779
Mfg. Co., Dorsett v. 131 N. C., 261 470
Mfg. Co. v. Gray 124 N. C., 322 70, 71
Mfg. Co., Hicks v. 138 N. C., 331, 333 470, 709
Mfg. Co., Holt v. 177 N. C., 170, 175 12, 445
Mfg. Co., Krachanake v. 175 N. C., 441 750
Mfg. Co., Lytton v. 157 N. C., 331 445
Mfg. Co. v. McCormick 175 N. C., 277 695
Mfg. Co., Page v. 180 N. C., 330, 334 575
Mfg. Co., Perry v. 176 N. C., 69 574
Mfg. Co., R. R. v. 169 N. C., 156 184
Mfg. Co., Roberts v. 181 N. C., 204 55, 391
Mfg. Co. v. Summers 143 N. C., 103 299
Mfg. Co., Williams v. 175 N. C., 226 126
Mfg. Co., Williams v. 177 N. C., 515 282
March v. Harrell 46 N. C., 329 24
Marcus v. Loane 133 N. C., 54 11
Markham v. Hicks 90 N. C., 1 106
Marks v. Cotton Mills 135 N. C., 287 57
Marsh, Miller v. 85 N. C., 51 560
Marsh, S. v. 132 N. C., 1000 307
Marshall, Frisbee v. 122 N. C., 760 216
Marshall v. Tel. Co. 181 N. C., 292 57
Martin, Lackey v. 120 N. C., 391 195
Martin, S. v. 85 N. C., 508 631
Martin County v. Trust Co. 178 N. C., 26 373, 376
Mason v. Wilson 84 N. C., 51 553
Massey, S. v. 86 N. C., 658 307, 310
Mateer, Miller v. 172 N. C., 401 110
Matthews, S. v. 142 N. C., 621 483
Maxwell, Peoples v. 64 N. C., 313 571
May v. Lewis 132 N. C., 115 223
May v. Loomis 140 N. C., 350 43, 110
May v. Menzies 184 N. C., 150 145
May, Williams v. 173 N. C., 78 342
Mayo v. Gardner 49 N. C., 359 214
Meadows, Taylor v. 169 N. C., 124 353
Meadows, Taylor v. 175 N. C., 373 353

Meadows, Taylor v. ....182 N. C., 266.... 353
Means, *In re*....176 N. C., 307.... 36
Means v. R. R....124 N. C., 578.... 26
Mears, Heiser v....120 N. C., 443.... 198
Mebane, Institute v. ....165 N. C., 644, 650 542
Meekins v. Newberry....101 N. C., 18.... 695
Meisenheimer v. Alexander....162 N. C., 235.... 170
Mendenhall, McKesson v. .... 64 N. C., 502.... 28
Menzies, May v....184 N. C., 150.... 145
Mercantile Co. v. Mount Olive....161 N. C., 125.... 675
Mercer, Hood v....150 N. C., 699.... 361
Mercer v. R. R. ....154 N. C., 399.... 443
Merrell v. Dudley ....139 N. C., 59.... 207
Merrick, S. v. ....171 N. C., 788, 795....266, 309
Metal Co. v. R. R....145 N. C., 293.... 400
Mial v. Ellington....134 N. C., 131.... 364
Midgett v. Vann....158 N. C., 128.... 465
Midyette v. Grubbs....145 N. C., 91.... 350
Miller v. Curl....162 N. C., 1.... 112
Miller, Drum v. ....135 N. C., 208.... 421
Miller v. Marsh.... 85 N. C., 51.... 560
Miller v. Mateer....172 N. C., 401.... 110
Miller v. Pierce ....104 N. C., 389.... 195, 197
Miller v. Scott ....184 N. C., 556.... 120
Miller, Taylor v. ....113 N. C., 340.... 213
Mills, Barnett v. ....167 N. C., 580.... 750
Mills v. Comrs. of Iredell ....175 N. C., 215....373, 374, 376
Mills, Norris v....154 N. C., 474.... 445
Mills v. Williams.... 33 N. C., 558.... 460
Mining Co., Bason v. .... 90 N. C., 417.... 612
Mining Co., Currie v....157 N. C., 209.... 151
Mirror Co., Rea v....158 N. C., 24.... 752
Misenheimer, Hall v. ....137 N. C., 183.... 313
Mitchell, Hardy v....156 N. C., 76.... 299
Mitchell, Hardy v....161 N. C., 351.... 299
Mitchell v. Mitchell.... 96 N. C., 15.... 46
Mitchell v. R. R....176 N. C., 645.... 67
Mizell v. Simmons.... 79 N. C., 190.... 758
Modlin v. Ins. Co....151 N. C., 43.... 270
Modlin v. R. R....145 N. C., 218.... 44
Monk v. Goldstein....172 N. C., 516.... 756
Monroe v. R. R....151 N. C., 374.... 121
Monroe, Russell v....116 N. C., 720, 727 664
Montague v. Simpkins....178 N. C., 270, 273 53
Montgomery, S. v....183 N. C., 747.... 450
Moody v. Moody....118 N. C., 926.... 333
Moody, S. v. ....172 N. C., 967.... 411
Moon v. Simpson....170 N. C., 335.... 299
Moore, Bank v....138 N. C., 529.... 695
Moore, Bethell v.... 19 N. C., 311.... 717, 718
Moore v. Brady ....125 N. C., 35.... 523
Moore v. Green.... 73 N. C., 394.... 482
Moore v. Moore ....185 N. C., 332.... 360
Moore v. Quickel ....159 N. C., 129.... 78
Moore v. R. R....185 N. C., 189.... 258

Moore, Robeson v. ..... 168 N. C., 388 ..... 512, 513
Moore, Smith v. ..... 150 N. C., 159 683
Moore, S. v. ..... 104 N. C., 743 435
Moore, Summers v. ..... 113 N. C., 403 277
Moore v. Trust Co. ..... 178 N. C., 123, 126, 128 ..... 173, 285, 287, 362
Morehead, Smith v. ..... 59 N. C., 360 620
Morgan, Cuthbertson v. ..... 149 N. C., 72 532
Morgan, Puckett v. ..... 158 N. C., 344 223
Moring v. Dickerson ..... 85 N. C., 466 196
Morris, Briggs v. ..... 54 N. C., 193 531
Morris v. Express Co. ..... 183 N. C., 147 61
Morris v. Kramer ..... 182 N. C., 87 587
Morris v. Morris ..... 89 N. C., 113 333
Morris, Ritch v. ..... 78 N. C., 377 119
Mortgage Co., Best v. ..... 128 N. C., 351 151
Morton v. Lumber Co. ..... 178 N. C., 166 296
Morton, Nash v. ..... 48 N. C., 6 588
Morton v. Tel. Co. ..... 130 N. C., 299 46
Moses, S. v. ..... 13 N. C., 463, 464 ..... 436, 581
Motley v. Whitemore ..... 19 N. C., 537 285
Motor Co. v. Jackson ..... 184 N. C., 328 735
Mott, Tate v. ..... 96 N. C., 23 464
Mottu v. Davis ..... 151 N. C., 237 ..... 45, 696
Mount Airy, Fawcett v. ..... 134 N. C., 125 394
Mount Olive, Mercantile Co. v. ..... 161 N. C., 125 675
Mule Co. v. R. R. ..... 160 N. C., 253 477
Mull, Brittain v. ..... 91 N. C., 498 107
Mull, Duckworth v. ..... 143 N. C., 461 292
Mullinax v. Hood ..... 174 N. C., 607 477
Mumpower v. R. R. ..... 174 N. C., 742 574
Munger, Taylor v. ..... 169 N. C., 727 296
Myerfield, S. v. ..... 61 N. C., 108 630
Myers, Brown v. ..... 150 N. C., 443 757
Myers v. Petty ..... 153 N. C., 462 299

N

Nall v. McMath ..... 177 N. C., 183 85
Nash v. Morton ..... 8 N. C., 6 588
Nash, S. v. ..... 97 N. C., 516 555
Nelson v. Relief Department ..... 147 N. C., 104 507
New Bern, White v. ..... 146 N. C., 449 664
Newberry, Meekins v. ..... 101 N. C., 18 695
Newland v. Newland ..... 46 N. C., 463 390
Newlin, Thompson v. ..... 41 N. C., 380 743
Newsom, S. v. ..... 27 N. C., 250 499
Newsome v. Bunch ..... 144 N. C., 15, 16 36
Newsome v. Earnheart ..... 86 N. C., 395 ..... 229, 233
Newton v. School Committee ..... 158 N. C., 186, 187, 188 ..... 498, 648
Nichols v. Gladden ..... 117 N. C., 497 ..... 512, 513
Nicholson, Bruce v. ..... 109 N. C., 204, 285 261
Nicholson, DeBerry v. ..... 102 N. C., 465 ..... 228, 233
Nissen, Linville v. ..... 162 N. C., 95, 96 ..... 341, 344
Nixon v. Williams ..... 95 N. C., 103 277
Nobles v. Davenport ..... 185 N. C., 162 18

Nobles v. Nobles ....177 N. C., 245.... 512, 513
Norcum v. Savage....140 N. C., 473.... 277
Norman v. Hallsey ....132 N. C., 6.... 158
Norris, Brisco v. ....112 N. C., 671, 677....276, 465
Norris v. Mills....154 N. C., 474.... 445
Nunn, Lewis v....182 N. C., 119.... 18

O

Oakley v. Lasater ....172 N. C., 96.... 481
Oates, Rankin v....183 N. C., 517.... 85
Oates, Ryder v. ....173 N. C., 569.... 74, 106
Odell, Ward v. ....126 N. C., 946.... 126
Odom v. Clark ....146 N. C., 550.... 523
Odum v. Russell....179 N. C., 6.... 286
O'Higgins, S. v. ....178 N. C., 709.... 410, 412
Oliver, S. v. .... 70 N. C., 61.... 364
Outlaw v. Outlaw....184 N. C., 259.... 159
Overcash v. Electric Co....144 N. C., 572, 582 ....573, 574, 575
Owen v. Lumber Co....185 N. C., 612.... 747
Owen, S. v. .... 5 N. C., 452.... 436
Owens, Cawfield v. ....129 N. C., 286.... 103
Ownby, S. v....146 N. C., 678.... 587
Oxford, Wood v.... 97 N. C., 228.... 229

P

Packing Co., Lacy v....134 N. C., 572.... 675
Padgett, Whitehurst v. ....157 N. C., 428.... 554
Page v. Mfg. Co. ....180 N. C., 330, 334 575
Page v. McDonald....159 N. C., 41.... 151
Page v. Page....166 N. C., 90.... 35
Paper Co. v. Chronicle....115 N. C., 143.... 743
Parish v. Cedar Co....133 N. C., 484.... 456
Park v. Exum....156 N. C., 231.... 586
Parker v. Beasley ....116 N. C., 1.... 195
Parker v. Daniels ....159 N. C., 518.... 554
Parker v. McPhail....112 N. C., 502.... 536
Parker, Smith v. ....131 N. C., 470.... 235
Parker, S. v. .... 61 N. C., 473.... 450
Parks, S. v.... 25 N. C., 296.... 577
Paschal v. Johnson....183 N. C., 130.... 375
Pate v. Blades ....163 N. C., 267.... 110
Pate, Johnston v.... 95 N. C., 68, 70....231, 620
Patrick v. Dunn....162 N. C., 19.... 113
Patterson, Johnson v.... 9 N. C., 183.... 24
Patterson, McKinney v....174 N. C., 483.... 481
Patterson, Ray v....165 N. C., 512.... 588
Patterson, S. v....134 N. C., 615.... 141
Patton, Campbell v. ....113 N. C., 48.... 299
Patton v. Lumber Co....179 N. C., 103.... 147
Paul v. Burton....180 N. C., 45.... 265
Paul v. R. R....170 N. C., 230, 231, 233, 265 ....666, 667, 740
Peace, Raleigh v....110 N. C., 32.... 457
Peanut Co. v. R. R....155 N. C., 148.... 61

Peebles v. Foote ..... 83 N. C., 102 481
Peele v. Powell ..... 156 N. C., 553, 557, 560 ..... 221, 554
Pegues v. Pegues ..... 40 N. C., 418 276
Pendleton v. Jones ..... 82 N. C., 249 432
Penn v. Ins. Co. ..... 158 N. C., 29 ..... 336, 339
Penn v. Ins. Co. ..... 160 N. C., 400 337
Penny v. R. R. ..... 161 N. C., 530 17
Peoples v. Maxwell ..... 64 N. C., 313 571
Peregoy, Bank v. ..... 147 N. C., 293 535
Perkins, S. v. ..... 141 N. C., 797, 803 ..... 378, 721
Perkinson, Yellowday v. ..... 167 N. C., 146 27
Perley, S. v. ..... 173 N. C., 790 377
Perry v. Comrs. of Franklin ..... 148 N. C., 521 722
Perry v. Mfg. Co. ..... 176 N. C., 69 574
Person v. Watts ..... 184 N. C., 499, 506, 508, 527, 531, 532, 536, 538, 540— 648, 723, 727, 728, 729, 731, 732
Peters v. Highway Com. ..... 184 N. C., 30 648
Peters, S. v. ..... 107 N. C., 884 ..... 434, 435
Pettit v. R. R. ..... 156 N. C., 136 15
Petty, Myers v. ..... 153 N. C., 462 299
Phelps v. Davenport ..... 151 N. C., 22 532
Phifer v. R. R. ..... 122 N. C., 940 57
Phillips v. Land Co. ..... 174 N. C., 542 212
Piano Co. v. Spruill ..... 150 N. C., 168 642
Pickett v. R. R. ..... 117 N. C., 616, 639 ..... 122, 525
Pierce, Miller v. ..... 104 N. C., 389 ..... 195, 197
Piner, S. v. ..... 141 N. C., 760 436
Pinner, Ledbetter v. ..... 120 N. C., 455 106
Pipe Co., Alley v. ..... 159 N. C., 327 250
Pipkin, Cheese Co. v. ..... 155 N. C., 395 106
Pitt, Lawrence v. ..... 46 N. C., 344 ..... 275, 276, 320
Pittman v. Pittman ..... 107 N. C., 159 531
Pleasants, Bridges v. ..... 39 N. C., 26 ..... 391, 463
Plumbling Co., Handle Co. v. ..... 171 N. C., 502 554
Plummer, Elwood v. ..... 78 N. C., 392 319
Plymouth, Darden v. ..... 166 N. C., 492 664
Pollard v. Slaughter ..... 92 N. C., 72 350
Pool v. Anderson ..... 150 N. C., 624 8
Porter, Voorhees v. ..... 134 N. C., 604 553
Potter, S. v. ..... 61 N. C., 338 ..... 438, 484
Powe, Bynum v. ..... 97 N. C., 374 536
Powell, Brasfield v. ..... 117 N. C., 141 642
Powell v. Lumber Co. ..... 168 N. C., 632 214
Powell, Peele v. ..... 156 N. C., 553, 557, 560 ..... 221, 554
Powell v. R. R. ..... 68 N. C., 395 588
Powell v. Water Co. ..... 171 N. C., 290 ..... 270, 271
Power Co., Brown v. ..... 140 N. C., 333 183
Power Co., Campbell v. ..... 166 N. C., 488 46
Power Co., Horne v. ..... 144 N. C., 375 756
Power Co., Leonard v. ..... 155 N. C., 10 110
Power Co. v. Power Co. ..... 171 N. C., 248 ..... 74, 184
Power Co. v. Power Co. ..... 175 N. C., 668 ..... 180, 182, 185
Power Co., Pruett v. ..... 167 N. C., 598 400

Power Co., Public Service Co. v. 181 N. C., 356 18
Power Co., Taylor v. ..... 174 N. C., 583 756
Powers v. Wilmington ..... 177 N. C., 361 400
Presley, S. v. ..... 35 N. C., 494 588
Pressly v. Yarn Mills ..... 138 N. C., 410, 416 16
Prince v. McRae ..... 84 N. C., 674 432
Printing Co. v. McAden ..... 131 N. C., 178 754
Pritchard, Ferebee v. ..... 112 N. C., 83 571
Pritchard, Hinton v. ..... 107 N. C., 128 531
Pritchard v. Sanderson ..... 84 N. C., 300 235
Pritchard, Smith v. ..... 173 N. C., 720 282
Pritchett v. R. R. ..... 157 N. C., 88 639
Proctor v. Comrs. of Nash ..... 182 N. C., 59 498
Proctor v. Fertilizer Works ..... 183 N. C., 153 766
Propst v. Roseman ..... 49 N. C., 130 173
Pruden, Comrs of Wilkes v. ..... 178 N. C., 394 374
Pruett v. Power Co ..... 167 N. C., 598 400
Public Service Co., Durham v. ..... 182 N. C., 333 ..... 457, 688
Public Service Co. v. Power Co. 181 N. C., 356 18
Puckett v. Morgan ..... 158 N. C., 344 223
Pugh v. Allen ..... 179 N. C., 307 223
Puitt v. Comrs. of Gaston ..... 94 N. C., 709 426
Pullen v. Corporation Com. ..... 152 N. C., 553 728
Pulliam, S. v. ..... 184 N. C., 681, 687 ..... 124, 125, 563
Pump Co. v. R. R. ..... 138 N. C., 301 477
Purgason, McCurry v. ..... 170 N. C., 463 560
Purnell v. Vaughan ..... 77 N. C., 268 235

Q

Quickle, Moore v. ..... 159 N. C., 129 78
Quinn v. Lattimore ..... 120 N. C., 426 233

R

R. R., Allen v. ..... 102 N. C., 381 498
R. R., Aman v. ..... 179 N. C., 310, 313 ..... 88, 240
R. R., Armfield v. ..... 167 N. C., 464 184
R. R., Arrowood v. ..... 126 N. C., 631 259
R. R., Asbury v. ..... 125 N. C., 568 421
R. R., Barrus v. ..... 121 N. C., 504 535
R. R., Beard v. ..... 143 N. C., 140 543
R. R., Berry v. ..... 122 N. C., 1002 240
R. R., Biles v. ..... 139 N. C., 528 249
R. R., Branch v. ..... 88 N. C., 573 764
R. R., Brendle v. ..... 125 N. C., 474 708
R. R., Brittain v. ..... 167 N. C., 642 707
R. R., Bryan v. ..... 174 N. C., 177 88
R. R., Bumgardner v. ..... 132 N. C., 442 26
R. R. v. Carpenter ..... 165 N. C., 465 325
R. R., Cherry v. ..... 185 N. C., 90, 92 265
R. R., Cogdell v. ..... 130 N. C., 314 477
R. R. Connection Case ..... 137 N. C., 21 ..... 555, 682, 683
R. R., Coppersmith v. ..... 184 N. C., 26 48
R. R., Cox v. ..... 149 N. C., 87 28

R. R., Cox v. ....149 N. C., 117.... 575
R. R., Cunningham v. ....139 N. C., 434.... 270
R. R., Davis v. ....172 N. C., 209.... 239, 241
R. R., Deppe v. ....154 N. C., 523.... 477
R. R., Development Co. v....147 N. C., 504.... 48
R. R., Dewey v. ....142 N. C., 392.... 425
R. R., Fleming v. ....160 N. C., 196.... 470
R. R., Foot v. ....142 N. C., 52.... 705
R. R., Fry v. ....159 N. C., 362.... 748
R. R., Futch v. ....178 N. C., 282.... 749
R. R., Greenlee v. ....122 N. C., 977.... 15, 709
R. R., Griffin v. ....150 N. C., 315.... 683
R. R., Hancock v. ....124 N. C., 222, 224.... 141
R. R., Harrill v. ....132 N. C., 655.... 26
R. R., Hart v. ....144 N. C., 91.... 49
R. R., Hill v. ....180 N. C., 493.... 748
R. R., Hinton v. ....172 N. C., 587.... 667
R. R., Huff v. ....171 N. C., 203.... 426
R. R., Ins. Co. v....132 N. C., 75.... 270
R. R., Ins. Co. v....165 N. C., 136.... 270
R. R., Johnson v. ....163 N. C., 431, 451....123, 251, 748, 767
R. R., Kerner v. ....170 N. C., 97.... 57
R. R., King v. .... 66 N. C., 277.... 455
R. R., King v. ....174 N. C., 39.... 443
R. R., Kinston v. ....183 N. C., 14.... 425, 457
R. R., Lee v. ....136 N. C., 533.... 48
R. R., Lewark v. ....137 N. C., 384.... 48
R. R., Lloyd v. ....151 N. C., 536.... 667
R. R. v. Lumber Co....114 N. C., 690.... 183
R. R., Lumber Co. v....151 N. C., 217.... 478
R. R., Lyman v. ....132 N. C., 721.... 737
R. R., Lyon v. ....165 N. C., 147.... 240
R. R. v. McCaskill .... 94 N. C., 746.... 498, 500
R. R., McConnell v. ....163 N. C., 507.... 240
R. R., McCoy v. ....142 N. C., 387.... 438
R. R., McCracken v. ....168 N. C., 62.... 646
R. R., McGhee v. ....147 N. C., 142.... 756
R. R., McIntire v. .... 67 N. C., 278.... 498, 500
R. R. v. McLean....158 N. C., 498.... 183
R. R., McNeil v. ....117 N. C., 642.... 535
R. R., Manning v. ....122 N. C., 824.... 181
R. R. v. Mfg. Co.... ....169 N. C., 156.... 184
R. R., Means v. ....124 N. C., 578.... 26
R. R., Mercer v. ....154 N. C., 399.... 443
R. R., Metal Co. v....145 N. C., 293.... 400
R. R., Mitchell v. ....176 N. C., 645.... 67
R. R., Modlin v. ....145 N. C., 218.... 44
R. R., Monroe v. ....151 N. C., 374.... 121
R. R., Moore v. ....185 N. C., 189.... 258
R. R., Mule Co. v....160 N. C., 253.... 477
R. R., Mumpower v. ....174 N. C., 742.... 574
R. R., Paul v. ....170 N. C., 230, 231, 233 .....265, 666, 667, 740
R. R., Peanut Co. v....155 N. C., 148.... 61
R. R., Penny v. ....161 N. C., 530.... 17

R. R., Pettit v. ....156 N. C., 136.... 15
R. R., Phifer v. ....122 N. C., 940.... 57
R. R., Pickett v. ....117 N. C., 616, 639....122, 525
R. R., Powell v. .... 68 N. C., 395.... 588
R. R., Pritchett v. ....157 N. C., 88.... 639
R. R., Pump Co. v....138 N. C., 301.... 477
R. R. v. R. R....147 N. C., 368, 382 53
R. R. v. R. R....148 N. C., 59.... 181, 182
R. R., Rawls v. ....172 N. C., 211.... 241
R. R., Raynor v. ....129 N. C., 195.... 57
R. R., Renn v. ....170 N. C., 128.... 489
R. R., Russell v. ....118 N. C.,1098.... 117, 432
R. R., Sears v. ....178 N. C., 285.... 749
R. R., Seawell v. ....133 N. C., 515.... 25
R. R., Sharpe v. ....130 N. C., 614.... 48
R. R., Shepard v. ....169 N. C., 239.... 667
R. R., Smith v. ....147 N. C., 603.... 249
R. R., Smith v. ....163 N. C., 145.... 240
R. R., Street Ry. v....142 N. C., 423.... 182, 183
R. R. v. Stroud....132 N. C., 413.... 182
R. R., Styron v. ....161 N. C., 78.... 664
R. R., Summerlin v. ....133 N. C., 551.... 477
R. R., Terry v. .... 91 N. C., 236.... 380
R. R., Thigpen v. ....184 N. C., 33.... 63, 558
R. R., Thompson v. ....147 N. C., 412.... 386
R. R., Troxler v....124 N. C., 189, 190....15, 709
R. R., Vann v. ....182 N. C., 567, 569 741
R. R., Vassor v. ....142 N. C., 68.... 67
R. R., Ward v. ....161 N. C., 179.... 740
R. R., Wells v. .... 51 N. C., 47.... 240
R. R., West v. ....140 N. C., 620.... 285, 361
R. R., Wilkie v. ....127 N. C., 203.... 207
R. R., Willis v. ....120 N. C., 508.... 67
R. R., Witsell v. ....120 N. C., 557.... 756
R. R., Worth v. .... 89 N. C., 305.... 729
R. R., Wright v. ....122 N. C., 852.... 66
Raisin v. Thomas.... 88 N. C., 148.... 106
Raleigh, Betts v. ....142 N. C., 229.... 724
Raleigh, Briggs v. ....166 N. C., 149.... 550
Raleigh, Dillon v. ....124 N. C., 184.... 662
Raleigh, Dowell v. ....173 N. C., 202.... 664
Raleigh, Johnson v. ....156 N. C., 271.... 664
Raleigh, Love v. ....116 N. C., 296.... 423, 424
Raleigh, Manly v. .... 57 N. C., 370.... 460
Raleigh v. Peace....110 N. C., 32.... 457
Raleigh, Revis v. ....150 N. C., 353.... 664
Ramsey v. Browder....136 N. C., 251.... 213
Randolph v. McGowans....174 N. C., 203, 206....734, 737
Rankin, Johnston v. .... 70 N. C., 555.... 499
Rankin v. Oates....183 N. C., 517.... 85
Rawles, S. v.... 65 N. C., 334, 336....630, 631
Rawls, Harrington v....131 N. C., 39.... 235
Rawls v. R. R....172 N. C., 211.... 241
Ray v. Blackwell.... 94 N. C., 10.... 209, 695

Ray, Harrison v. ....108 N. C., 215.... 285
Ray v. Long....128 N. C., 90.... 276, 277
Ray v. Patterson....165 N. C., 512.... 588
Raynor v. R. R....129 N. C., 195.... 57
Rea v. Mirror Co....158 N. C., 24.... 752
Realty Co., White v....182 N. C., 538.... 665
Reaves, Carter v. ....167 N. C., 132.... 154
Rector v. Lyda....180 N. C., 577, 578....503, 554
Redman, Cook v....37 N. C., 623.... 531
Redwine, Bank v....171 N. C., 569.... 642
Reel v. Reel ....9 N. C., 63.... 588
Rees, Reid v....155 N. C., 231.... 443
Rees v. Williams....165 N. C., 201.... 398
Register Co. v. Hill....136 N. C., 277.... 199
Reid v. Rees....155 N. C., 231.... 443
Reid, S. v....178 N. C., 745.... 489
Reidsville, Allen v. ....178 N. C., 532.... 142
Reiger v. Davis....67 N. C., 185.... 588
Relief Department, Nelson v....147 N. C., 104.... 507
Remick, Bd. of Education v....160 N. C., 568.... 456
Renn v. R. R....170 N. C., 128.... 489
Revis v. Raleigh....150 N. C., 353.... 664
Reynolds v. Express Co....172 N. C., 487.... 61
Rich, Williams v....117 N. C., 235.... 465
Richardson v. Woodruff....178 N. C., 46.... 70
Ricks v. Wilson....154 N. C., 386.... 384
Riddle v. Germanton....117 N. C., 388.... 475
Ridge v. High Point....176 N. C., 421.... 664
Riggs v. Swann....59 N. C., 119.... 531
Riggsbee, Durham v....141 N. C., 128, 131....498, 500
Riley, S. v....113 N. C., 648.... 115
Ritch v. Morris....78 N. C., 377.... 119
Ritter, Blue v....118 N. C., 582.... 189
Rives v. Frizzle....43 N. C., 237.... 319
Road Comm. v. Highway Comm.185 N. C., 56.... 377, 500
Robbins, Boyle v....71 N. C., 130.... 6
Roberson v. Griffin....185 N. C., 38.... 285
Roberson v. Lumber Co....154 N. C., 328.... 67
Roberson, S. v....150 N. C., 837.... 760
Roberts v. Baldwin....155 N. C., 276.... 74
Roberts v. Calvert....98 N. C., 581.... 233
Roberts v. Mfg. Co....181 N. C., 204.... 55, 391
Roberts v. Roberts....82 N. C., 30.... 24
Roberts, Russell v....121 N. C., 322.... 103
Roberts, S. v....19 N. C., 541.... 483
Robertson v. Aldridge....185 N. C., 292.... 241, 344
Robertson, S. v....86 N. C., 628.... 601
Robertson, S. v....121 N. C., 551.... 603
Robeson v. Hodges....105 N. C., 49, 51 106
Robeson v. Moore....168 N. C., 388.... 512, 513
Robinson v. B. of L. F. and E....170 N. C., 548.... 270
Robinson v. Comrs. of Brunswick ....182 N. C., 590.... 375
Robinson, Hall v....30 N. C., 56.... 553

Robinson, Rodman v.....134 N. C., 503, 509.....124, 125
Rocky Mount, Battle v.....156 N. C., 329.....231, 683
Rodman v. Robinson.....134 N. C., 503, 509.....124, 125
Roe v. Journigan.....181 N. C., 183.....465
Roebuck v. Trustees.....184 N. C., 144, 145.....375, 472
Rogers, S. v.....166 N. C., 389.....206
Rogers, S. v.....168 N. C., 114, 116.....475, 603
Rogers, S. v.....173 N. C., 755.....588
Rogerson v. Hontz.....174 N. C., 27.....443, 444
Rolin v. Tobacco Co.....141 N. C., 300, 314, 315.....11, 12
Rollins v. Wicker.....154 N. C., 560, 563.....218, 622
Rollins v. Winston-Salem.....176 N. C., 411.....664
Roseman, Propst v.....49 N. C., 130.....173
Roseman v. Roseman.....127 N. C., 494, 497.....74, 106, 107
Roseman, Shell v.....155 N. C., 90.....197
Rosenthal v. Goldsboro.....149 N. C., 128.....498
Ross v. Cotton Mills.....140 N. C., 115.....574
Ross, Hemphill v.....66 N. C., 477.....195
Ross v. Hendrix.....110 N. C., 403.....276, 277
Ross, Howard v.....3 N. C., 333.....49
Ross, *In re*.....182 N. C., 477.....57, 313, 604
Rountree, S. v.....181 N. C., 535.....781, 784
Rouse v. Rouse.....167 N. C., 208.....516
Rowland, Blacknall v.....108 N. C., 555.....110
Rowland, Blacknall v.....116 N. C., 389.....110
Royal, S. v.....90 N. C., 755.....85
Rumbough v. Improvement Co...112 N. C., 751.....746
Rush v. McPherson.....176 N. C., 567.....554
Russell, Harris v.....124 N. C., 554.....319
Russell v. Monroe.....116 N. C., 720, 727.....664
Russell, Odum v.....179 N. C., 6.....296
Russell v. R. R.....118 N. C.,1098.....117, 432
Russell v. Roberts.....121 N. C., 322.....103
Rutjes, Bailey v.....86 N. C., 517.....432
Ryder v. Oates.....173 N. C., 569.....74, 106

S

Saddler, Topping v.....50 N. C., 357.....285
Sain, Hauser v.....74 N. C., 552.....560
St. James v. Bagley.....138 N. C., 384, 393.....390
Sanders, Building Co. v.....185 N. C., 328.....209
Sanders v. Ins. Co.....183 N. C., 66.....766
Sanderson, Gordon v.....83 N. C., 1.....106
Sanderson, Pritchard v.....84 N. C., 300.....235
Sandlin v. Wilmington.....185 N. C., 257.....55, 665
Sanford v. Eubanks.....152 N. C., 697.....174
Sash and Blind Co., Walters v...154 N. C., 323.....11
Satterfield v. Kindley.....144 N. C., 461.....553
Saunders, *In re* Will of.....177 N. C., 156.....716
Savage, Norcum v.....140 N. C., 473.....277
Savings Bank, Alexander v.....155 N. C., 124.....713
Sawyer, Ferebee v.....167 N. C., 199.....325
Sawyer v. Grandy.....113 N. C., 42.....571
Scarboro, Harris v.....110 N. C., 239.....233

Schas v. Assurance Society.....170 N. C., 420..... 618
Schiele v. Ins. Co.....171 N. C., 426..... 201
School Comrs. v. Alderman.....158 N. C., 197..... 252
School Committee v. Kesler.....67 N. C., 443..... 327
School Committee, Newton v.....158 N. C., 186, 187, 188.....498, 648
School Committee, Venable v.....149 N. C., 120..... 647
Schoolfield, S. v.....184 N. C., 723..... 450
School Trustees, Bonitz v.....154 N. C., 375, 379.....426, 725
School Trustees, Dula v.....177 N. C., 426, 431.....498, 648
School Trustees, Lowery v.....140 N. C., 33..... 426
School Trustees, Smith v.....141 N. C., 143, 150, 155, 160.....229, 426, 472, 722
Scott, Miller v.....184 N. C., 556..... 120
Seaborn, S. v.....15 N. C., 311..... 330
Sea Food Co., Way v.....184 N. C., 171..... 224
Sears v. McBride.....70 N. C., 152, 153.....276, 277
Sears v. R. R.....178 N. C., 285..... 749
Sears, S. v.....61 N. C., 146..... 450
Seawell v. Lumber Co.....172 N. C., 320..... 201
Seawell v. R. R.....133 N. C., 515..... 25
Sechrist v. Comrs. of Guilford.....181 N. C., 511..... 254
Sehorn v. Charlotte.....171 N. C., 541..... 664
Seip, Tarault v.....158 N. C., 363..... 754
Selby, Knights of Honor v.....153 N. C., 207..... 465
Sessoms v. Sessoms.....144 N. C., 122..... 398
Setzer v. Setzer.....128 N. C., 170..... 334
Sewing Machine Co. v. Bullock..161 N. C., 1..... 110
Sewing Machine Co. v. Burger..181 N. C., 241..... 106
Shapiro, Hanes v.....168 N. C., 24..... 737
Sharp, S. v.....125 N. C., 634..... 371
Sharpe v. R. R.....130 N. C., 614..... 48
Sheffield, S. v.....183 N. C., 783..... 450
Shelby v. Tiddy.....118 N. C., 792..... 94
Sheldon v. Kivett.....110 N. C., 410..... 151
Shell v. Roseman.....155 N. C., 90..... 197
Shell v. West.....130 N. C., 171..... 617
Shelton v. Shelton.....58 N. C., 292..... 531
Shelton's Will, *In re*.....143 N. C., 218..... 717
Shepard v. R. R.....169 N. C., 239..... 667
Shepard v. Tel. Co.....143 N. C., 244..... 574
Sheppard, S. v.....97 N. C., 402..... 484
Sherrill v. Tel. Co.....109 N. C., 527..... 500
Shew v. Call.....119 N. C., 450..... 617
Shields v. Whitaker.....82 N. C., 516..... 531
Shipman, S. v.....81 N. C., 513..... 631
Shoaf, S. v.....179 N. C., 747..... 563
Shober v. Wheeler.....113 N. C., 370..... 146
Shore v. Holt.....185 N. C., 312, 313.....46, 55, 391, 560
Shuford, Hackett v.....86 N. C., 144..... 276
Shuler, Davidson v.....119 N. C., 582..... 757
Shute v. Shute.....180 N. C., 389..... 465
Sigmon, Campbell v.....170 N. C., 351.....326, 384
Silver, Lefkowitz v.....182 N. C., 339..... 532
Simmons v. Davenport.....140 N. C., 407.....748, 749
Simmons v. Fleming.....157 N. C., 389..... 119

Simmons, Mizell v. 79 N. C., 190 758
Simonton v. Cornelius 98 N. C., 437 285
Simpkins, Montague v. 178 N. C., 270, 273 53
Simpson v. Elwood 114 N. C., 528 6
Simpson, Moon v. 170 N. C., 335 299
Singleton, S. v. 183 N. C., 738, 739 115, 207
Skeen, S. v. 182 N. C., 844 585
Skinner, Hill v. 169 N. C., 409 233
Skittletharpe v. Skittletharpe 130 N. C., 72 361
Slaughter, Pollard v. 92 N. C., 72 350
Sloan v. Assurance Society 169 N. C., 257 313
Small v. Edenton 146 N. C., 527 498
Smallwood, S. v. 78 N. C., 560 85
Smathers v. Hotel Co. 168 N. C., 69 299
Smith, Barger v. 156 N. C., 323 563
Smith v. Barham 17 N. C., 420 119
Smith, Britt v. 86 N. C., 305 119
Smith, Chilton v. 180 N. C., 474 384
Smith, Cochran v. 171 N. C., 369 756
Smith v. Comrs. of Hertford 182 N. C., 149 472
Smith, Coor v. 101 N. C., 261 195
Smith v. Fort 105 N. C., 446 107
Smith, Kirkman v. 175 N. C., 579 398
Smith v. Lumber Co. 142 N. C., 26 200
Smith v. Moore 150 N. C., 159 683
Smith v. Morehead 59 N. C., 360 620
Smith v. Parker 131 N. C., 470 235
Smith v. Pritchard 173 N. C., 720 282
Smith v. R. R. 147 N. C., 603 249
Smith v. R. R. 163 N. C., 145 240
Smith v. School Trustees 141 N. C., 143, 150, 155, 160 229, 426, 472, 722
Smith v. Wilkins 164 N. C., 147 263
Smith's Will, *In re* 163 N. C., 464 598
Snead, Burwell v. 104 N. C., 118 475
Snipes, S. v. 185 N. C., 747 173
Snyder v. Asheboro 182 N. C., 708 557
Somers, Houck v. 118 N. C., 607 276
Sossamon v. Cruse 133 N. C., 470 206, 207
Southerland, Winders v. 174 N. C., 235 507
Sovereign Lodge, Beard v. 184 N. C., 154 558
Sparks, Drainage Comrs. v. 179 N. C., 581 106
Spear, S. v. 164 N. C., 452 307, 309
Spencer, S. v. 176 N. C., 709, 713 489
Spencer v. Weatherly 46 N. C., 327 217
Spires, Wright v. 152 N. C., 6 234
Spitzer, Comrs. of Caldwell v. 173 N. C., 147 701, 702
Spivey, S. v. 151 N. C., 680 25
Springs v. Springs 182 N. C., 484 391
Sprinkle v. Foote 71 N. C., 441 588
Sprinkle v. Wellborn 140 N. C., 163 85
Spruill, Armstrong v. 182 N. C., 1 20
Spruill, Piano Co. v. 150 N. C., 168 642
Sprunt, Wilmington v. 114 N. C., 310 94
Stadiem, Brittingham v. 151 N. C., 299, 302 342, 755

Stadiem, Clothing Co. v. ..... 149 N. C., 6 198
Stancill, Joyner v. ..... 108 N. C., 154 195
Stancill, S. v. ..... 178 N. C., 683 749
Stanford v. Grocery Co. ..... 143 N. C., 419 268
Stanly v. Hendricks ..... 35 N. C., 87 553
Starr, Burriss v. ..... 165 N. C., 662 213
S. v. Addington ..... 143 N. C., 685 292
S. v. Addor ..... 183 N. C., 687, 467 469
S. v. Allen ..... 11 N. C., 356 308
S. v. Alston ..... 113 N. C., 666 ..... 307, 312
S. v. Anderson ..... 101 N. C., 758 146
S. v. Angel ..... 29 N. C., 27 601
S. v. Apple ..... 121 N. C., 585 451
S. v. Bailey ..... 60 N. C., 137 588
S. v. Baker ..... 63 N. C., 276 115
S. v. Baldwin ..... 80 N. C., 390 330
S. v. Baldwin ..... 152 N. C., 822 760
S. v. Baldwin ..... 184 N. C., 787, 789, 791 ..... 450, 599, 602
S. v. Barrett ..... 123 N. C., 753 207
S. v. Beam ..... 181 N. C., 597 ..... 620, 762, 763
S. v. Bell ..... 184 N. C., 701 763
S. v. Boon ..... 35 N. C., 244 306
S. v. Boon ..... 82 N. C., 637 451
S. v. Boone ..... 132 N. C., 1107 378
S. v. Bordeaux ..... 93 N. C., 560 484
S. v. Bowman ..... 78 N. C., 509 477
S. v. Brabham ..... 108 N. C., 793 24
S. v. Braddy ..... 104 N. C., 737 401
S. v. Brittain ..... 89 N. C., 481 85
S. v. Brown ..... 100 N. C., 524 601
S. v. Bryson ..... 173 N. C., 803 489
S. v. Bullock ..... 161 N. C., 225 ..... 371, 674
S. v. Burbage ..... 172 N. C., 876 563
S. v. Burke ..... 82 N. C., 551 115
S. v. Burnett ..... 142 N. C., 581 410
S. v. Byers ..... 100 N. C., 512 451
S. v. Cain ..... 8 N. C., 352 484
S. v. Caldwell ..... 127 N. C., 527 262
S. v. Carpenter ..... 173 N. C., 769 484
S. v. Carraway ..... 181 N. C., 561 26
S. v. Carter ..... 126 N. C., 1011 330
S. v. Cauble ..... 70 N. C., 62 378
S. v. Charles ..... 161 N. C., 287 450
S. v. Chisenhall ..... 106 N. C., 679 410
S. v. Christmas ..... 101 N. C., 755 306
S. v. Church ..... 63 N. C., 15 ..... 630, 631
S. v. Cline ..... 146 N. C., 640 ..... 435, 438
S. v. Cline ..... 150 N. C., 854 ..... 435, 437, 438
S. v. Cloninger ..... 149 N. C., 572 596
S. v. Cole ..... 94 N. C., 958 477
S. v. Collins ..... 118 N. C., 1204 451
S. v. Colonial Club ..... 154 N. C., 177 114
S. v. Connor ..... 142 N. C., 700 411
S. v. Cook ..... 162 N. C., 586 587
S. v. Cooke ..... 176 N. C., 735 411

S. v. Craig ..... 81 N. C., 588..... 378
S. v. Crane .....110 N. C., 535..... 602
S. v. Dancy ..... 78 N. C., 437..... 587
S. v. Daniel .....136 N. C., 571..... 630, 631
S. v. Darnell .....166 N. C., 300..... 427
S. v. Davenport .....156 N. C., 614..... 585
S. v. Davis ..... 15 N. C., 612..... 588
S. v. Davis ..... 79 N. C., 603..... 763
S. v. Davis .....126 N. C.,1007..... 484
S. v. Davis .....134 N. C., 633..... 599
S. v. Dewey .....139 N. C., 560..... 603
S. v. Dick ..... 60 N. C., 440..... 588
S. v. Dickerson ..... 98 N. C., 708..... 760
S. v. Douglass ..... 63 N. C., 500..... 484
S. v. Edwards .....110 N. C., 511..... 292
S. v. Ellick ..... 60 N. C., 450..... 115
S. v. Ellsworth .....130 N. C., 690..... 306
S. v. Elwood ..... 73 N. C., 189..... 115
S. v. English .....164 N. C., 498..... 309
S. v. Estes .....185 N. C., 752..... 115
S. v. Exum .....138 N. C., 600..... 24
S. v. Falkner .....182 N. C., 799..... 244
S. v. Ferguson .....107 N. C., 841..... 411
S. v. Fleming .....107 N. C., 905..... 308
S. v. Fogleman .....164 N. C., 461..... 451
S. v. Foster .....129 N. C., 704..... 305
S. v. Foster .....185 N. C., 674..... 624
S. v. Fowler .....151 N. C., 732..... 760
S. v. Francis .....157 N. C., 612..... 484
S. v. Freeman ..... 86 N. C., 683..... 206
S. v. French .....109 N. C., 722..... 262
S. v. George ..... 30 N. C., 324..... 24, 484
S. v. George ..... 93 N. C., 567..... 410
S. v. Godwin .....138 N. C., 582..... 28
S. v. Graham .....133 N. C., 652..... 451
S. v. Green .....126 N. C.,1032, 1034.....254, 722
S. v. Green .....134 N. C., 661..... 207
S. v. Griffice ..... 74 N. C., 317..... 330
S. v. Grisham ..... 2 N. C., 13..... 308
S. v. Hampton ..... 63 N. C., 13.....629, 630, 631
S. v. Hancock .....151 N. C., 699..... 624
S. v. Hannon .....168 N. C., 215..... 763
S. v. Harris .....145 N. C., 456..... 435
S. v. Harrison .....145 N. C., 408..... 475
S. v. Harrison .....184 N. C., 762..... 624
S. v. Haywood ..... 73 N. C., 437..... 330
S. v. Hazell ..... 95 N. C., 624..... 555
S. v. Hedgecock .....185 N. C., 714..... 435
S. v. Hildreth ..... 31 N. C., 429, 440.....115, 585
S. v. Hill .....141 N. C., 769, 770.....114, 115
S. v. Hinson .....150 N. C., 827..... 26
S. v. Holder .....133 N. C., 710..... 330
S. v. Holloman .....139 N. C., 648..... 371, 674
S. v. Holloway .....117 N. C., 730..... 451
S. v. Holt ..... 90 N. C., 751..... 85, 589

S. v. Horn ....116 N. C.,1037.... 760
S. v. Horne ....171 N. C., 787.... 588
S. v. Horton ....100 N. C., 448.... 411
S. v. Hunter ....106 N. C., 796.... 206
S. v. Hyman ....164 N. C., 413, 414....435, 438
S. v. Jackson .... 82 N. C., 566.... 331
S. v. Jackson ....183, N. C., 695.... 231
S. v. Jacobs ....106 N. C., 695.... 602
S. v. Jarrell ....141 N. C., 722, 725....585, 596
S. v. Jeffreys ....117 N. C., 743, 746....630, 631
S. v. Jim .... 12 N. C., 142.... 306
S. v. Johnson ....170 N. C., 688.... 252
S. v. Johnson ....182 N. C., 888.... 411, 414
S. v. Johnson ....184 N. C., 637.... 760
S. v. Johnston ....118 N. C.,1188.... 378
S. v. Johnston ....119 N. C., 883, 897....308, 312
S. v. Jones .... 95 N. C., 588.... 760
S. v. Jones ....139 N. C., 616.... 500
S. v. Jordan .... 75 N. C., 27.... 308
S. v. Journegan ....185 N. C., 700.... 311
S. v. Killian ....173 N. C., 792.... 282
S. v. Kincaid ....183 N. C., 709, 710 ....450, 599, 760
S. v. Kirkman ....104 N. C., 911.... 437
S. v. Krout ....183 N. C., 804.... 24
S. v. Lance ....149 N. C., 555.... 599
S. v. Lance ....166 N. C., 413.... 451
S. v. Langford .... 12 N. C., 253.... 305
S. v. Lanier .... 90 N. C., 714.... 484
S. v. Laxton .... 78 N. C., 564.... 603
S. v. Leak ....156 N. C., 643.... 489
S. v. Lee ....121 N. C., 546.... 451
S. v. Lemons ....182 N. C., 828.... 484
S. v. Liles ....134 N. C., 735.... 292
S. v. Lipsey .... 14 N. C., 485.... 586
S. v. Long .... 76 N. C., 254.... 134
S. v. Lovelace ....178 N. C., 769.... 450
S. v. Lyle ....100 N. C., 497, 503....498, 499
S. v. Lytle ....117 N. C., 803.... 489
S. v. McAfee ....107 N. C., 812.... 206
S. v. McCourry ....128 N. C., 598.... 25
S. v. McDaniel .... 60 N. C., 245.... 306
S. v. McDowell ....129 N. C., 532.... 451
S. v. McIver .... 88 N. C., 690.... 500
S. v. Marsh ....132 N. C.,1000.... 307
S. v. Martin .... 85 N. C., 508.... 631
S. v. Massey .... 86 N. C., 658.... 307, 310
S. v. Matthews ....142 N. C., 621.... 483
S. v. Merrick ....171 N. C., 788, 795....266, 309
S. v. Montgomery ....183 N. C., 747.... 450
S. v. Moody ....172 N. C., 967.... 411
S. v. Moore ....104 N. C., 743.... 435
S. v. Moses .... 13 N. C., 463, 464....436, 581
S. v. Myerfield .... 61 N. C., 108.... 630
S. v. Nash .... 97 N. C., 516.... 555

S. v. Newsom ..... 27 N. C., 250..... 499
S. v. O'Higgins ..... 178 N. C., 709..... 410, 412
S. v. Oliver ..... 70 N. C., 61..... 364
S. v. Owen ..... 5 N. C., 452..... 436
S. v. Ownby ..... 146 N. C., 678..... 587
S. v. Parker ..... 61 N. C., 473..... 450
S. v. Parks ..... 25 N. C., 296..... 577
S. v. Patterson ..... 134 N. C., 615..... 141
S. v. Perkins ..... 141 N. C., 797, 803..... 378, 721
S. v. Perley ..... 173 N. C., 790..... 377
S. v. Peters ..... 107 N. C., 884..... 434, 435
S. v. Piner ..... 141 N. C., 760..... 436
S. v. Potter ..... 61 N. C., 338..... 483, 484
S. v. Presley ..... 35 N. C., 494..... 588
S. v. Pulliam ..... 184 N. C., 681, 687..... 124, 125, 563
S. v. Rawles ..... 65 N. C., 334, 336..... 630, 631
S. v. Reid ..... 178 N. C., 745..... 489
S. v. Riley ..... 113 N. C., 648..... 115
S. v. Roberson ..... 150 N. C., 837..... 760
S. v. Roberts ..... 19 N. C., 541..... 483
S. v. Robertson ..... 86 N. C., 628..... 601
S. v. Robertson ..... 121 N. C., 551..... 603
S. v. Rogers ..... 166 N. C., 389..... 206
S. v. Rogers ..... 168 N. C., 114, 116..... 475, 603
S. v. Rogers ..... 173 N. C., 755..... 588
S. v. Rountree ..... 181 N. C., 535..... 781, 784
S. v. Royal ..... 90 N. C., 755..... 85
S. v. Schoolfield ..... 184 N. C., 723..... 450
S. v. Seaborn ..... 15 N. C., 311..... 330
S. v. Sears ..... 61 N. C., 146..... 450
S. v. Sharp ..... 125 N. C., 634..... 371
S. v. Sheffield ..... 183 N. C., 783..... 450
S. v. Sheppard ..... 97 N. C., 402..... 484
S. v. Shipman ..... 81 N. C., 513..... 631
S. v. Shoaf ..... 179 N. C., 747..... 563
S. v. Singleton ..... 183 N. C., 738, 739..... 115, 207
S. v. Skeen ..... 182 N. C., 844..... 585
S. v. Smallwood ..... 78 N. C., 560..... 85
S. v. Snipes ..... 185 N. C., 747..... 173
S. v. Spear ..... 164 N. C., 452..... 307, 309
S. v. Spencer ..... 176 N. C., 709, 713..... 489
S. v. Spivey ..... 151 N. C., 680..... 25
S. v. Stancill ..... 178 N. C., 683..... 749
S. v. Staton ..... 133 N. C., 643..... 306
S. v. Stephens ..... 170 N. C., 745..... 468
S. v. Stephenson ..... 109 N. C., 734..... 675
S. v. Taylor ..... 170 N. C., 695..... 371, 674
S. v. Thomas ..... 29 N. C., 381..... 588
S. v. Thompson ..... 113 N. C., 638..... 435
S. v. Thornton ..... 136 N. C., 610..... 760
S. v. Thorp ..... 72 N. C., 186..... 489
S. v. Tilghman ..... 33 N. C., 513..... 85
S. v. Traylor ..... 121 N. C., 674..... 536
S. v. Tyson ..... 133 N. C., 692..... 599
S. v. Tytus ..... 98 N. C., 705..... 306

S. v. Van Pelt ..... 136 N. C., 633 438
S. v. Vines ..... 93 N. C., 493 114
S. v. Walker ..... 4 N. C., 662 115
S. v. Walker ..... 87 N. C., 541 484
S. v. Wallace ..... 94 N. C., 838 141
S. v. Watson ..... 86 N. C., 624 330
S. v. Wessell ..... 109 N. C., 735 262
S. v. White ..... 138 N. C., 705 760
S. v. Whiteacre ..... 98 N. C., 753 475
S. v. Whitfield ..... 92 N. C., 831 760
S. v. Whitley ..... 141 N. C., 826 410
S. v. Wilcox ..... 118 N. C.,1131 760
S. v. Wilcox ..... 132 N. C.,1120, 1137 ..... 450, 477
S. v. Wilkerson ..... 164 N. C., 432 ..... 574, 575
S. v. Williams ..... 26 N. C., 400 563
S. v. Williams ..... 185 N. C., 666 ..... 449, 451
S. v. Williams ..... 185 N. C., 685 308
S. v. Willis ..... 52 N. C., 190 305
S. v. Winchester ..... 113 N. C., 641 115
S. v. Winder ..... 183 N. C., 777 450
S. v. Womble ..... 112 N. C., 862 378
S. v. Woodard ..... 123 N. C., 710 330
S. v. Woodside ..... 31 N. C., 500 ..... 372, 378
S. v. Woolard ..... 119 N. C., 779 115
Statesville, Clark v. ..... 139 N. C., 490 229
State Tr., Comrs. of Johnston v. 174 N. C., 141, 145, 148 ..... 473, 695, 725
Staton, S. v. ..... 133 N. C., 643 306
Staton, Tarboro v. ..... 156 N. C., 504 ..... 457, 459
Steadman v. Steadman ..... 143 N. C., 351 189
Steel v. Steel ..... 104 N. C., 631, 638 352
Stephens, S. v. ..... 170 N. C., 745 468
Stephenson, S. v. ..... 109 N. C., 734 675
Sterchie, Trust Co. v. ..... 169 N. C., 22, 23 ..... 77, 384
Stewart, Avery v. ..... 136 N. C., 426 532
Stewart v. Carpet Co. ..... 138 N. C., 60 ..... 574, 575
Stewart, Craig v. ..... 163 N. C., 533 554
Stewart, Dixon v. ..... 113 N. C., 410 617
Stewart, Taylor v. ..... 172 N. C., 203, 204 ..... 342, 666
Stith v. Jones ..... 119 N. C., 428 181
Stokes v. Cogdell ..... 153 N. C., 181 34
Stone, *In re* ..... 176 N. C., 337 ..... 74, 464, 465
Stratford v. Greensboro ..... 124 N. C., 127 142
Street Ry. v. R. R. ..... 142 N. C., 423 ..... 182, 183
Strickland, Carter v. ..... 165 N. C., 69 391
Strickland v. Kress ..... 183 N. C., 537 214
Strong v. Glasgow ..... 6 N. C., 290 531
Stroud, R. R. v. ..... 132 N. C., 413 182
Stultz v. Thomas ..... 182 N. C., 471 265
Styron v. R. R. ..... 161 N. C., 78 664
Sullivan v. Blount ..... 165 N. C., 7 218
Sullivan v. Field ..... 118 N. C., 358 507
Summerlin v. R. R. ..... 133 N. C., 551 477
Summers, Mfg. Co. v. ..... 143 N. C., 103 299
Summers v. Moore ..... 113 N. C., 403 277
Supply Co., Harper v. ..... 184 N. C., 205 282

Sutton v. Wells....175 N. C., 1.... 525
Swain v. Goodman....183 N. C., 531, 534....325, 327, 384
Swann, Riggs v.... 59 N. C., 119.... 531
Sweaney, Clark v....176 N. C., 529.... 342
Swindell v. Belhaven....173 N. C., 1.... 164
Sykes v. Boone....132 N. C., 200.... 531

T

Tanning Co., Beck v....179 N. C., 123, 127.... 748
Tanning Co., Tisdale v....185 N. C., 497.... 248
Tarault v. Seip....158 N. C., 363.... 754
Tarboro v. Staton....156 N. C., 504....457, 459
Tate v. Comrs. of Haywood....122 N. C., 812.... 460
Tate, Graham v.... 77 N. C., 120.... 28
Tate v. Greensboro....114 N. C., 392.... 498
Tate v. Mott.... 96 N. C., 23.... 464
Tax Commission, Bickett v....177 N. C., 436.... 675
Taylor v. Ervin....119 N. C., 277.... 556
Taylor v. Greensboro....175 N. C., 423.... 550
Taylor v. Meadows....169 N. C., 124.... 353
Taylor v. Meadows....175 N. C., 373.... 353
Taylor v. Meadows....182 N. C., 266.... 353
Taylor v. Miller....113 N. C., 340.... 213
Taylor v. Munger....169 N. C., 727.... 296
Taylor v. Power Co....174 N. C., 583.... 756
Taylor, S. v....170 N. C., 695.... 371, 674
Taylor v. Stewart....172 N. C., 203, 204....342, 666
Taylor v. Wahab....154 N. C., 220.... 532
Teachey, Williams v.... 85 N. C., 402.... 194
Teague, Boyer v....106 N. C., 571, 576.... 234
Teeter v. Tel. Co....172 N. C., 784.... 184
Tel. Co., Bennett v. ....168 N. C., 498.... 500
Tel. Co., Copland v. ....136 N. C., 11.... 6
Tel. Co., Darlington v. ....127 N. C., 448.... 764
Tel. Co., Hamrick v. ....140 N. C., 151.... 764
Tel. Co., Marshall v. ....181 N. C., 292.... 57
Tel. Co., Morton v. ....130 N. C., 299.... 46
Tel. Co., Shepard v. ....143 N. C., 244.... 574
Tel. Co., Sherrill v. ....109 N. C., 527.... 500
Tel. Co., Teeter v. ....172 N. C., 784.... 184
Tel. Co., Wheeler v. ....172 N. C., 9, 11.... 216
Temple v. Hay Co....184 N. C., 241.... 150
Temple v. LaBerge....184 N. C., 253.... 151
Terry v. R. R.... 91 N. C., 236.... 380
Terry, Trogden v....172 N. C., 542.... 631
Thigpen v. Cotton Mills....151 N. C., 97.... 55
Thigpen v. R. R....184 N. C., 33.... 63, 558
Thomas, Raisin v.... 88 N. C., 148.... 106
Thomas, S. v.... 29 N. C., 381.... 588
Thomas, Stultz v....182 N. C., 471.... 265
Thomason v. Bescher....176 N. C., 622.... 296
Thompson v. Andrews.... 53 N. C., 453.... 173
Thompson v. Humphrey....179 N. C., 44.... 397
Thompson v. Newlin.... 41 N. C., 380.... 743

Thompson v. R. R. ..... 147 N. C., 412 386
Thompson, S. v. ..... 113 N. C., 638 435
Thompson v. Thompson ..... 46 N. C., 430 276
Thompson, Wright v. ..... 171 N. C., 88 443
Thorp, S. v. ..... 72 N. C., 186 489
Thornton, S. v. ..... 136 N. C., 610 760
Threadgill, Bruner v. ..... 88 N. C., 361 195
Threadgill v. McLendon ..... 76 N. C., 24 553
Tiddy, Shelby v. ..... 118 N. C., 792 94
Tilghman, S. v. ..... 33 N. C., 513 85
Tillotson v. Fulp ..... 172 N. C., 500 74
Timber Co. v. Bryan ..... 171 N. C., 265 296
Timber Co., Gwaltney v. ..... 115 N. C., 579 217
Timber Co. v. Wells ..... 171 N. C., 262 296
Timber Co. v. Yarborough ..... 179 N. C., 340 618
Tinsley v. Hoskins ..... 111 N. C., 340 465
Tisdale v. Tanning Co. ..... 185 N. C., 497 249
Tise v. Whitaker-Harvey Co. ..... 144 N. C., 510 178
Tob. Co., Comrs. of Durham v. ..... 116 N. C., 446 729
Tobacco Co., Leathers v. ..... 144 N. C., 350 11
Tobacco Co., Rolin v. ..... 141 N. C., 300, 314, 315 ..... 11, 12
Tob. Wks., Friedenwald Co. v. ..... 117 N. C., 544 225
Todd v. Zachary ..... 45 N. C., 286 285
Topping v. Saddler ..... 50 N. C., 357 285
Townsend, Cash Register Co. v. ..... 137 N. C., 652 110
Traction Co., Land Co. v. ..... 162 N. C., 314 182
Traction Co., Land Co. v. ..... 162 N. C., 503 183
Transportation Co., Mann v. ..... 176 N. C., 105 61
Traylor, S. v. ..... 121 N. C., 674 536
Tremaine v. Williams ..... 144 N. C., 116 641
Triplett v. Williams ..... 149 N. C., 394 ..... 53, 513
Tritt v. Lumber Co. ..... 183 N. C., 830 747
Trogdon v. Terry ..... 172 N. C., 542 631
Troxler v. Gant ..... 173 N. C., 422 103
Troxler v. R. R. ..... 124 N. C., 189, 190 ..... 15, 709
Trunk Co., Jarrett v. ..... 142 N. C., 466, 469 ..... 400, 412, 596
Trust Co., Asheville v. ..... 143 N. C., 360 ..... 457, 688
Trust Co., Baugham v. ..... 181 N. C., 406 398
Trust Co., Comrs. of Surry v. ..... 178 N. C., 170 374
Trust Co., Debruhl v. ..... 172 N. C., 839 560
Trust Co., Donlan v. ..... 139 N. C., 214 465
Trust Co. v. Ellen ..... 163 N. C., 45 299
Trust Co., Holleman v. ..... 185 N. C., 49 302
Trust Co. v. Ins. Co. ..... 173 N. C., 558 338
Trust Co., Martin Co. v. ..... 178 N. C., 26 ..... 373, 376
Trust Co., Moore v. ..... 178 N. C., 123, 126, 128 ..... 173, 285, 287, 362
Trust Co. v. Sterchie ..... 169 N. C., 22, 23 ..... 77, 384
Trust Co., Trustees v. ..... 181 N. C., 306 ..... 254, 375
Trust Co. v. Whitehead ..... 165 N. C., 74 299
Trustees, Roebuck v. ..... 184 N. C., 144, 145 ..... 375, 472
Trustees v. Trust Co. ..... 181 N. C., 306 ..... 254, 375
Trustees, Webb v. ..... 143 N. C., 299 694
Trustees v. Webb ..... 155 N. C., 379 460
Tudor, Tyree v. ..... 183 N. C., 340 343
Turner v. Boger ..... 126 N. C., 302 465

Turner, Ewbank v. 134 N. C., 77 ... 106
Turner, Harris v. 179 N. C., 325 ... 748
Turner, *In re* 151 N. C., 474 ... 36
Turner v. Lumber Co. 119 N. C., 387 ... 11
Turner v. Vann 171 N. C., 127 ... 45
Tweed, Dellinger v. 66 N. C., 206 ... 481, 482
Tyree v. Tudor 183 N. C., 340 ... 343
Tyson, Elliott v. 117 N. C., 114 ... 106
Tyson, S. v. 133 N. C., 692 ... 599
Tytus, S. v. 98 N. C., 705 ... 306

U

Underwood v. Ins. Co. 185 N. C., 540 ... 421
Upton, Lee v. 178 N. C., 198 ... 128
Utilities Co., Fry v. 183 N. C., 281 ... 708

V

Vann, Kearney v. 154 N. C., 311 ... 204
Vann, Midgett v. 158 N. C., 128 ... 465
Vann v. R. R. 182 N. C., 567, 569 ... 741
Vann, Turner v. 171 N. C., 127 ... 45
Van Pelt, S. v. 136 N. C., 633 ... 438
Vass, Bank v. 130 N. C., 592 ... 642
Vassor v. R. R. 142 N. C., 68 ... 67
Vaughan, Boyett v. 85 N. C., 364 ... 106
Vaughan v. Fallin 183 N. C., 318 ... 382
Vaughan, Purnell v. 77 N. C., 268 ... 235
Venable v. School Committee 149 N. C., 120 ... 647
Venters, Walker v. 148 N. C., 388 ... 695
Vernoy, Etheridge v. 70 N. C., 717, 724 ... 45
Vines, S. v. 93 N. C., 493 ... 114
Voorhees v. Porter 134 N. C., 604 ... 553

W

Wagstaff, Gentry v. 14 N. C., 270 ... 277
Wahab, Taylor v. 154 N. C., 220 ... 532
Waldrop, Hampton v. 104 N. C., 453 ... 233
Walker, Banking Co. v. 121 N. C., 115 ... 146
Walker v. Carpenter 144 N. C., 674 ... 174
Walker v. Cooper 159 N. C., 536 ... 212
Walker, S. v. 4 N. C., 662 ... 115
Walker, S. v. 87 N. C., 541 ... 484
Walker v. Venters 148 N. C., 388 ... 695
Wallace, S. v. 94 N. C., 828 ... 141
Wallace v. Wallace 181 N. C., 158, 161 ... 223, 224, 512
Walsh v. Hall 66 N. C., 233 ... 43, 45, 110
Walston, Hyatt v. 174 N. C., 55 ... 93
Walters v. Sash and Blind Co. 154 N. C., 323 ... 11
Walters v. Walters 171 N. C., 313 ... 327, 384
Walters v. Walters 172 N. C., 330 ... 327, 384
Walton v. Walton 178 N. C., 73 ... 360
Ward v. Albertson 165 N. C., 218 ... 296
Ward v. Comrs. of Beaufort 146 N. C., 534 ... 498

Ward v. Odell....126 N. C., 946.... 126
Ward v. R. R....161 N. C., 179.... 740
Ward, Taylor v....150 N. C., 385.... 296
Warren, Bland v.... 65 N. C., 372.... 221
Wasson, Wittkowsky v.... 71 N. C., 451.... 282
Water Co., Powell v....171 N. C., 290.... 269, 271
Watkins, Wittkowski v.... 84 N. C., 457.... 195
Watson, Cheek v.... 90 N. C., 302.... 146
Watson v. Farmer....141 N. C., 452.... 293
Watson, S. v.... 86 N. C., 624.... 330
Watts, Person v....184 N. C., 499, 506, 508, 527, 531, 532, 536, 538, 540— 648, 723, 727, 728, 729, 731, 732
Way v. Sea Food Co....184 N. C., 171.... 224
Waynesville, Lee v....184 N. C., 565, 568....143, 498, 647
Weatherly, Spencer v.... 46 N. C., 327.... 217
Weathersbee v. Goodwin....175 N. C., 234.... 194, 195
Webb v. Trustees....143 N. C., 299.... 694
Webb, Trustees v....155 N. C., 379.... 460
Webster, Fowler v....173 N. C., 442.... 516
Weil v. Casey....125 N. C., 356.... 196
Weil v. Davis....168 N. C., 298.... 194, 196
Wellborn, Sprinkle v....140 N. C., 163.... 85
Wellborn's Will, *In re*....165 N. C., 636.... 716
Wells v. R. R.... 51 N. C., 47.... 240
Wells, Sutton v....175 N. C., 1.... 525
Wells, Timber Co. v....171 N. C., 262.... 296
Wescott, Bowser v....145 N. C., 57.... 174
Wessell, S. v....109 N. C., 735.... 262
West v. R. R.... 140 N. C., 620.... 285, 361
West, Shell v....130 N. C., 171.... 617
Wharton, Brinson v.... 43 N. C., 80.... 319
Whedbee v. Leggett.... 92 N. C., 469.... 27
Wheeler, Shober v....113 N. C., 370.... 146
Wheeler v. Tel. Co....172 N. C., 9, 11.... 216
Whilden, Bank v....175 N. C., 52.... 218
Whilden, Johnson v....166 N. C., 104.... 194
Whilden, Johnson v....171 N. C., 153.... 194
Whisenhant, Dobson v....101 N. C., 646.... 475
Whitaker-Harvey Co., Tise v.....144 N. C., 510.... 178
Whitaker, Shields v.... 82 N. C., 516.... 531
White v. Auditor....126 N. C., 584.... 683
White v. Carroll....146 N. C., 230.... 523
White v. Casten.... 46 N. C., 197.... 717
White v. Hines....182 N. C., 276.... 574, 576
White v. New Bern....146 N. C., 449.... 664
White v. Realty Co....182 N. C., 538.... 665
White, S. v....138 N. C., 705.... 760
White v. White....179 N. C., 599.... 360
Whiteacre, S. v.... 98 N. C., 753.... 475
Whitehead, Trust Co. v....165 N. C., 74.... 299
Whitehurst v. Hyman.... 90 N. C., 490.... 553
Whitehurst v. Ins. Co....149 N. C., 273.... 44
Whitehurst v. Padgett....157 N. C., 428.... 554

Whitemore, Motley v. ... 19 N. C., 537 ... 285
Whitesides v. Cooper ... 115 N. C., 570 ... 397
Whitfield v. Douglass ... 175 N. C., 46 ... 189
Whitfield v. Garris ... 131 N. C., 148 ... 350
Whitfield v. Garris ... 134 N. C., 24 ... 350, 398
Whitfield, S. v. ... 92 N. C., 831 ... 760
Whitley, Lumber Co. v. ... 163 N. C., 47 ... 296
Whitley, S. v. ... 141 N. C., 826 ... 410
Whittington, Faw v. ... 72 N. C., 321 ... 193, 195, 197
Wicker, Bynum v. ... 141 N. C., 96 ... 287
Wicker, Rollins v. ... 154 N. C., 560, 563 ... 218, 622
Wilcox, Gambrill v. ... 111 N. C., 42 ... 158
Wilcox, S. v. ... 118 N. C., 1131 ... 760
Wilcox, S. v. ... 132 N. C., 1120, 1137 ... 450, 477
Wilder, Hinnant v. ... 122 N. C., 149 ... 464
Wilkerson, S. v. ... 164 N. C., 432 ... 574, 575
Wilkie v. R. R. ... 127 N. C., 203 ... 207
Wilkins, Beck v. ... 179 N. C., 231 ... 215, 737, 738
Wilkins, Smith v. ... 164 N. C., 147 ... 263
Williams v. Comrs. of Polk ... 176 N. C., 554 ... 229
Williams, Cox v. ... 39 N. C., 15 ... 743
Williams, Faison v. ... 121 N. C., 152 ... 106
Williams v. Hedgepeth ... 184 N. C., 114 ... 110
Williams, Herring v. ... 158 N. C., 1 ... 120
Williams v. Honeycutt ... 176 N. C., 103 ... 531
Williams, Jones v. ... 155 N. C., 179 ... 158
Williams v. Lumber Co. ... 174 N. C., 229, 230 ... 296
Williams v. Mfg. Co. ... 175 N. C., 226 ... 126
Williams v. Mfg. Co. ... 177 N. C., 515 ... 282
Williams v. May ... 173 N. C., 78 ... 342
Williams, Mills v. ... 33 N. C., 558 ... 460
Williams, Nixon v. ... 95 N. C., 103 ... 277
Williams, Rees v. ... 165 N. C., 201 ... 398
Williams v. Rich ... 117 N. C., 235 ... 465
Williams, S. v. ... 26 N. C., 400 ... 563
Williams, S. v. ... 185 N. C., 666, 685 ... 308, 449, 451
Williams v. Teachey ... 85 N. C., 402 ... 194
Williams, Tremaine v. ... 144 N. C., 116 ... 641
Williams, Triplett v. ... 149 N. C., 394 ... 53, 513
Williamson, Kennedy v. ... 50 N. C., 284 ... 7
Willis v. R. R. ... 120 N. C., 508 ... 67
Willis, S. v. ... 52 N. C., 190 ... 305
Wilmington, Powers v. ... 177 N. C., 361 ... 400
Wilmington, Sandlin v. ... 185 N. C., 257 ... 55, 665
Wilmington v. Sprunt ... 114 N. C., 310 ... 94
Wilson, Bond v. ... 131 N. C., 505 ... 28
Wilson, Caldwell v. ... 121 N. C., 425 ... 456
Wilson, Caldwell v. ... 121 N. C., 473 ... 683
Wilson v. Comrs. of Buncombe ... 183 N. C., 638 ... 252, 253, 254
Wilson, Deal v. ... 178 N. C., 605 ... 554
Wilson v. Jones ... 176 N. C., 207 ... 384
Wilson v. Lewis ... 170 N. C., 47 ... 299
Wilson, Mason v. ... 84 N. C., 51 ... 553
Wilson, Ricks v. ... 154 N. C., 386 ... 384
Winchester, S. v. ... 113 N. C., 641 ... 115

Winchester v. Winchester.....178 N. C., 483..... 103
Winder, S. v.....183 N. C., 777..... 450
Winders, Blackmore v.....144 N. C., 215..... 626
Winders v. Southerland.....174 N. C., 235..... 507
Winkler v. Killian.....141 N. C., 575, 578.....540, 560
Winslow v. Hardwood Co.....147 N. C., 275, 276.....174, 575
Winstead, Alspaugh v..... 79 N. C., 526..... 683
Winston, Bailey v.....157 N. C., 252..... 664
Winston-Salem, Crotts v.....170 N. C., 24..... 498
Winston-Salem, Rollins v.....176 N. C., 411..... 664
Wiseman v. Green.....127 N. C., 288..... 757
Withers v. Comrs. of Columbus..163 N. C., 341..... 724
Withers v. Lane.....144 N. C., 192..... 588
Witsell v. R. R.....120 N. C., 557..... 756
Wittkowski v. Watkins..... 84 N. C., 457..... 195
Wittkowsky v. Wasson..... 71 N. C., 451..... 282
Witty v. Witty.....184 N. C., 381..... 398
Wofford v. Hampton.....173 N. C., 686..... 382
Womble v. Grocery Co.....135 N. C., 474.....574, 575
Womble, S. v.....112 N. C., 862..... 378
Wood v. McCabe..... 151 N. C., 458..... 755
Wood v. Oxford..... 97 N. C., 228..... 229
Woodard, S. v.....123 N. C., 710..... 330
Woodcock v. Bostic.....118 N. C., 822..... 503
Woodford v. Higly..... 60 N. C., 234..... 285
Woodmen, Blackman v.....184 N. C., 75..... 282
Woodrow, Carson v.....160 N. C., 144..... 150
Woodruff, Richardson v.....178 N. C., 46..... 70
Woodside, S. v..... 31 N. C., 500.....372, 378
Woody v. Fountain.....143 N. C., 66..... 75
Woolard, S. v.....119 N. C., 779..... 115
Woosley v. Comrs. of Davidson..182 N. C., 429..... 375
Wooten v. Cunningham.....171 N. C., 123..... 74
Wooten, Kinston v.....150 N. C., 296.....457, 459
Worley v. Logging Co.....157 N. C., 499..... 241
Worth v. R. R..... 89 N. C., 305..... 729
Wright v. R. R.....122 N. C., 852..... 66
Wright v. Spires.....152 N. C., 6..... 234
Wright v. Thompson.....171 N. C., 88..... 443

Y

Yarbrough, Timber Co. v.....179 N. C., 340..... 618
Yarn Mills, Pressly v.....138 N. C., 410, 416..... 16
Yellowday v. Perkinson.....167 N. C., 146..... 27
Younce v. Lumber Co.....155 N. C., 239..... 746
Young, Church v.....130 N. C., 8..... 324
Yount, Abernethy v.....138 N. C., 338.....400, 401, 402, 403
Younts v. Comrs. of Union.....151 N. C., 583..... 229

Z

Zachary, Todd v..... 45 N. C., 286..... 285
Zageir v. Express Co.....171 N. C., 692.....666, 667
Ziegler v. Love.....185 N. C., 40..... 398

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1923

C. C. MAYO v. D. U. MARTIN.

(Filed 12 September, 1923.)

1. Evidence—Nonsuit.

The evidence must be taken most strongly in favor of the plaintiff for the purpose of defendant's motion of a nonsuit and dismissal of the action.

2. Courts—Jurisdiction—Accounts Severable—Evidence—Demurrer.

The plaintiff owned a store, and agreed with the defendant, who operated a sawmill, that the former would pay, in goods, etc., the orders on him by the latter, evidenced by "plucks" or brass checks, given to his mill employees, and the latter would make weekly settlements therefor in cash: *Held*, the agreement for a weekly settlement was divisible and may be split up into several causes of action and brought before a justice of the peace when the amount is jurisdictional in his court; and the fact that an account was stated between the parties, showing a total balance due from various weekly accounts within the jurisdiction of the Superior Court, does not oust the jurisdiction of the justice of the peace or confer exclusive jurisdiction on the Superior Court; and a demurrer to the evidence tending to establish such facts is properly overruled.

3. Evidence—Burden of Proof—Orders—Defendant's Possession of Evidence of Indebtedness.

The plaintiff agreed to accept the orders of defendant given on him to the latter's employees, in goods, etc., evidenced by "plucks," or brass checks, settlements to be made weekly between them, which the defendant failed to do. The defendant admitted that he had got from the plaintiff

the merchandise accordingly, but claimed he had paid for them: *Held*, the possession by the defendant of these "plucks," or brass checks, and produced at the trial, could only be considered by the jury as evidence of payment.

APPEAL by defendant from *Connor, J.*, at May Term, 1923, of BEAUFORT.

Civil actions consolidated, tried before Hon. George W. Connor, judge presiding, and a jury, at May Term, 1923, of the Superior Court of Beaufort County, on appeals from a justice of the peace.

There were eleven actions separately instituted before a justice of the peace. In apt time, in the court of the justice of the peace, the defendant moved to dismiss upon the ground that they constitute a single action, which had been split for the purpose of giving jurisdiction to the justice of the peace.

Upon the calling of these cases in the Superior Court, the plaintiff moved that the eleven cases be consolidated and tried together. The defendant, in apt time, renewed his motion in each case to dismiss for want of jurisdiction and upon the suggestion of the court, without waiving the said motion, but reserving all rights with respect to same. Defendant consented that a jury should be impaneled and hear the evidence, and that at the conclusion of the evidence defendant's motion to dismiss for want of jurisdiction in each case should be heard and determined; any issue of fact affecting said motion to be submitted to the jury, and motion with respect to fact determined after verdict rendered. The plaintiff consented that the actions should be consolidated upon the conditions stated by defendant, both plaintiff and defendant being present with their attorneys of record.

Wiley C. Rodman for plaintiff.
Stephen C. Bragaw and Harry McMullan for defendant.

CLARKSON, J. The essential facts of this case are as follows:

According to the testimony of Mayo, in 1920, and prior thereto, Martin was operating a mill and Mayo a store in the village of South Creek. Until the end of the year 1920 he had been able to finance Martin, with monthly settlements, but at the end of 1920 and the beginning of 1921 he testified that he canceled this arrangement with Martin and told him his account was behind, and that the people he owed were after him, and that he would have to go on a cash basis, and that Martin would have to pay him by the week. Mayo testified that, after the first of January, it was agreed that the orders issued by him were to be paid by the week. Pursuant to this arrangement, Mayo for a certain number of weeks paid the orders given on him by Martin, keeping the orders

for each week separate and presenting them for payment weekly to Martin. On striking a balance for the 1920 account, it was agreed between Mayo and Martin that there was a balance due Mayo of $1,318.27. Mayo testified that, in payment on this account, Martin gave him certain notes, aggregating $1,200, which he turned over to his creditors, and on which both Martin and Mayo are now being sued. This left a balance on the 1920 account of $118.27.

The 1920 account, or the balance due thereon, formed the basis of one suit before the magistrate. The weekly orders which had been paid by Mayo for Martin for a certain number of weeks formed the basis of eight suits, each week being sued on as a separate account. In addition to this, Mayo claimed that Martin had issued certain checks on banks, which he had cashed at the request of the payee therein. These checks had been presented for payment to the banks and payment had been refused. These checks aggregated $151.32, to which was added two items of interest paid by Mayo for Martin at his request, being interest on the notes for $1,200 given in payment of the 1920 account, formed the basis of the other suit. One suit was on a farm account for 1921.

The eleven actions against Martin were:

1. One suit for $118.27, brought for the balance due on a book account for 1920.

2. Eight suits were brought, based on orders issued on Mayo by Martin and paid by Mayo weekly, the orders being kept separate and apart and having been presented for payment weekly.

3. One suit was brought, based on checks issued by Martin against certain banks, payable to persons other than Mayo, but cashed by Mayo, and had been presented to the banks, and on which payment had been refused for "insufficient funds." These checks amounted to $151.32, and to this item has been added certain discount, which had been paid by Mayo at Martin's request, being the interest on said notes which Martin had given him in settlement of a part of Martin's 1920 account.

4. One suit was brought on a farm account, independent of other matters.

According to the testimony of Martin, he owned and operated a sawmill at South Creek, and sold out to the plaintiff, Mayo, a store or commissary which had been operated by him in connection with said sawmill. By agreement between Mayo and himself, he was to pay off his hands, in part, through this store operated by Mayo. The system was that he furnished his hands with "brass plucks," or a piece of round metal, stating thereon that the same was good for so much money in trade at Mayo's store. Afterwards, by reason of having lost some of these plucks, slips of paper were used in place of the brass plucks, serving the same purpose.

This business was conducted for a considerable period, and from time to time Mayo and Martin had settlements of their business involving these transactions, Mayo and Martin both agreeing that in June, 1920, there was a settlement in full between them, and a balance struck. On 31 December, 1920, Martin claimed that he and Mayo had another settlement, in which he paid the plaintiff up in full for all orders, checks, etc., taken up by him to that time. The plaintiff, Mayo, denied that a settlement was made at that time, but claimed that the amount due by Martin was agreed upon between them, and that this amount was $1,318.27.

Martin claimed that on 1 January, 1921, or about that time, the plaintiff Mayo surrendered and delivered to him all of the brass plucks and orders which he had taken up for him at his store. He claimed that this fact was admitted by Mayo, but that Mayo contended that notwithstanding the fact that he surrendered these evidences of indebtedness to Martin, that Martin did not in fact at that time, or any previous time, pay him therefor. Martin testified and contended that on that date he paid the plaintiff Mayo the balance due by him on these orders and plucks, and that the same were surrendered to him in consideration of full settlement, and Martin produced the orders and checks at the trial covering these items, and had the same in his possession.

Martin claimed that it is admitted by Mayo that prior to 1 January, 1921, it was agreed between Mayo and himself that they would have monthly settlements of their business, but Martin denied that a new agreement was made by which Mayo was to receive settlements on a weekly basis.

After 1 January, 1921, the business continued, and thereafter it is admitted by Martin that he became indebted to Mayo in the sum of approximately the amount claimed by Mayo in the trial—$1,529.82. Martin contended that Mayo admitted that he paid him in checks and notes an amount more than sufficient to pay the said indebtedness which occurred after 1 January, 1921, but the plaintiff Mayo contended that he applied the said payments in settlement of what he claims was the 1920 account rather than the 1921 business, and after having so applied it, it left the defendant Martin indebted to him in the sum of $118.27 for the 1921 business.

There were twelve issues submitted to the jury. Under the charge of the court, the jury found for the plaintiff on all issues submitted to them.

The first issue was: "Were these suits properly instituted in a court of a justice of the peace?" The jury responded "Yes."

To the other eleven issues the jury responded "Yes," and found the amounts due all within the jurisdiction of the justice of the peace, as shown by the record.

The entire controversy in the case, from the exceptions taken by defendant, can be considered under two heads: Was the plaintiff's claim divisible and could it be split up and sued on as was done in eleven cases before the justice of the peace, or was it indivisible and an entire contract and incapable of being divided and split up, so that suits could only be brought in the Superior Court?

Exceptions 1, 2, 3 and 4 all relate to the refusal of the court for nonsuit and to direct a verdict in favor of the defendant predicated upon the contention that it appeared from all the evidence that at the time the eleven actions were instituted the amount due by defendant to plaintiff, as claimed by the plaintiff, was in excess of the jurisdiction of the justice of the peace, and the claim was improperly divided and split into eleven actions for the purpose of giving the justice of the peace jurisdiction, and the suits should be dismissed for want of jurisdiction.

The main facts to consider in these exceptions may be stated in very few sentences:

The defendant was operating a mill and the plaintiff a store. The defendant issued orders to his mill help; these orders were "brass plucks," or a piece of round metal stating thereon that the same was good for so much money in trade at Mayo's store. Afterwards, by reason of having some of these "plucks" lost, slips of paper, orders on plaintiff, were used in place of the "plucks." The agreement between the parties was that the plaintiff was to pay these orders given to the mill help by defendant, and that the defendant would pay him each week, and the orders issued were to be paid by the week. Pursuant to this agreement, the defendant, for a certain number of weeks, paid the orders. The plaintiff kept each week's orders separate and presented them for payment weekly to defendant. Eight of the suits are for the orders due for each respective week. The other three suits are not involved in this aspect of the case.

We think his Honor was correct in refusing to nonsuit plaintiff and dismiss for want of jurisdiction.

The evidence must be taken most strongly in favor of the plaintiff for the purpose of a nonsuit and dismissal of an action. The evidence showed that plaintiff's claim was divisible—each week payment was to be made and orders for each week kept separate. The plaintiff had a right to bring separate actions for each week's orders. The agreement between the parties was not indivisible or an entire contract, incapable of being divided and split up, so that suits could be brought separately for each week's orders.

The principle is laid down by *Clark, C. J.*: "The items of the plaintiff's claim having been incurred under different contracts and at different times, the plaintiff could maintain a separate action for the

amount due under each contract, and if under two hundred dollars, before a justice of the peace, though the aggregate be in excess of that sum. It is optional with the creditor in such cases to join the amounts and bring an action therefor, or upon each item separately." *Copland v. Tel. Co.,* 136 N. C., 11.

"A party has a right to 'split up' his account, so as to include a certain number of items under one warrant, and a certain number of items under another, and so on, so as to bring the several warrants under the jurisdiction of a justice of the peace." *Caldwell v. Beatty,* 69 N. C., 365.

"A creditor, whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a justice for any number of such items not exceeding $200. If, however, the debt is an entire one, consisting of but one item, and exceeds $200, it cannot be divided to give the justice jurisdiction." *Boyle v. Robbins,* 71 N. C., 130.

"One who has an account for articles sold, the different items of which constitute separate transactions, and the entire amount of which exceeds the jurisdiction of a justice, may split it up so as to bring his actions within the jurisdictional amount, the account not having become an account stated, by reason of being presented as a whole, and not objected to within a reasonable time." *Simpson v. Elwood,* 114 N. C., 528.

Rodman, J., who rendered the decision in *Boyle v. Robbins, supra,* says: "A seller of a horse for $300 cannot divide his account and have two actions before a justice; neither can a carpenter who had built a house upon contract for an entire sum for over $200, nor a materialman who had furnished material upon an entire contract." In such cases the contract was "indivisible" and "entire." If the contract was to rent a house for a year at $1,200, monthly payments of $100 to be made on the first of each month, a suit could be brought each month before a justice of the peace for each $100 as due. The contract itself "splits" up the payments.

The other proposition is presented in Exceptions 5, 8 and 9. (Exceptions 6 and 7 were abandoned under the Rule in the brief of defendant.) Defendant requested the court to instruct the jury as follows: "The main controversy in these cases is as to the payment of the 1920 account, Mayo contending that prior to the payment to him of the $500 in notes payable to O. Marks, and $700 in notes to E. R. Nixon & Co., the defendant Martin was indebted to him on the 1920 account in the sum of $1,318.27, and the defendant Martin claiming that the said indebtedness had been settled in full on or about 1 January, 1921. The plaintiff Mayo having admitted that he surrendered to the defendant Martin

the orders or checks included in the 1920 account, and the same being in the possession of the defendant Martin prior to the time that the payments of $1,200 in notes above referred to were made, the law would presume that the said orders or checks had been paid at the time the same were delivered to the defendant Martin, and the burden of proof would be upon the plaintiff Mayo to establish, by the greater weight of the evidence, that at the time he surrendered the said orders or checks the same were not paid for by the defendant Martin, and if the plaintiff has failed to so satisfy the jury, the jury should answer the first to twelfth issues 'Nothing.' "

The court declined to give this instruction, and defendant excepted.

The court instructed the jury as follows: "I instruct you, inasmuch as Mr. Martin admits that he got from Mayo goods, wares and merchandise and other things of value, making a total of $2,013.45, the law puts upon him the burden to satisfy you that he has paid it, the entire amount, then Mr. Mayo is entitled to have you answer this issue in such sum as you may find is the balance due, which he contends is $118.27." To this portion of the court's charge defendant excepted.

The court instructed the jury as follows: "I instruct you further, should you find that Mr. Martin admits owing Mr. Mayo and admits the amount, then the burden is on Martin to satisfy you, not by the greater weight of the evidence, but to satisfy you that he has paid it." To this portion of the court's charge the defendant excepted.

These exceptions go to the charge of the court as given, and to the refusal of the court to charge the jury that under the evidence in the case the surrender by Mayo of the orders, brass plucks and evidence of indebtedness to Martin would create a presumption which would shift the burden of proof.

The plaintiff testified that he and the defendant figured up the 1920 account. Their books showed that the defendant had a total debit of $2,013.45; both added it up exactly the same amount and the same credits, and this debt was reduced by credits, so that there was an agreed amount due on 1 January, 1921, of $1,318.27. Plaintiff said that when this was agreed upon he turned the orders over to defendant.

A settlement of accounts between parties is presumed to have taken in all matters of charge and discharge on both sides. *Kennedy v. Williamson,* 50 N. C., 284.

This evidence perhaps presents the question that, as the orders, checks, or plucks were turned over to the defendant and in his possession, the possession by the defendant raised a presumption of payment, and the burden was on the plaintiff to establish by the greater weight of the evidence that at the time they were surrendered they were not paid by the defendant Martin, and the court erred in not giving the prayer as

asked for and the instructions given. We cannot so hold. We think the court was correct. We do not think, under the circumstances and evidence in this case, that by the surrender of these orders or plucks, payment could be presumed from possession and that such a presumption was created as to shift the burden of proof. The possession would be a circumstance or some evidence which the jury could consider.

In *Pool v. Anderson,* 150 N. C., 624, the facts were: Action for recovery of land. Plaintiffs claim under John E. Gray who, on 12 March, 1879, executed a bond obligating himself to make title to S. N. Stockton upon the payment of $300, as stipulated by note or otherwise. The signature to the bond was attested by H. W. Wise. Stockton went into possession of the land upon the execution of the bond, and remained thereon until his death, devising it to the *feme* defendant, Cordelia Anderson, who has been in possession at all times since the death of said Stockton. Defendant alleged that the purchase-money for the land was paid by Stockton. For the purpose of sustaining the allegation of payment, defendant offered a note which was found among Stockton's papers. This note was payable to Jno. E. Gray. The note had no signature, but the paper appeared to have been cut off at the place for the signature. H. W. Wise's signature was on the note as a witness. Wise was dead. The note when found was wrapped in the bond for title and found among the papers of S. N. Stockton after his death. The court allowed this evidence, and the plaintiff excepted. *Connor, J.,* said: "The possession does not raise any presumption of payment or change the burden of proof. It is a circumstance, a condition open to explanation, but of sufficient relevancy to the fact in issue to entitle it to be considered in connection with other evidence to aid the jury in arriving at a correct conclusion."

There may be certain cases where payment of a bill or a note will be presumed from possession after maturity by the maker or acceptor, but the possession of these orders or brass "plucks" by the defendant, under the facts in this case, at most, would be only a circumstance to be considered by the jury.

The court did not err in refusing the motion to nonsuit the plaintiff and dismiss for want of jurisdiction, or in refusing the instruction prayed for, or in the charge as given.

No error.

E. W. PETTITT, ADMR., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 September, 1923.)

1. Railroads—Carriers of Freight—Negligence—Evidence—Employer and Employee—Children—Dangerous Employment—Contributory Negligence—Nonsuit.

The employment by the defendant of a lad under twelve years of age as a messenger to carry train orders from the dispatcher's office to numerous trains shifting and moving upon the extensive freight yard, without evidence that he had been instructed or made aware of his dangerous employment, is evidence of defendant's actionable negligence in causing his death while he was engaged in the course of his employment in delivering one of these messages; and evidence that he was then riding on the step at the end of a box car on a moving train, according to an established custom known to the officers or superior employees of the railroad company, and killed by being struck by a passing train on a near-by parallel track, is not sufficient to bar his recovery on the issue of his contributory negligence, and defendant's motion as of nonsuit should be denied. *Semble*, a boy of that age, under the circumstances, could not be guilty of contributory negligence.

2. Evidence—Nonsuit.

Upon a motion as of nonsuit upon the evidence, the evidence must be considered in the light most favorable to the plaintiff.

3. Supreme Court — Decisions—Stare Decisis — New Trials — New Evidence—Evidence.

A decision of the Supreme Court on a former appeal in an action between the same parties upon the same cause will not be held as controlling when on a later trial in the Superior Court evidence has been introduced that would render the former opinion inapplicable upon the point therein passed upon.

STACY, J., concurring.

APPEAL from *Connor, J.*, at April Term, 1923, of EDGECOMBE.

This was an action by the administrator *d. b. n.* of a boy 11 years old for wrongful death alleged to be caused by exposure to dangerous employment, and without instruction as to the danger, by the defendant.

The evidence is that Joe Pettitt, the intestate, a boy 11 years of age, was knocked by a car from the step of one of several moving cars attached to a shifting engine being operated by the defendant on its terminal and transfer yards in South Rocky Mount and caught underneath the wheels of a train of cars and killed, his leg being cut off at the thigh, whereby he bled to death. The evidence is that he was under 12 years of age, not above the average in physical or mental development, and was employed by the defendant to carry messages from the dispatcher's telegraph office across said terminal and transfer yards.

These yards were one to one and one-half miles long, with eighteen to twenty railroad tracks across which the intestate was constantly called upon to pass in delivering messages. It was a place of almost ceaseless activity and along the tracks of which engines and trains were passing backwards and forwards every few minutes during the day, Sundays as well as week days.

The intestate was on duty from 7 a. m. until 7 p. m., seven days in the week and twelve hours in the day. On Sunday, the day of his death, he reported at the usual hour (7 a. m.) for duty at the dispatcher's telegraph office, where he was required to be when not on the yard delivering messages, and later made delivery of one of the messages entrusted to him. He thereafter mounted the step of a moving car and while standing thereon was knocked off by another car and was killed as above stated. It was an established custom for all messenger boys in this service of the defendant at South Rocky Mount, including the intestate, to ride moving trains, engines and cars, in order to expedite the delivery of messages and to avoid being run over by other moving cars and shifting engines.

At the close of the plaintiff's evidence, on motion of the defendant's counsel, judgment was entered of nonsuit, and the plaintiff excepted and appealed.

L. V. Basset and Don Gilliam for plaintiff.

M. V. Barnhill, F. S. Spruill, and Bridgers & Bourne for defendant.

CLARK, C. J. This appeal is from a nonsuit. Regardless of all statutory regulations, the mere fact of employment of the intestate, a boy less than 12 years of age and wearing knee breeches, the assignment of him to the hazardous task of crossing eighteen to twenty railroad tracks at all hours for the purpose of conveying telegraph and other messages to the numerous officials was a hazardous work, and the assignment of him to such a task constituted negligence on the part of the defendant. In addition, it is not shown that he was instructed or cautioned by the officials in charge as to the dangers incident to the work to which he was assigned.

In *Fitzgerald v. Furniture Co.*, 131 N. C., 639-40, the Court approved the rule laid down in Cooley on Torts, 652, as follows: "Masters may also be guilty in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants."

In *Ensley v. Lumber Co.*, 165 N. C., 691, *Walker, J.*, approving the above citation from Cooley on Torts *verbatim*, added: "It is the duty

of the master to exercise due care in giving his servant a reasonably safe place to work, and in the case of youthful or inexperienced employees, this further duty rests upon him; where the master knows, or ought to know, the dangers of the employment and knows, or ought to know, that the servant, by reason of his immaturity of years or inexperience, is ignorant of or unable to appreciate such dangers, to give him such instructions or warning of the dangerous character of the employment as may reasonably enable him to understand its perils." He added that "while the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him if he in fact knows and appreciates the dangers of the employment; and generally it is incumbent upon the jury to determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work and how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him warning and instruction as is reasonably required by his youth, inexperience, or want of capacity, and that will enable him with the exercise of reasonable care to perform the duties of his employment with reasonable safety to himself. 26 Cyc., 1174-1178; *Turner v. Lumber Co.*, 119 N. C., 387; *Marcus v. Loane*, 133 N. C., 54; *Walters v. Sash and Blind Co.*, 154 N. C., 323; *Fitzgerald v. Furniture Co.*, 131 N. C., 636; *Rolin v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 350. Those cases fairly illustrate the rule as it has been applied by this Court, and the Fitzgerald case would seem to be essentially the same in its salient facts as this one, and if not entirely so, there is a sufficient likeness between them to make it a controlling authority. The authorities elsewhere are in harmony with our decision." *Judge Walker* then, after quoting and approving the above citation from Cooley on Torts, p. 62, adds the following quotation from Thompson on Negligence, 978: "The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him and to place him with reference to it in substantially the same state as if he were an adult." *Judge Walker* further proceeds in the same opinion to quote to the same effect from Bailey on Personal Injuries, 1291, and from *R. R. v. Fort*, 84 U. S., 553 (where a parent was suing for injuries to his son who was 16 years old), as follows: "This boy occupied a very different position (from an adult). How could he be expected to know the perils of the undertaking? He was a mere youth without experience,

not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of the master, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collet to order a boy of his age and inexperience to do a thing which in its very nature was perilous and which any man of ordinary sagacity would know to be so." In this case, *Ensley v. Lumber Co.,* the distinguished judge elaborated this proposition by numerous other quotations from other authorities to the same effect.

In *Holt v. Mfg. Co.,* 177 N. C., 175, *Judge Walker* quotes from the above case of *Ensley v. Lumber Co.* and the above cited cases and reaffirms the quotation from *Fitzgerald v. Furniture Co.,* 131 N. C., 636, and Cooley on Torts, 652, and Thompson on Negligence, 978, and other authorities, which hold that the master is also guilty of actionable negligence if he expose persons to perils in his service, which, though open to observation, they do not fully understand and appreciate, and emphasizes that the duty is further imposed upon him in such cases to "fully explain the hazards and dangers connected with the business." There is no evidence in this case of any instruction of that kind by the defendant.

Indeed, this Court has held that the intestate being under 12 years of age could not be guilty of contributory negligence as the defendant contends. In *Rolin v. Tobacco Co.,* 141 N. C., 314-315, *Connor, J.,* said: "Within certain ages, courts hold children incapable of contributory negligence. We do not find any case, nor do we think it sound doctrine to say that a child of 12 years comes within that class (capable of contributory negligence). Adopting the standard of the law in regard to criminal liability, we think that a child under 12 years of age is presumed to be incapable of so understanding and appreciating danger from the negligent act or conditions produced by others or to make him guilty of contributory negligence."

But, indeed, in this case there was no evidence whatever tending to show contributory negligence if it had been admissible. There were the simple facts that a boy under 12 years of age, in knee breeches, had been assigned to this dangerous work, and there was no evidence whatever that he was warned of its dangers or that he was capable of understanding the warning if it had been given to him. This case was here, 156 N. C., 119, when a nonsuit was sustained by a divided Court, there being two dissenting opinions. It appears from reference to the majority opinion that two of the judges placed their affirmation of the nonsuit upon the ground (p. 129) that though the Court had held that "when the employment is dangerous, it is not necessary to prove a failure on the part of the employer to instruct 'that there was noth-

ing in the evidence to show that the intestate was on duty or was performing a duty for the defendant. The evidence is vague and unsatisfactory. No witnesses swear what day the intestate was killed, but we assume it was on Sunday, 1907. No witness says that the intestate was on duty the day he was killed or that he was performing a duty for the defendant at the time of his death. These facts were not peculiarly in the knowledge of the defendant, as his mother and step-father knew whether or not he was on duty that day, and both knew he was employed by the defendant and the mother received his wages.' " The third judge placed his decision upon a different ground, that the Legislature had not forbidden the employment of a child under 12 at that time in such employment. The two dissenting judges held that on the evidence the boy was "on duty" when killed.

At the time of the nonsuit in the former case two of the witnesses, for some unknown reason, were absent, but since then they have returned to the State and the evidence on this trial is explicit, by these two eyewitnesses, that the intestate was on duty when he was killed. J. R. Jones testifies that "the deceased was in knee trousers at the time of his death; that there were about twenty tracks on the yard; that he was a messenger boy also in the same service with the deceased; that Joe was killed on Sunday morning; that he himself was on duty the previous night and was relieved by Joe that Sunday morning, who went into service at 7 o'clock delivering messages; that both of them were required to work twelve hours a day and seven days a week; that they received $12.50 per month, and that their duties were to deliver messages at any point on the yard or at any place where messages were to go; that Joe, the deceased, was killed between 10 and 12 that morning; that the yard was used in making up trains going north, south, east and west; that it was a little over a mile long and that it was about a mile from the telegraph office to the most distant point to which they were required to deliver messages. The established custom for messenger boys to deliver messages was for them to ride freight trains or ride anything that would run on the track that they could get a ride on; that he had been working as messenger boy for two years when Joe was killed; that during that time no officer or employee of the defendant had ever objected to the messenger boys riding cars or engines in the yards in delivering messages."

L. C. Johnson also testified that he "was a messenger boy with the plaintiff at the time of his death, and that his duty was to carry messages to the different offices about the yard wherever they sent him: to the freight office, to Mr. Gordon's office, Mr. Wells' office, the chief car inspector's office, then over to the round house and out to the conductors on the yards. It was an established custom at the time of Joe's death

for messenger boys in delivering messages to deliver them as soon as we could get them to their destination, riding, if we could get a chance to ride, on moving trains or cars—any old way; we also rode switch engines. The authorities knew how we were moving around the yard and how we were delivering messages; they saw us use the moving trains. I rode with the train master on the switch engine and there was no objection. We continued the practice of riding the cars and engines in the yard without objection as long as we were around there. When we were at work, Pettitt rode on the engines and coaches. The yard was busy ordinarily in shifting trains twelve hours a day, seven days to the week; about fifteen tracks in the yard, and the yard was about a mile and one-half long. The most distant point for delivering a message was about a mile. I saw Joe the day he was killed in the early part of the morning. He had some messages in his hand, said he had to go to Mr. Gordon's office to carry a message. So he went on over and carried the message, and I saw him after that delivering messages."

He says he did not testify at the former trial as he was down in Georgia.

Another witness, J. W. Batts, testified that he "saw Joe Pettitt pass. He was a small boy wearing knee pants; looked to be 11 or 12; saw him just before he was killed. He was hanging upon the corner of a car that was being moved by the defendant's engine attached to the car. He was hanging to the ladder attached to the bottom of the car. He had his feet on the step of the car and his hand on the grab iron. About a minute after he saw Joe on the moving car he heard somebody scream. He went down there and Joe Pettitt had been run over. His leg was cut off and on the track. He said these shifting cars would barely clear one another, but might not clear a man swinging on the car. There was very small space between the cars. The leg was cut off and was lying on the track when he got there."

Two of the affirmative opinions in the former case were based upon the express ground that there was no evidence that the little boy was on duty in the service of the defendant at the time he was killed. If, therefore, these witnesses had been obtainable at the time, the decision at the former hearing must have been different. It was for the jury to say (if anybody could have denied it) that this service was not only dangerous, but exceedingly so. As was said in one of the dissenting opinions at the former hearing: "In this case, a child under 12 years of age, under-grown and therefore known to be immature, was set to work by the defendant in a most dangerous place, exposed to be run over by the constantly passing trains and shifting engines, crossing eighteen or more tracks to carry messages which might have been sent by telephone. He was found on the track in the yard with his leg cut off. Under our

decisions the company could not show contributory negligence, and neither pleaded nor offered to show any. It was the duty of the defendant to show that they had instructed all employees, much more a child placed in such employment, of its dangers. The defendant did not show this."

And it was also said: "It will be asked by future ages as well as the present, why an innocent child of immature age should have been subjected to such perils so far beyond his comprehension. This record gives the answer. His mother had seven other children to support and he had a step-father, and, in this combination of circumstances, their mother testifying that she did not know the dangerous nature nor the character of the employment, and indeed did not consent to his being employed. The defendant was able to secure this child's services for the munificent sum of $12.50 per month. This was truly 'the price of innocent blood.' Had the defendant employed a man or a boy of mature years, it would have had to pay for his services more in proportion to the peril. Such a person would have known the danger and would have charged for the risk. By employing these little children the defendant was able to cheapen, to that extent, by the competition, the price of other labor. There was no evidence on this trial of warning or instruction given to the little boy by the men who exposed him to this dangerous service, and no cause shown why telephones were not used across these tracks to avoid exposing any one to such dangers. We held in *Greenlee v. R. R.*, 122 N. C., 977, and in *Troxler v. R. R.*, 124 N. C., 189, that the fact that 'it would have cost the defendant company some expenditure to put in automatic couplers would not be any defense to the exposure of the employee to unnecessary danger.'"

In regard to the danger of this particular employment, it is well known from the governmental reports that the number of workmen killed or maimed in this country every year in industrial accidents is larger by much than the total number killed and wounded in both armies in the four years of the great Civil War. For this reason, public sentiment has been demanding more and more the use of devices that will prevent or reduce the danger in many employments. This has been shown by marked advance in the legislation in probably all the States, certainly in this and in the national Legislature. Indeed, it may well be said again that this little boy "was sent to his death by exposure to an accumulation of perils, greater to him in his unguarded and unwarned innocence than that which met the charging column of brave men on Cemetery Ridge. Many soldiers survived four years of war. This child was slain on the fourth day of his employment." This was said in this case, 156 N. C., 136, and in the interests of the humane and just administration of the law it should be repeated here.

To take the very strongest view of this case for the defendant upon these facts, it was a question for the jury to say whether or not the deceased could appreciate the dangers and knew how to avoid them. *Turner v. R. R.*, 40 W. Va., 675; 4 Thompson on Negligence, sec. 498.

The place where the child was put to work being a dangerous one, the question was open for the jury to pass upon the negligence of the defendant. *Cahill v. Stone Co.*, 19 L. R. A. (N. S., 1094); *Lynch v. Mardin*, 1 Q. B., 29; *Pressly v. Yarn Mills*, 138 N. C., 416.

On the former hearing one of the judges put his opinion upon the ground that there was no legislation to prohibit the exposure of a child of this age to any danger in this employment, though this opinion was not expressed by any one else. The present statute does prohibit the employment of "any one under 14 years of age" in messenger or delivery service. C. S., 5032. While that would not be applicable to this case, it is a confirmation of what is said in *Pressly v. Yarn Mills*, 138 N. C., 410. "The law grows more just with the growing humanity of the age and broadens with the process of the suns."

This being a nonsuit, the evidence must be taken in the most favorable aspect to the plaintiff and with the most favorable inferences which can be drawn from it by the jury. There is no conflict in the evidence of the five witnesses who have testified. But the whole record is before us and it should not pass without comment that the boy was killed on Sunday, 28 April, 1907; his mother took out letters of administration on 13 May, 1907; summons served on 14th of the same month, but the judgment of the nonsuit was entered four years thereafter at June Term, 1911, below and in October here.

The mother having confidence in her case, doubtless owing to the fact, as appears from the above, that the former opinion was rendered against her for the failure of witnesses to appear who would have proved that her son was "on duty" at the time of his death, brought a new action on 5 January, 1912; summons served the same day. She died in 1921, and her oldest son took out letters of administration on 5 May, 1922, and was substituted as plaintiff.

From the date of the death of the boy to the present time has been more than 16 years. During that time approximately 100 terms of the court, with probably 150 weeks of session, have been held in Edgecombe County (including special terms), and there has been a change of personnel of the presiding judge more than 32 times. If the little boy had lived he would be now in his 28th or 29th year.

More than 700 years ago the barons at Runnymede compelled the king to put in *Magna Carta* the pledge that justice would be "neither delayed nor denied," and this Court has several times said that "a delay of justice is often a denial of justice."

The American Bar Association, composed of some 20,000 lawyers and judges, have in the last few days issued a statement declaring that disrespect of, and even hostility toward, the courts was alarmingly on the increase throughout this country. The deceased was receiving for his dangerous and arduous services of twelve hours a day, seven days in the week, the payment of $12.50 a month. If the defendant deemed that the claim was not just, it was within its rights, if it saw fit, to defend the action, but in common humanity and as a matter of sound policy, the prompt decision of a court should have been procured. The State owes to its people to see that in some way such unreasonable delay as this is shall not be possible, especially where the recovery is sought by a laborer who needs whatever compensation is justly due him.

Whatever the effect, the criticisms by the Bar Association in the address, participated in as it was by the Chief Justice of the United States, may have on the public, so far as it is based, as stated therein, on delays and technicalities by the courts in the administration of justice, it is entitled to our respectful consideration and should be remedied by the courts. It is as unwise to ignore such a state of facts as appears upon this record as it is unjust not to prevent it. We do not seek to place the blame—whether the delay in this instance was caused by an insufficient number of courts, or in the method of their administration or for any other reason. The surest way to insure relief of any grievance is to give publicity to the most glaring cases, at least that those seeking justice may receive it in accordance with the solemn pledge more than 700 years old that "To no man will we sell, or deny, or delay, right or justice."

Though the plaintiff has already waited 16 years during which he has been denied the right to trial by jury to which he is entitled, he has now in addition, when the case goes back, to wait the yet unknown number of years before he can have his rights passed upon.

We have on more than one occasion had occasion to comment upon the unnecessary delays and technicalities in trials of which Chief Justice Taft and other judges have spoken in their opinions as well as in addresses, as being too common in the administration of justice. Among them see *Penny v. R. R.*, 161 N. C., 530, where the delay had been for 15 years, and there had been four trials. "There are others" which have not been thus brought to the attention of the public. In this case, the plaintiff has not yet had the opportunity to have his facts passed upon by a jury.

The plaintiff is entitled to have this case submitted to the jury upon proper instructions as to the law applicable. The judgment of nonsuit is

Reversed.

STACY, J., concurring: This case, as now presented, is different from what it was on the first appeal; otherwise our former decision would constitute the law of the case, both in subsequent proceedings in the trial court and also on a subsequent appeal here. *Nobles v. Davenport,* 185 N. C., 162; *Lewis v. Nunn,* 182 N. C., 119; *Public Service Co. v. Power Co.,* 181 N. C., 356. But I think the evidence appearing on the present record is sufficient to carry the case to the jury, and for this reason I concur in the reversal of the judgment of nonsuit.

It now appears, as it did not appear before, or at least there is evidence from which the jury may find, that plaintiff's intestate was at work for the defendant and in the discharge of his duties when he received his fatal injuries. In this state of the record the defendant's motion for judgment as of nonsuit should have been overruled.

JESSE ARMSTRONG v. C. T. SPRUILL AND W. D. PEEL, EXR. OF MRS. C. T. SPRUILL, DECEASED.

(Filed 12 September, 1923.)

1. Supreme Court—Decisions—New Trials—Second Appeal.

The former decision of the Supreme Court, holding that the issue as to plaintiff's damage for overflow of water upon his land should have been submitted to the jury upon evidence tending to show that defendant had enlarged an established common drainage ditch to increase the flow of water upon plaintiff's lands, does not apply to the present appeal, wherein it appears that the defendant had not so enlarged the ditch or increased the flow of the waters, to plaintiff's damage.

2. Waters—Drainage—Damages—Lower Proprietor.

Where it is shown that a drainage ditch is common to several owners of land through which it runs, and that the owners and predecessors in title have cleared or maintained the ditch on their own lands for this purpose for a long term of years: *Held,* in an action for damages by overflow water by a lower proprietor against an upper one, that it is the duty of the former to cut and keep the ditch properly open on his own land without obligation of the upper proprietor to do so for him; and where the upper proprietor has not increased or changed the flow of the water upon the lands of the lower one, the latter may not recover damages in his action therefor.

3. Same—Contracts.

And where the owners of land have afterwards entered into a written contract, whereby each one draining into the common canal has obligated himself to cut, clear out, and maintain it, each paying his proportionate part, an upper proprietor properly doing more than his share creates no cause of action against him thereby, or relieves the lower proprietor from

sustaining the damages caused by the flow of water on his own land, occasioned by his breach of duty to perform his own agreement upon his own land.

4. Waters—Drainage—Discontinuance—Statutes.

Where an owner of lands in connection with other adjacent owners is bound to the clearing-out and cutting of a drainage canal on his land that has been used by them all and their predecessors in title in common for a long term of years, he must give notice of his wish to discontinue it, under the provisions of the statute, to relieve him of responsibility for not doing so.

APPEAL from *Connor, J.*, at January Term, 1923, of TYRRELL.

This was an action for alleged damages to crops and land by reason of cleaning out the canal, some two and one-half miles long, running from the farm of the defendant through the lands of a number of parties, including the plaintiff, down to Alligator Creek.

This canal was cut before the Civil War over 60 years ago. It was originally cut 12 feet or more in width, and those owning lands on each side of it drained into this canal and helped to keep it open until about 1915, at which time the plaintiff purchased a small tract of land, lying on the canal, of about 80 acres owned by Jesse Cooper, who lived on the farm. After Cooper's death it was cut up and sold in small tracts. Don C. Sawyer purchased part of the Cooper tract and drained into and used said canal and helped keep it cleaned out. The canal runs through the Cooper tract and the plaintiff's 30 acres and that of others, and they all helped to clean it out—all the land between Mrs. Spruill's California Farm aforesaid and the Alligator River adjacent to this canal.

The canal was cleaned out in 1915 after the plaintiff purchased his 30 acres of the Cooper tract. He sold off $700 of it and now holds the balance. Cooper, and those who owned the lands after him, down to the plaintiff, drained into the canal and helped to maintain it. The plaintiff joined with his neighbors in a contract, signed 1 September, 1917, whereby he and others describing themselves as "The owners of the land adjoining or lying near to the Cherry River Landing Canal, which said canal extends from Cherry's Landing on Alligator River up to the farm now owned by Claude Spruill," and reciting that "Whereas we have heretofore been accustomed to use Cherry River Landing Canal for the purpose of draining our lands, but in recent years the said canal has become so filled with dirt, debris and other matter that it is no longer sufficient to adequately drain the said land, and it is necessary that the same be put in proper condition for that purpose; and whereas it is our decision and purpose to clean out said canal from Cherry's Landing aforesaid up to the fork of the Gum Neck Road so that the same may be used hereafter as a common drainway for the lands now owned by us respectively, and to hereafter keep up and main-

tain the same so that the said canal will thereafter at all times be sufficient for the purpose aforesaid: Now, therefore, we, the undersigned, on behalf of ourselves and our heirs and assigns, do hereby contract and agree to and with each other to have said Cherry River Landing Canal cleaned out and put in proper condition from Cherry's Landing aforesaid up to the fork of the Gum Neck Road so that the same will thereafter be sufficient to drain the land now owned by us, our heirs or assigns, and that each of us will pay our proportionate part of the expense of the same according to the number of acres of land which we have to drain into the same, i. e., that as soon as the total cost of improvement is ascertained we will pay our proportionate part of the same according to the number of acres which we may have to drain into the same, and we do hereby contract and agree to and with each other that should any of us fail to pay his proportionate part of such expense as aforesaid that the part of the ones so remaining unpaid shall be a lien upon the tract of land owned by him; and in case he, his heirs or assigns, shall fail to pay the same for any reason, then the others shall be entitled to have the land of such defaulting landowner sold to pay his proportionate part of such expenses."

There is a further provision in the contract for the future maintenance of the said canal that there shall be a lien upon the land of each for the proportionate part of the expense of maintenance. The contract was duly executed under seal.

At the close of the plaintiff's testimony the defendant moved for a nonsuit and excepted to its refusal, and at the conclusion of all the testimony the motion was renewed and refused, which was excepted to.

From the verdict and judgment for plaintiff, the defendants appealed.

W. L. Whitley and Meekins & McMullan for plaintiff.
T. H. Woodley and Aydlett & Simpson for defendants.

CLARK, C. J. This case was before Fall Term, 1921—*Armstrong v. Spruill,* 182 N. C., 1. It there appeared from the uncontradicted testimony that the canal drained the lands of all the parties along its line under a prescriptive right, but that the defendant, an upper proprietor, finding it had become insufficient, without a proceeding under the statute, had enlarged and deepened it and increased the flow of water upon the plaintiff's land, and there was a conflict of testimony whether such enlargement had caused damage to the plaintiff. The Court held that it was error not to have submitted this to the jury. In the present case, witnesses of both plaintiff and defendant testified that the canal was not cut deeper or wider than before, and the plaintiff testified that it was not cut as wide or as deep in 1915 as it was originally. Therefore the former decision has no bearing.

One question much debated was whether Mrs. L. C. Spruill had authorized the cleaning out and cutting of the canal, which work was supervised by her husband. Defendant moved for nonsuit upon the ground that the evidence did not sustain the contention that the work was done by her authority; and secondly, that upon the merits there should have been a nonsuit.

We do not think it necessary to discuss the first proposition for, upon the evidence, we think the nonsuit should have been granted because no cause of action was shown.

The decisions of this and other courts are to the effect that "Where a drainage canal has been established and used as a right by abutting proprietors, in the absence of statutory contract or prescriptive regulations to the contrary, the obligation is upon each of the proprietors to clean out and properly maintain the portion of the canal running through his own land, and ordinarily he has no right to compel another proprietor to do this for him, nor to hold such proprietor for damages for not doing it." *Craft v. Lumber Co.*, 181 N. C., 31; *Lamb v. Lamb*, 177 N. C., 150, and cases cited.

The uncontroverted evidence here is that this canal was dug more than fifty years ago and was used for that length of time or longer, up to 1915, by the owners of the lands adjoining the canal as a drainway. The plaintiff owned a part of the Cooper tract, and the evidence is that Cooper drained into this canal and helped to maintain it. Afterwards Sawyer purchased a part of the Cooper tract, which is the land that the plaintiff now owns, and drained into this canal and helped to maintain it; that this canal is the only drainway of the California and other farms adjacent to the canal down to the Alligator River; that the owners of these adjacent lands have helped to maintain this canal all these years; that the canal has not been enlarged either in width or depth. The testimony of both the plaintiff and defendant established these facts. It follows that while it was not the duty of the owner of the California Farm to cut the ditch through the land of the plaintiff, neither was it her duty to cut it on to the Alligator River. The owners of the Cooper land were bound to cut the ditch through their lands according to all the decisions of the Court.

Besides, there is the express agreement, 1 September, 1917, of the plaintiff and all the other owners of land adjacent to the canal and draining into it to cut and clean out the canal and to maintain it, each one paying his proportionate part.

The court therefore erred in not sustaining the motion of nonsuit, both at the close of the plaintiff's testimony and at the close of the whole testimony. She was not compelled under that agreement to cut as far as was done, but that she did more than her share constitutes no cause

of action against her estate. She, being now deceased, is represented in this action by her personal representative.

Had the defendants not cut through her land as she was required to do under the joint agreement, she would be liable to the other parties, but she is not responsible for having cut further than her obligation required nor that she did not cut down to the Alligator River.

The land of the plaintiff was a part of the Cooper tract. The canal was cut through it. It was divided up into small tracts according to the evidence of the plaintiff himself, and a part of the water from his land drained into this canal as appeared from his cross-examination, and the canal runs through his lands; therefore, even if he had cut other ditches and drained part or the most of his land elsewhere, still the defendant would not be legally bound to cut the ditch through the plaintiff's land. *Craft v. Lumber Co.* and *Lamb v. Lamb, supra.*

The plaintiff has given no notice that he would discontinue draining into this canal and, in fact, has not discontinued. If he had desired to relieve himself of this responsibility his remedy was under the statute.

From a careful perusal of all the evidence in the record, it clearly appears that the lands of the plaintiff are low lands; that this canal was cut over two miles many years ago by the owners of these lands; that the canal has been maintained regularly as a drain-way and that it is the only drain-way, according to the testimony and the maps, for these lands. The plaintiff was bound under the joint contract of September, 1917, to cut the ditch through his own lands, and if, by failing to do so, the water from the other proprietors, among them the defendant, comes upon his land, he is not entitled to damages. His remedy is fully set out by his Honor, *Hoke, J.,* in a very clear and instructive opinion in *Lamb v. Lamb, supra.*

There was error.

Reversed.

STATE v. WALTER BETHEA.

(Filed 12 September, 1923.)

1. Evidence—Declarations of Witness—Corroboration.

Where the credibility of the testimony of a witness is impugned on a trial, either by proof of his bad character or his contradictory statements, or by contradictory testimony, or by cross-examination tending to impeach his veracity or memory, or by his relation to the cause or the party for whom he testified, it is competent to corroborate and support his credibility by evidence tending to restore confidence in his veracity and the truthfulness of his testimony; and such corroborating evidence may include previous statements, whether near or remote, made either pending the controversy or *ante litem motam.*

2. Same—Witnesses—Relationship—Res Gestæ.

Where the mother has testified in behalf of her son, on trial for murder, that the deceased, on the occasion, had followed her son into her home, cursing, and that she saw on him what looked like the handle of a gun, etc.; that she was in an adjoining room when the prisoner shot the deceased; that she told her husband at the time that the deceased was after the prisoner with a gun: *Held*, the relationship subjected the mother's testimony to suspicion, if not to discredit, making competent the admission of her evidence of her declarations made to her husband at the time; and upon the admission of this evidence, the testimony of others to like effect was also admissible, and its rejection was reversible error, to the prisoner's prejudice: *Held, further*, it was competent as *pars rei gestæ*, being spontaneous and springing out of the occurrence, and relating to the contemporaneous acts and language of the deceased.

CRIMINAL ACTION tried before *Kerr, J.*, and a jury, at May Term, 1923, of WILSON.

The prisoner was convicted of murder in the first degree, and he appealed from the judgment pronouncing sentence of death.

Attorney-General Manning and Assistant Attorney-General Frank Nash for the State.

Branes & Mintz and O. P. Dickinson for the prisoner.

ADAMS, J. The homicide occurred on Saturday night, 25 May, 1923. About seventy-five people had come together at the home of Ratty Bethea, father of the prisoner, to attend a festival projected for the benefit of a church. They were entertained, it is said, with music and dancing and "barbecue and liquor." The house had two rooms with a porch in front. There was evidence tending to show that Peter Fields, the deceased, had gone from the yard into the porch; that some one "cursed out there," whereupon the prisoner's mother called to him to come from the porch into the house; that the deceased followed and the two went into one of the adjoining rooms; that soon afterwards the prisoner, having a pistol in his right hand, seized the deceased and pulled him into the other room and shot him. There was also evidence of self-defense. The time intervening between the conversation or "cursing" on the porch and the death of the deceased does not definitely appear in the evidence.

The following is a synopsis of the testimony of Mary Bethea, mother of the prisoner, who testified in his behalf: "That the party was held at her house that night for the benefit of the church; that she went out of her room where they were sitting to see if there was any fire in there and heard some one curse on the porch out there and called to the defendant, who was standing on the porch, and said, 'What is the matter out there?' and defendant said, 'Nothing much,' and went on in the

house; that in a few seconds the deceased came in, cursing; that there was another fellow with him but did not know him; that deceased ran his hand in his pocket and was cursing and that she saw the handle of what looked like a gun. That she did not see the deceased when the defendant shot him as she was in the adjoining room where her husband was; that deceased was cursing defendant outdoors; that she heard him; that he came into the house soon after the defendant came in; that she went to her husband and told him that the deceased was after the defendant with a gun; *that she made a statement to her husband.*"

The prosecution offered to prove by the witness that she told her husband, "The deceased was after the defendant, was cursing him and was going to kill him and had his hand in his pocket, and that she saw a pistol in his hand." The question is whether his Honor's exclusion of this statement deprived the prisoner of evidence to which he was justly entitled.

This Court has often held that whenever a witness has given evidence in a trial and his credibility is impugned, whether by proof of bad character or by his contradictory statements or by testimony contradicting his or by cross-examination tending to impeach his veracity or memory or by his relationship to the cause or to the party for whom he testified, it is permissible to corroborate and support his credibility by evidence tending to restore confidence in his veracity and in the truthfulness of his testimony. Such corroborating evidence may include previous statements, whether near or remote and whether made pending the controversy or *ante litem mortam. Johnson v. Patterson,* 9 N. C., 183; *S. v. George,* 30 N. C., 324; *Hoke v. Fleming,* 32 N. C., 263; *March v. Harrell,* 46 N. C., 329; *Jones v. Jones,* 80 N. C., 247; *Roberts v. Roberts,* 82 N. C., 30; *Davis v. Council,* 92 N. C., 726; *S. v. Brabham,* 108 N. C., 793; *S. v. Exum,* 138 N. C., 600; *Cuthbertson v. Austin,* 152 N. C., 336; *Bowman v. Blankenship,* 165 N. C., 519; *Belk v. Belk,* 175 N. C., 69; *S. v. Krout,* 183 N. C., 804.

In *S. v. Brabham, supra, Shepherd, J.,* said: "Whatever may be the ruling in other States upon the subject, it is well settled in North Carolina that such testimony as Baker's is admissible for the purpose of corroborating a witness who has been impeached or stands in such a relationship to the parties or the action as to subject his testimony to suspicion or discredit."

Judged by the principle enounced in these cases, his Honor's exclusion of the proposed evidence was erroneous. The relation existing between the witness and the prisoner—that of mother and son—invited and justified the jury's scrutiny of her testimony and subjected her recital of the occurrence to suspicion if not discredit; and as the rejected evidence would have tended to support her claim to veracity, it

was competent for the purpose of corroboration. If this evidence had been admitted, the testimony of Marshall McDonald and others to the effect that they heard the witness make the alleged statement would likewise have been competent in support of her credibility.

Furthermore, the excluded statement was competent as *pars rei gestæ*. If accepted as true, it was the spontaneous and instinctive declaration of the witness springing out of the transaction and relating to the contemporaneous acts and language of the deceased. The fact that the shots were fired in one room and the statement was made in the room adjoining is immaterial. "The question is," says Wharton, "Is the evidence offered that of the event speaking through participants, or that of observers speaking about the event? In the first case, what was thus said can be introduced without calling those who said it; in the second case, they must be called. Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined. They vary in fact with each particular case. . . . Declaration claimed to be part of the *res gestæ* may precede, accompany, or follow the transaction to which they relate. It is only when they accompany the transaction so as to be wrought up in it, and to emanate from it, that they can be rightfully regarded as excepted from the rule that excludes hearsay. . . . The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it or of the action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." Criminal Evidence, secs. 262, 263.

In *S. v. Spivey*, 151 N. C., 680, *Manning, J.*, in a learned discussion of the question, reached this conclusion: "Following the rule clearly established by these authorities, a statement made as the 'outpouring of the mind' of one of the actors in the tragedy is competent as *pars rei gestæ*. We conceive there is, and ought to be, a distinction made between the statements of one of the parties to the tragedy and a bystander or non-participant. In the latter case, where the evidence proposed is the statement of a bystander or non-participant, whose mind is unmoved by the terrible emotions that overflow and express themselves in words uttered without design or thought or preparation, it must appear, to be admissible, that such statement was made while the thing was being done, the transaction was occurring; they ought to be strictly contemporaneous. *S. v. McCourry*, 128 N. C., 598; *Seawell v. R. R.*, 133

N. C., 515; *Harrill v. R. R.*, 132 N. C., 655; *Bumgardner v. R. R.*, 132 N. C., 442; *Means v. R. R.*, 124 N. C., 578; *S. v. Hinson*, 150 N. C., 827."

Here the statement was made "while the transaction was occurring." McKelvey on Ev., 344; Underhill on Cr. Ev., secs. 96, 97; McClain's Cr. Law, sec. 411 *et seq.*; *S. v. Carraway*, 181 N. C., 561.

For error in the exclusion of evidence the prisoner is entitled to a New trial.

E. P. COHOON v. W. C. COOPER AND J. B. COOPER.

(Filed 12 September, 1923.)

1. Pleadings—Counterclaim—Voluntary Nonsuit—Statutes.

Where defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross-action and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. C. S., 521 (1).

2. Same—Verdict.

Where the defendant has set up a counterclaim as allowed by C. S., 521 (2), as to a cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of that section, he may, as a matter of right, take a nonsuit thereon at any time of the trial before verdict.

3. Same.

Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge had held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. C. S., sec. 521 (1) and (2).

4. Verdict—Inadvertence—Correction—Courts.

It is proper for the judge to call to the attention of the jury, when they render their verdict, an inadvertence on their part in awarding a larger amount in their verdict than the plaintiff claimed in his action—in this case 95 cents.

APPEAL by defendant from *Connor, J.*, at April Term, 1923, of TYRRELL.

The action was brought upon notes given for a tract of land to secure payment of which the defendant executed a deed of trust upon all the crops cultivated upon said land. Growing out of the dealings between

the parties, there were three suits upon the docket which were consolidated and tried as one. There were eight issues submitted to the jury.

The last was for a counterclaim by the defendant for a credit for the value of 1,009 barrels of potatoes. The plaintiff claimed that the defendants had delivered to him only 596 barrels, and denied credit was due for the amount claimed by the defendant.

The jury came into the courtroom with their responses to the first five issues and to the eighth issue (the counterclaim). The court told them that upon the responses upon those issues it was not necessary to answer the sixth, but that they should retire and consider the evidence and answer the seventh issue.

While the jury were out on this instruction the defendant's counsel asked to enter nonsuit as to his counterclaim, i. e., the eighth issue, which the court refused. In a few moments the jury returned, having answered the seventh issue $663.96. The court remarked to the jury that the plaintiff contended for only $663.01 on that issue, and the entire jury, in response to an inquiry from the court, stated that it was their purpose to so answer the issue, and with their consent the court amended the reply to the seventh issue to read $663.01. The defendant excepted to the court receiving a verdict from the jury upon issue involving the counterclaim. Motion was denied, and the defendant excepted to receiving the verdict upon the eighth issue. Judgment upon the verdict as rendered and appeal by defendant.

Thompson & Wilson for plaintiff.
T. H. Woodley and Aydlett & Simpson for defendant.

CLARK, C. J. There are two counterclaims that can be set up under C. S., 521, i. e., 521 (1): "A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." Such counterclaim must not only exist at the commencement of the action, but as to this, when it has been pleaded a nonsuit cannot be taken. The defendant "is not obliged to set up such counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim, it becomes a cross-action and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the court of all matters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy without or against the consent of the other." *Francis v. Edwards,* 77 N. C., 271; *Whedbee v. Leggett,* 92 N. C., 469; *McNeill v. Lawton,* 97 N. C., 20; *Yellowday v. Perkinson,* 167 N. C., 146.

The other ground of counterclaim, C. S., 521 (2), is "Any other cause of action arising also on contract and existing at the commencement of the action." As to such cause of action a nonsuit may be taken at any time before a verdict.

But even upon such counterclaim the defendant could not take a nonsuit except "before verdict." *Graham v. Tate,* 77 N. C., 120; *McKesson v. Mendenhall,* 64 N. C., 502. And in this case the verdict had been rendered as to all the issues except the sixth, as to which the judge held that there was no response required, and the seventh, as to which the jury were sent out for further deliberation. The verdict had been returned upon the eighth issue, which alone pertained to the counterclaim. But passing by that question, the defendant was not entitled at any time to take a nonsuit as to this counterclaim arising out of a "contract or the transaction set forth in the complaint as to the foundation of the plaintiff's claim, or connected with the subject of the transaction," as this was.

As for the correction by the jury in open court of the answer to the seventh issue by reducing it from $663.96 to $663.01, the court acted eminently proper in giving the jury the opportunity to correct their inadvertence and in accepting the correction. *Cox v. R. R.,* 149 N. C., 87; *S. v. Godwin,* 138 N. C., 582; *Bond v. Wilson,* 131 N. C., 505; *Cole v. Laws,* 104 N. C., 651.

Indeed, the court had the power to reduce the verdict of its own motion so long as the plaintiff, the party in whose favor it was rendered, did not object. *Isley v. Bridge Co.,* 143 N. C., 51. Even if the difference of 95 cents had been against the defendant the time of the court, both below and here, cost too much to the public to debate that matter, *De minimis non curat lex.*

These are the only errors assigned in the record.

No error.

ANNIE McINTOSH CLEGG v. I. N. CLEGG.

(Filed 12 September, 1923.)

1. Appeal and Error—Findings—Habeas Corpus.

The Supreme Court, on appeal, is bound by the findings of fact by the Superior Court judge in *habeas corpus* proceedings, if supported by any competent evidence.

2. Habeas Corpus—Husband and Wife—Custody of Children.

Where the husband and wife are living in a state of separation, without divorce, the Superior Court has jurisdiction to award the custody of the minor children of their marriage to either the husband or the wife for

such time, under such provisions, restrictions and directions as will, in the opinion of the court or judge, best promote the interest and welfare of the children, and retain the cause, and thereafter annul, vary or modify the same on good cause shown. C. S., sec. 2241.

3. Same—Courts—Jurisdiction—Juvenile Courts.

The jurisdiction of the Superior Court or judge thereof in *habeas corpus* proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the Juvenile Court.

4. Appeal and Error—Courts—Jurisdiction—Habeas Corpus—Supreme Court—Supersedeas.

Upon appeal to the Supreme Court from an order of the judge of the Superior Court in *habeas corpus* proceedings between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a *supersedeas* bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term.

5. Habeas Corpus—Husband and Wife—Custody of Children.

While as a general rule and at common law the father has *prima facie* the paramount right to the control and custody of his minor children until they arrive at age, the mother, in *habeas corpus* proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it.

6. Same—Appeal and Error.

When the Superior Court judge has entered judgment in *habeas corpus* proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment, and affirm, reverse or modify it.

7. Same — Nonresident Wife — Jurisdiction — Bond — Apportionment of Custody of Children.

Upon the wife's petition in *habeas corpus* it was made to appear that she and her husband were living apart by mutual consent, but not divorced, when she carried the minor children of their marriage to live with her in Virginia, from which place the husband surreptitiously took them back to his home in this State. Each were equally worthy to have their custody and control, and the welfare of the children was equally safeguarded: *Held*, proper to order a division of the time of the children between the parents, with full right of each to visit and associate with them when living with the other, requiring of the wife a bond in a certain sum, conditioned upon her not taking the children out of the State and complying with the order of the court, made payable to the State of North Carolina, and filed with and approved by the clerk of the Superior Court, the cause retained to be further determined on change of conditions properly established.

8. Same—Appeal and Error—Costs.

On this appeal from the judgment of the Superior Court judge in *habeas corpus* proceedings, brought by the wife against her husband for the control and custody of the minor children of their marriage, the costs of the appeal and hearing are taxed against the respondent, with order that the cost in the lower court be made out and judgment entered by the clerk thereof.

STACY, J., dissenting.

THIS was a *habeas corpus* proceeding, heard before *Devin, J.,* at chambers, at Lumberton, N. C., 15 June, 1923.

Appeal by plaintiff (petitioner).

Appeal by defendant (respondent).

McLean, Varser, McLean & Stacy for petitioner.

H. F. Seawell and McIntyre, Lawrence & Proctor for respondent.

CLARKSON, J. The essential facts of the case are as follows:

The prayer of the petitioner, Annie McIntosh Clegg, the wife of the respondent, was that Ann Monroe, Margaret and Archie Clegg, her children, be delivered to her "for her care and custody in accordance with the agreement between the two."

She alleges that "on or about the 13th day of September, 1922, in an effort to reconcile the difference between petitioner and respondent, and to adjust the relationship that would exist between them in the future, the petitioner and respondent agreed, at her home near Richmond, Va., that the petitioner should have the possession, care and custody of her two girls, Ann Monroe and Margaret, and her infant son, Archie; and in order to consummate this agreement, petitioner agreed to return with the respondent to North Carolina and stay with him for a week or ten days, at which time it was agreed that she would return to the home of her mother at Richmond, Va., and take with her the infant son of the petitioner and respondent."

She alleges that she carried out her part of the agreement, but that the respondent did not, and alleges in detail his failure and conduct towards her in this respect, and that in violation of the agreement he even went to her home near Richmond, and, unknown to her, took the two girls, and the respondent now has all four of the children born of the marriage—Newton, aged 12; Ann Monroe, aged 10; Margaret, aged 7, and Archie, aged 5, living with him at his home in the town of Rowland. From the findings of the court below, it is unnecessary in the decision of this case to recite in detail the allegations of wrongs done her by respondent.

The respondent, I. N. Clegg, denies this agreement, and denies "that petitioner returned to North Carolina under any agreement or arrange-

ment with the respondent whereby the petitioner should be permitted to take the children or any of them away from the care and custody of the respondent, but admits that the petitioner did return to North Carolina upon what he presumed to be a reconciliation and with the sincere hope upon the part of respondent that their home life might be improved and made into what it should be."

He denies that he was in any way responsible for the causes which petitioner claims forced her from his home at Rowland to the home of her mother at Richmond. The respondent claimed that the two girls were taken to the home of their grandmother near Richmond ostensibly upon a visit, and that he went and got them. He admitted that he took them unknown to the petitioner, but in the daytime; that the children were in the country, and "he spoke to said children, who rushed to him, put their arms about his neck, kissed him, and gladly accompanied him back to their home in North Carolina"; that he placed them in the graded school at Rowland, where they had been previously going to school.

The respondent admits the children are with him, and that "they are happy, contented and are receiving the best of care possible under the unfortunate circumstances existing, which have been caused by no fault of respondent; and it is admitted that the respondent has refused to abandon his duty and surrender the care and custody of said children to the petitioner, or to permit her to take them away from the home of the respondent to be a care and burden to their old grandmother, who is very aged and unable to personally care for them."

Respondent "prays that the writ of *habeas corpus* may be dismissed, and that said children may be left in the custody of the respondent, and their care, custody and tuition may be left with the respondent while the petitioner chooses to remain away and refuses to reside with the respondent and in the home provided by him for said children."

The court found the following facts:

"The court finds as a fact, from the affidavits and oral testimony offered, that the petitioner and respondent are mother and father, respectively, of the children named in the petition, and that the father and mother, without divorce, are living in a state of separation, the mother now residing with petitioner's mother in Chesterfield County, near the city of Richmond, Va., and the respondent is now residing in Rowland, Robeson County, North Carolina, and that the children are now with their father in said county.

"The court finds that each of the parties hereto is a person of good moral character, and that there is nothing in evidence reflecting on either of said parties, except incompatibility of temper and disposition, and the differences and friction caused thereby; that the separation is

due to faults on both sides, but that there is nothing, in the opinion of the court, that Christian forgiveness and forbearance could not overcome; but that the court realizes that it is not in the power or jurisdiction of the court to do more than to find that there is nothing in the evidence adduced in the case which would in any way militate against or prevent a complete reconciliation and cohabitation upon the part of the petitioner and respondent.

"The court finds that the failure of the respondent to protect his wife from being frightened and terrorized by the visitation in their home in Rowland, and the circumstances surrounding it, was such as would prevent the petitioner from living with her husband at that place, and that her failure to return and live with him there should not be held against her as an abandonment.

"The court finds that the respondent, on or about the first day of November, 1922, went to the city of Richmond, where the petitioner was residing with two of the children, and surreptitiously obtained possession of said children and returned with them to his home in Rowland.

"The court had a private talk with the children, in addition to the evidence offered, in the effort to ascertain what would be for the best interest of said children.

"The court finds that the respondent is a capable and suitable person to have the custody of said children, and that said children are happy and are well provided for in their present home. The respondent is a minister of the gospel, in the active ministry, serving four churches, each of which has adopted resolutions testifying to his character as a minister and a man.

"The petitioner is residing now with her mother in Chesterfield County, near Richmond, Va. Her mother is a woman 71 years of age, worth about $40,000, has a large, commodious home, and is a woman of high Christian character. The brothers of petitioner are men of standing and character. The home where petitioner now resides is in every way a suitable place in which the mother may be associated with and know and be known to her children.

"The court is of opinion that the children, in the interest of their welfare, should be permitted to be associated with and to know their mother.

"The court finds that the petitioner is a woman of good standing and in every way suitable for the association with her children.

"The court finds that the petitioner, on 3 August, 1922, left the home of the respondent, taking with her the two daughters to her mother's, in Virginia; that while in respondent's home the differences and unpleasantness between petitioner and respondent were not sufficient, in law, to entitle her to a divorce from bed and board, nor to constitute an abandonment upon his part; that the respondent has always been a

dutiful and loving father to said children, and has means sufficient to reasonably provide for their nurture and upbringing; that the mother is a dutiful and loving mother and, in the opinion of the court, should not be prevented from an opportunity to associate with and to be known by her own children, subject to the superior custody of the children to the father.

The order of the court is as follows:

"This cause coming on to be heard, and being heard, before W. A. Devin, judge presiding over the courts of the Ninth Judicial District, at chambers in Lumberton, North Carolina, and this, the 15th day of June, 1923, and after consideration of the pleadings, affidavits, oral testimony and argument of counsel, the court finds that the custody of said children should be awarded the respondent, but that the welfare of the children, Anne Monroe, Margaret, and Archie Clegg, would be subserved by their spending a part of their time with the petitioner and part thereof with the respondent, and to that end it is ordered, adjudged and decreed that the custody of said children is awarded to the respondent, I. N. Clegg, upon the condition that the said children be allowed to reside with and associate with their mother, at the home of the petitioner's mother in Chesterfield County, near the city of Richmond, Va., until the first day of September, 1923, at which time the respondent shall have the care and custody of said children until the first day of June, 1924, and on the first day of June, 1924, and each year thereafter, until otherwise ordered, the said children shall be permitted to be and reside with their mother until the first day of September, 1924, and each year thereafter until otherwise ordered.

"The court finds that the respondent is a suitable person to have the care and custody of said children, but that their welfare would be promoted by permitting them to associate with and to know their mother, whom the court also finds to be a suitable and competent person.

"The expense of transporting the aforesaid children from the home of the respondent to the home of the petitioner shall be borne by the petitioner in each instance, and the expense of transporting the children from the home of the petitioner to the home of the respondent shall be borne in each instance by the respondent. Either the petitioner or the respondent shall have the right to visit said children at any time, whether in the custody of the petitioner or the respondent.

"Should conditions in the home life of either the petitioner or respondent materially change from what they now are, this order is made without prejudice to the right of either party to move the court to reopen this hearing, or for a modification of this order.

"The permission that said children may reside with their mother in the State of Virginia shall be conditioned upon the petitioner entering

into a bond in the sum of $5,000, to be approved by the clerk, conditioned upon her compliance with this order.

"The findings of fact by the court, upon which this order is based, are hereto annexed and made a part of the decree.

"It is ordered that respondent produce said children at Lumberton on 21 June, 1923, at 4 p. m., for compliance with this order.

"Done at Lumberton, N. C., the 15th day of June, 1923."

"Pending the appeal, so much of the order permitting the temporary removal of the children to Virginia is suspended, and pending said appeal the mother shall be permitted to be with and associate with her said children at the home of her brother and their uncle, Dr. D. M. McIntosh, at Old Fort, N. C., and the home of said McIntosh is found to be a suitable place for this purpose. And the children to be delivered to their mother for this purpose at the time and place mentioned in the order of the cause. And the said children shall not be allowed to be carried out of the State pending appeal.

"Respondent requests the court to fix amount of *supersedeas* bond to vacate this order pending appeal. Request refused, and respondent excepts and appeals to Supreme Court."

On 16 June, 1923, petition for writ of *supersedeas* was filed in Supreme Court, and notice was duly given to counsel for petitioner that the respondent would apply for such writ to his Honor, Walter Clark, Chief Justice, at chambers at Raleigh, N. C., on 18 June, 1923. On the return day, all parties, with their counsel, appeared, and upon consideration of respondent's petition for writ of *supersedeas,* and after argument of counsel, his Honor granted such writ, and respondent filed *supersedeas* bond in the sum of $5,000, as required by order of the Chief Justice. By consent of counsel of both parties, the Chief Justice also set the hearing of the appeal for the end of the call of the First District at Fall Term, 1923.

The court, on account of the controversy between a man and his wife with a family of four children, has recited the essential facts of difference between them as mildly as possible to determine the merits of the cause.

This Court is bound by the findings of fact made by the court below, if such findings are supported by any competent evidence. This is now the well-settled law of this State. In this case there was competent evidence to support all the findings of the court below.

Stacy, J., in *In re Hamilton,* 182 N. C., 47, says: "The findings of fact made by the judge of the Superior Court, founded as they are upon competent evidence, are also conclusive on us (*Stokes v. Cogdell,* 153 N. C., 181), and we must therefore base our judgment upon his find-

ings." This case was on petition to rehear (*In re Hamilton,* 183 N. C., 57), and the Court adhered to its former decision by dismissing the petition.

The respondent's first exception is to the refusal of the court below to dismiss this proceeding, or else to remand same to the Juvenile Court of Robeson County, as the controversy was one involving the custody of children under the age of sixteen, and the Superior Court had no jurisdiction.

The statute is plain in a case of this kind, and the Superior Court had jurisdiction. The findings of the court were "that the father and mother, without divorce, are living in a state of separation."

Chapter 41, C. S. (*Habeas Corpus*), sec. 2241, 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." *In re Natalie Blake,* 184 N. C., 278.

Respondent's second, third, and fourth exceptions are based on the court's findings of certain facts complained of. This is a matter in the sound discretion of the court below, and as there was some evidence on which the court below could find as it did, this Court is bound by the findings. *In re Hamilton, supra.* "The Supreme Court has jurisdiction to review, upon appeal, any decision of the court below upon any matter of law or legal inference. And the jurisdiction of said court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of 1868, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Const. of N. C., Art. IV, sec. 8.

The fifth and seventh exceptions of respondent were to the court below refusing to allow *supersedeas,* and to the judgment as signed. The action of the Chief Justice in granting the writ of *supersedeas* pending the hearing of this appeal renders any discussion of these exceptions unnecessary, and is in accord with the practice heretofore adopted by this Court. See *Page v. Page,* 166 N. C., 90.

The sixth exception of respondent was to that part of the judgment allowing the petitioner to have the custody of the children from June

to September each year, and allowing petitioner to take the children beyond the jurisdiction of the court.

In the view taken by the Court in this case, it will be unnecessary to discuss this exception. Nor will it be necessary to discuss petitioner's exceptions *seriatim*. The court below has found the material facts pertinent to the controversy.

Walker, J., in *In re Turner*, 151 N. C., 474, says: "We repeat what we said in *Newsome v. Bunch*, 144 N. C., 16, that the father is, in the first instance, entitled to the custody of his child. But this rule of common law has more recently been relaxed, and it has been said that where the custody of children is the subject of dispute between different claimants, the legal rights of parents and guardians will be respected by the courts as being founded in nature and wisdom, and essential to the virtue and happiness of society; still the welfare of the infants themselves is the polar star by which the courts are to be guided to a right conclusion; and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child, and in some cases will order it into the custody of a third person, for good and sufficient reasons. *In re Lewis*, 88 N. C., 31; Hurd on Habeas Corpus, 528, 529; Tyler on Infancy, 276, 277; Schouler on Domestic Relations, sec. 305, at p. 428; 2 Kent's Com., 205. But, as a general rule, and at the common law, the father has the paramount right to the control of his children as against the world; this right springing necessarily from and being incident to the father's duty to provide for their protection, maintenance, and education. 21 A. & E. Enc., 1036; Blackstone (Sharswood), 452, and note 10, where the authorities are collected. This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, when the empire of the father gives place to the empire of reason. 1 Blk., 452."

Hoke, J., in *In re Means*, 176 N. C., 307, says: "On the question thus presented, it is the established principle in this State that parents have *prima facie* the right to the custody and control of their infant children—the father, preferably, when it appears that he is fitted for the position and its responsibilities; though, as between the two, even when equally worthy, the mother may be allowed the superior claim when it is shown that the welfare of the child requires it. The doctrine and the basic reason for it, and the authorities with us upon which it rests, are set forth in the last case upon the subject, as follows: 'It is fully recognized in this State that parents have *prima facie* the right of the custody and control of their infant children, the natural and substantive right not to be lightly denied or interfered with, except when the good of the child clearly requires it.' *In re Mercer Fain*, 172 N. C., 790; *In re Mary J. Jones*, 153 N. C., 312; *Newsome v. Bunch*, 144

N. C., 15; *Latham v. Ellis,* 116 N. C., 30. . . . And, further, 'The best interest of the child is being given more and more prominence in cases of this character, and on special facts has been held the paramount and controlling feature in well-considered decisions,' citing *Bryan v. Lyon,* 104 Ind., 227; *In re Welch,* 74 N. Y., 299; *Kelsey v. Greene,* 69 Conn., 291; *Atkinson v. Downing,* 175 N. C., 244."

From the decisions of this State we have it said:

1. As a general rule, and at common law, the father has a paramount right to the control and custody of his children, and this continues until the children arrive at age. He is bound by law to provide for their protection, maintenance, and education.

2. That it is an established principle in this State that parents (both father and mother) have *prima facie* the right to the custody and control of their infant children—the father, preferably; and even as between the two, when equally worthy, the mother may be allowed the superior claim when it is shown the welfare of the children requires it.

3. That the welfare of the infants themselves is the polar star by which the courts are to be guided. In some cases it is the paramount and controlling features.

Under the findings of fact by the court below, and from an appeal by both the petitioner and respondent, this Court has the power, in its sound and legal discretion, to review the judgment of the court below, and can affirm, reverse, or modify it. This responsibility is great, as it deals with the lives of a father, mother, and four infant children. In this matter we are not passing on the material things of this world, but the most sacred thing connected with our social fabric—the home, father, mother, children. Our republic is founded upon the consent of the governed. The home is the rock foundation for the governmental structures. If the unity of the home is weak, some day the structure may crumble. The rapid strides in the material prosperity of this commonwealth are such that all should be thankful, yet we pause. The Bureau of the Census (United States Department of Commerce) shows, in 1916 there were 668 divorces in North Carolina; 1922, there were 1,317. In the comparative years the marriages have been about the same, while divorces were increased 100 per cent.

From the record in this case, there is no divorce nor the suggestion, but a separation. The court below was cautious and careful not to widen this unfortunate and deplorable separation. The court found:

"That the respondent is a capable and suitable person to have the custody of said children, and that said children are happy and well provided for in their present home. The respondent is a minister of the gospel, in the active ministry, serving four churches, each of which has adopted resolutions testifying to his character as a minister and a

man. . . . That the children, in the interest of their welfare, should be permitted to be associated with and to know their mother. . . . That the petitioner is a woman of good standing and in every way suitable for the association with her children. . . . That the respondent had always been a dutiful and loving father to said children, and has means sufficient to reasonably provide for their nurture and upbringing; that the mother is a dutiful and loving mother, and, in the opinion of the court, should not be prevented from an opportunity to associate with and to be known by her own children, subject to the superior custody of the children to the father."

This is a matter so vital to the welfare of so many concerned, it may not be amiss to call attention to the solemn admonition given at this marriage altar:

"Into this holy state these two persons are come to be joined. Therefore, if any man can show any just cause why they may not lawfully be joined together, let him now declare it, or else hereafter forever hold his peace.

"Hear now what holy scripture doth teach as touching the duty of husbands to their wives, and of wives to their husbands.

"Husbands, love your wives, even as Christ also loved the church and gave Himself for it, that He might sanctify and cleanse it with the washing of water by the word. So ought men to love their wives as their own bodies. He that loveth his wife loveth himself. For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh.

"And, wives, submit yourselves unto your own husbands as unto the Lord. For the husband is the head of the wife, even as Christ is the Head of the Church. And He is the Saviour of the body. And again He saith, Let the wife see that she reverence her husband."

In considering the welfare of the children, the polar star, and the husband's paramount right to the control and custody of the children, let us not forget to consider the equal right of the mother. It was in Eden that she was made a "helpmeet for him." It was He who said, "Bone of my bone, and flesh of my flesh." It was a divine edict. "Therefore, shall a man leave his father and his mother and shall cleave unto his wife, and they shall be one flesh." She has walked through the valley of the shadow of death four times for love of him. There are those little children—two girls, who now know not a mother's tender care or caressing kiss. Yes, the welfare of the child is the polar star. As they kneel each night to say "Our Father who art in heaven," in the darkness, when the lights are out and the father gone, the heart-sobs are for the mother who bore them. Is it for their welfare that she is forgotten? The responsibility for their welfare is dual on both father

and mother. The God-given jewels belong to both. It was a great lawyer, Gamaliel, at whose feet Paul was taught. In citing Paul, it may be also the ideal of his great preceptor, "Nevertheless, let every man of you in particular so love his wife even as himself; the wife see that she reverence her husband." Ephesians, 5:33.

In the able argument of the attorneys in this case, one of the representatives of the petitioner was twitted as being a bachelor. One of the most beautiful tributes paid by man to woman was written by a bachelor: "As a vine which has long twined its graceful foliage about the oak, and been lifted by it into sunshine, will, when the hardy plant is rifted by the thunderbolt, cling around it with its caressing tendrils, and bind up its shattered boughs, so is it beautifully ordered by Providence that woman, who is the mere dependent and ornament of man in his happier hours, should be his stay and solace when smitten with sudden calamity, winding herself into the rugged recesses of his nature, tenderly supporting the drooping head, and binding up the broken heart." Washington Irving's "The Wife."

It appears from the facts in evidence, and the findings of the court below, that both parents are fit and proper persons to raise and care for their children. The order of the court below is modified as follows:

The Court finds that the custody of said children should be awarded the respondent, their father, but that the welfare of said children, Annie Monroe, Margaret and Archie Clegg, would be subserved by their spending a part of their time each year hereafter with the petitioner, their mother, and a part thereof with the respondent, their father, and to that end:

It is ordered, adjudged and decreed that the custody of said children is awarded to their father, I. N. Clegg, upon the condition that said children be allowed to reside with and associate with their mother, at the home of her brother and their uncle, Dr. D. M. McIntosh, at Old Fort, N. C., and the home of Dr. McIntosh is found to be a suitable place for the purpose, from the first day of June, 1924, until the first day of September, 1924, during which time the petitioner shall have the care and custody of said children, and during said summer months each year until otherwise ordered. That the petitioner, the mother, shall at all times during the time when the respondent, the father, has the custody of said children, from the first of September until the first of June of each year, have ingress and egress to the home of the respondent, her husband, to see said children, look after, nurse and care for them in such manner and way as will best promote the welfare of the children, but in no way impairing the authority of the respondent, the father, in the home. Either the petitioner or the respondent shall have the right

to visit the said children at any time, whether in the custody of the petitioner or the respondent. That the petitioner, before taking the children herein named each summer to the home of their uncle, Dr. D. M. McIntosh, shall give bond in the sum of $5,000 for the return of said children to the custody of their father on the first day of September of each year thereafter until otherwise ordered. That said bond shall be made payable to the State of North Carolina and be filed with the clerk of the Superior Court of Robeson County and approved by him, before the children are turned over to the petitioner for her care and custody of said children during the summer, the bond to be conditioned that she does not take the said children out of the State. That the respondent pay for the transportation of said children and their reasonable board during the summer months as fixed by the clerk of the Superior Court of Robeson County. That the respondent pay all the costs of this action. That this cause will be retained on the docket of the Superior Court of Robeson County, as this judgment is not intended to be a final determination of the rights of the parties touching the care and control of the children, and on change of conditions properly established the question may be further heard and determined. The appeal of the petitioner and the appeal of the respondent from the judgment of the Superior Court are modified in accordance with this opinion.

The costs of the appeal and the hearing will be taxed against the respondent; that of the lower court to be made out and judgment entered therefor by the clerk of the Superior Court of Robeson County.

Modified and affirmed.

STACY, J., dissenting: I regret very much my inability to concur in the disposition that is to be made of this cause. I am not in disagreement with any of the principles of law stated in the opinion of the Court, but my position arises from a different conception of the significance which should be given to some of the essential facts of the instant record.

The petitioner alleges that, for good and sufficient reasons, she can no longer live with the respondent as his wife. If this be true, the present judgment would seem to be a hard measure of justice for her and for her children. But the Court's decision, as I understand it, is based upon the hope that the healing balm of time, "the great softener of anger and soother of pain," will successfully dispel the fears upon which this allegation is made. I do not dissent from this hope, but to my mind it is too shadowy and holds out too little promise of fruit to serve as a controlling factor in determining the rights of the parties. I have a different estimate of the record. However, as the present order is subject to change or modification at any time, I shall not undertake to state now the full reasons for my dissent.

W. E. EVANS AND MAMIE EVANS v. C. C. DAVIS AND ROCKY MOUNT INSURANCE AND REALTY COMPANY.

(Filed 12 September, 1923.)

1. Contracts—Deeds and Conveyances.

The principle affording relief for fraud and deceit applies in proper instances to deeds and contracts concerning both real and personal property, the essential features ordinarily being that there should have been false representations of some material fact, within the knowledge of the party making it, and reasonably relied upon by the other, whereby he was induced to enter into the contract to his pecuniary injury.

2. Deeds and Conveyances — Fraud — Deceit — Acreage — Ignorance of Fraud—Misrepresentations.

In order to recover damages against a grantor of lands for fraud and deceit in misrepresenting the number of acres contained within the designation of the land in the deed, it is not always required that the party to be charged had known that the land did not contain the number of acres he has represented it to contain, when he is consciously and knowingly ignorant as to whether his representation has been true or false.

3. Pleadings—Demurrer—Fraud—Deceit—Deeds and Conveyances.

The grantee of the codefendant conveyed to plaintiff certain designated lands, and the complaint in the action alleged false and fraudulent representation made by plaintiff's immediate grantee in the number of acres within the description of the lands conveyed, which was identical with that of his codefendant in the deed to him, it appearing from the pleadings that these alleged misrepresentations were made solely upon the representations made to him by his grantor, with no allegation to show any connection between the two transactions or any concert of the defendants concerning them: *Held*, the complaint did not state a cause of action either against the grantee of the codefendant or against the plaintiff's immediate grantor in failing to allege facts to show knowledge on his part of the deficiency in the acreage of land at the time he executed his conveyance or at any other time, or that he was guilty of fraud as to the quantity of the land conveyed, and a demurrer as to both should have been sustained.

4. Deeds and Conveyances—Fraud—Deceit—Damages—Evidence.

In an action for damages for fraud and deceit for misrepresenting the number of acres contained in a tract of land designated in a deed by metes and bounds, and accessible to the plaintiff, he is required to have protected himself by proper covenants in that respect; and in the absence of positive fraud, or allegation, or evidence sufficient to correct the deed for mistake, etc., he is ordinarily without remedy.

5. Deeds and Conveyances — Fraud — Deceit — Misrepresentations — Evidence.

Where the basis of the cause of action is fraud and deceit in the defendant's misrepresentation of the acreage of a tract of land he had conveyed to the plaintiff, the complaint must allege the facts necessary for the

granting of the relief specifically and definitely, and general allegations that defendant breached his covenants contained in his deed, and deceit and fraud have therein been practiced on the plaintiff, are not sufficient.

6. Pleadings—Deeds and Conveyances—Fraud—Deceit—Allegations—Covenants.

Where there is no specific allegation of the facts constituting fraud and deceit in the misrepresentation by the defendant grantor of the number of acres contained within the description by metes and bounds in his deed, the general warranty of title, with no covenant as to the acreage, in the absence of allegation and evidence sufficient to correct the deed for mistake, etc., attach to the land conveyed by the description, which is not affected by a recitation that the boundaries given contained a certain number of acres, "more or less."

7. Pleadings—Amendments—Costs—Courts.

Where, in an action to recover damages for fraud and deceit in the misrepresentation of the acreage contained in the description of lands by metes and bounds in the deed, there is no allegation or evidence sufficient to correct the deed for mistake, etc., it is competent for the court to enter an order allowing the plaintiff to amend his complaint, and tax the costs against him. *Shore v. Davis*, 185 N. C., 312.

APPEAL by defendant Davis from *Kerr, J.*, at February Term, 1923, of NASH.

Civil action, heard on demurrer to complaint.

The action is to recover damages of the defendants, growing out of certain sales of a piece of real estate in said county in the years 1919 and 1920. The defendants filed separate demurrers, on the ground that the complaint failed to state a cause of action against either. The court entered judgment as follows:

"This cause coming on to be heard upon demurrer by Rocky Mount Insurance and Realty Company, defendant, and it appearing to the court that the complaint does not state a cause of action against said Rocky Mount Insurance and Realty Company, it is ordered that the action be dismissed as to the Rocky Mount Insurance and Realty Company, and that said defendant go hence without day and recover its costs of plaintiff. Upon demurrer filed by defendant C. C. Davis, the demurrer is overruled and the plaintiff allowed to file an amended complaint, and defendant Davis to answer over."

Defendant Davis excepted and appealed.

Thorne & Thorne for plaintiffs.

E. B. Grantham and Finch & Vaughan for defendants.

HOKE, J. The complaint filed against both of defendants contained averment, among other things, "that in January, 1919, the defendant, the Rocky Mount Insurance and Realty Company, sold and conveyed to

the codefendant, C. C. Davis, a piece of land in Rocky Mount, N. C., definitely describing the same by metes and bounds, and represented in the deed as 'containing 22½ acres, more or less,' and the conveyance having also the usual covenants of warranty, seizin, etc. That at the time of this sale and conveyance the Insurance and Realty Company expressly represented to said C. C. Davis that the lands described in the deed contained 22½ acres, whereas in fact and in truth said representations were false and fraudulent, said lands containing only 12 acres.

"Second, that thereafter, on 20 January, 1920, C. C. Davis and wife, Lizzie Davis, sold and conveyed said land to Mamie Evans, wife of W. E. Evans, set out and described as in the other deed, and represented as 'containing 22½ acres, more or less.' That plaintiffs paid to C. C. Davis $6,500 as purchase money for said land on the assurance of said C. C. Davis that the tract of land contained 22½ acres. That this deed also contained the usual covenants of warranty, seizin, etc. That present plaintiffs had no knowledge of the boundary of the land at the time of the purchase from C. C. Davis, and would not have purchased this land or paid the price but for the representations of C. C. Davis that there were 22½ acres in the tract. That some time after taking the deed, in June or July, 1921, plaintiff had the boundary pointed out to him, and ascertained that there were only 12 acres in the boundaries of the deed."

In section 10 the complaint closes with the following averment: "These plaintiffs aver that there has been a breach of the covenants of seizin and warranty contained in the two deeds hereinbefore referred to. Such covenants of seizin and warranty are fully set out in this complaint; and, furthermore, that deceit and fraud have been practiced on these plaintiffs or on their grantor, C. C. Davis. In consequence of the breach of said covenant of seizin, and deceit and fraud, these plaintiffs have been damaged in the sum of $1,380." And thereupon demands damages of defendant for $1,380.

It is fully recognized in this State that the principle affording relief for fraud and deceit applies in proper instances to deeds and contracts concerning both real and personal property. *May v. Loomis,* 140 N. C., 350; *Walsh v. Hall,* 66 N. C., 233. The essential features of such an action ordinarily being that there should have been false representations of some material fact or facts—false within the knowledge of the party making them, and reasonably relied upon by the other, whereby he was induced to enter into the contract to his pecuniary injury. This requirement as to a knowledge of the falsity by the party charged has been extended under certain circumstances to cases where one who should be expected to know gives positive assurance as to the existence of a material fact as an inducement to the bargain, when he is con-

sciously ignorant whether the same be true or false. Helpful cases in illustration of these positions being found in *Bell v. Harrison,* 179 N. C., 190; *Modlin v. R. R.,* 145 N. C., 218; *Whitehurst v. Insurance Co.,* 149 N. C., 273.

In *Bell v. Harrison* the principle is stated as follows: "Fraudulent representations, made in the procurement of a deed, sufficient to set it aside must be untrue in fact, made by the party inducing it with a knowledge of its being false or consciously ignorant thereof with intent that the other party should act thereon, or calculated to induce him to do so, and upon which he acted to his damage."

And in the *Whitehurst case* the same position is given: "When an agent of an insurance company has induced the insured to take a policy of insurance in his company by making misrepresentations of a material fact concerning which, as such agent, he should have known the truth, or makes it recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, his principal may be held responsible by the insured relying, and having reasonable ground to rely, upon the agent's statement as importing verity."

Applying these principles, there seems to be sufficient allegations of fraud in the complaint to sustain an action of fraud and deceit on the part of the Insurance and Realty Company in the sale and conveyance to Davis; but if this be conceded, there is no allegation which to our mind shows or tends to show that the wrong, if it existed, was done to plaintiff. The sale and conveyance from the company to C. C. Davis was made one year prior to that from Davis to plaintiffs. There are no facts alleged showing or tending to show any connection between the two transactions, or any concert of the parties defendant concerning them. The wrong in the first instance, if any, was done to C. C. Davis, a codefendant, who makes no complaint, and the court was undoubtedly right in sustaining the demurrer of the Insurance and Realty Company as to any suit against it in favor of plaintiffs or either of them.

In reference to the alleged cause of action against C. C. Davis, the complaint as now drawn contains no allegation that the defect in quantity of land complained of in the defendant's deed was known to such defendant at the time he executed his conveyance or at any other time, or that said defendant was guilty of any fraud in his representations as to quantity. The land was a small tract in the city of Rocky Mount, accessible so far as appears, and definitely described by metes and bounds. And in the absence of positive fraud on the part of vendor inducing the trade, and reasonably relied upon by the purchaser, the latter should have protected himself by proper covenants, or he is ordinarily without remedy.

On the facts appearing in the present record, the principle applicable is very well stated in the case of *Etheridge v. Vernoy,* 70 N. C., 717-724, as follows: "In contracts for the sale of land it is the duty of purchasers to guard themselves against defects of title, quantity, encumbrances and the like; if they fail to do so, it is their own folly, for the law will not afford them a remedy for the consequences of their own negligence. But if representations are made by the bargainor, which may reasonably be relied on by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Walsh v. Hall,* 66 N. C., 233."

A statement of the position fully approved in our more recent decisions on the subject. *Galloway v. Goolsby,* 176 N. C., 635; *Turner v. Vann,* 171 N. C., 127.

True, in the tenth paragraph of the complaint it is alleged in a general way that there has been a breach of the "covenants contained in the deed, and that deceit and fraud have been practiced on these plaintiffs or their grantor, C. C. Davis," but no issue of fraud is presented against defendant Davis by such a general averment as this, our decisions being to the effect that where it is sought to base one's relief on the ground of fraud, the allegations of fact must be specific and definite. *Galloway v. Goolsby, supra; Mottu v. Davis,* 151 N. C., 237.

Nor is there any actionable wrong set forth by reason of the breach of covenants contained in the deed. This land, as we have seen, is definitely described by metes and bounds, covering 12 acres. In the absence of allegation and evidence tending to correct the deed for mistake, etc., these ordinary covenants in assurance of the title attach to the land conveyed in the deed, and not otherwise. And the authorities apposite are decisive to the effect that where real property is conveyed by metes and bounds the quantity of land and the obligations of the deed concerning it are in no way affected by the addition of the words "containing so many acres, more or less." *Galloway v. Goolsby, supra; Turner v. Vann, supra.*

In the last case it is held that where a tract of land is sold as a whole, without stipulation or warranty as to the number of acres it contains, and in the absence of fraud, the purchaser may not recover an abatement of the price for a shortage of acres the tract is supposed to contain. In this instance the specific boundaries describing the land contain only 12 acres, and, there being no defect in the title as to such amount, there has been no breach of the covenants appertaining to title. Rawle on Covenants, sec. 297, wherein it is said, among other things: "As, there-

fore, the descriptive boundaries control the quantity, it has been repeatedly held that the covenants for title apply to the premises contained within those boundaries, and not to any enumeration of acres."

In our opinion, therefore, neither in one aspect or the other has there been a cause of action sufficiently stated against defendant Davis, and as to him also the demurrer should have been sustained. The demurrer having been sustained and the action dismissed as to the Insurance and Realty Company, and no appeal having been taken, the action stands, therefore, on a defective statement of a cause of action as against C. C. Davis, and it is competent for the court to enter an order allowing plaintiff to amend his complaint as to said defendant, and to that extent the judgment is affirmed — a course that is fully approved by the decisions. *Shore v. Holt,* 185 N. C., 312; *Campbell v. Light & Power Co.,* 166 N. C., 488; *Fidelity Co. v. Jordan,* 134 N. C., 236-244; *Morton v. Telephone Co.,* 130 N. C., 299; *Mitchell v. Mitchell,* 96 N. C., 15.

The question of misjoinder of parties, etc., has not been considered, as defendants have not seen proper to raise or rely on it.

This will be certified, that the demurrer of C. C. Davis be sustained, with leave to plaintiff to file an amended complaint as to him. Defendant Davis having been compelled to prosecute his appeal to avoid being concluded by the judgment on questions presented, the costs will be taxed against appellee.

Reversed and remanded.

NORFOLK SOUTHERN RAILROAD COMPANY v. A. B. HOUTZ AND FOREMAN-BLADES LUMBER COMPANY.

(Filed 12 September, 1923.)

1. Carriers of Freight — Wrongful Delivery — Damages — Notice — Evidence—Questions for Jury.

Where there is evidence tending to show that the carrier had delivered to a third person a shipment of logs, who had used them, and that these logs were intended to be used by the consignee for mine props of a higher market value than mill logs, and the evidence is conflicting as to their suitability as mine props, it is reversible error, in the carrier's action against such third person and the consignee for an adjustment of its liability, for the court to instruct the jury that the liability of such third person to the carrier depended upon notice either to the carrier, or to him, that the logs were intended for mine props, it being for the jury to determine, under conflicting evidence, the suitability of the shipment for mill logs or mine props, and answer the issue as to the carrier's damages according to their market value at destination, considering the evidence as to the prepayment of the freight.

2. Same—Instructions—Appeal and Error.

Held, under the evidence of this case, the conflict in the charge as to notice and the recovery of damages for the greater value of the logs as mill props, was reversible error, to the carrier's prejudice.

APPEAL by plaintiff from *Connor, J.*, at February Term, 1923, of PASQUOTANK.

Civil action.

On 31 August, 1920, W. E. Blount shipped from Mackeys, over the plaintiff's road, two car-loads of logs to A. B. Houtz at Elizabeth City. The logs arrived there on 1 September, 1920, and, by mistake, were delivered to and used by the Foreman-Blades Lumber Company. Houtz demanded of the plaintiff $312.23, the alleged value of the logs, with interest from 1 September, 1920, and the plaintiff in its complaint demanded the same amount of the Foreman-Blades Company, who contended that the value of the logs was only $197.08, and admitted its liability to the plaintiff for this amount. The issues were answered as follows:

1. In what sum, if any, is Norfolk Southern Railroad Company indebted to A. B. Houtz? Answer: $312.23, with interest from 1 September, 1920.

2. In what sum, if any, is defendant, Foreman-Blades Lumber Company, indebted to Norfolk Southern Railroad Company? Answer: $197.08, without interest.

The plaintiff contended that there should be no difference in the answers.

Houtz recovered judgment against the plaintiff for $312.23, with interest from 1 September, 1920; and as the Foreman-Blades Lumber Company had paid into court for the benefit of the plaintiff $197.08, it was adjudged that the company recover its costs. The plaintiff appealed.

Thompson & Wilson for the plaintiff.
W. A. Worth for A. B. Houtz.
Meekins & McMullan for the Lumber Company.

ADAMS, J. The plaintiff excepted to each of the following instructions:

1. "I instruct you that, notwithstanding you may find that Mr. Houtz had had these logs cut for a purpose other than sawmill logs, to wit, mine props, if the logs were just as suitable for saw logs as for mine props, then the fact that Mr. Houtz intended them for a purpose that would give them a higher value would not be considered by you, unless you find that the railroad company was put on notice that these logs were mine props."

2. "The railroad company says that your answer to the second issue should be the same as your answer to the first issue, and I instruct you, gentlemen of the jury, that that would be true, provided you find that the same quantity of logs were delivered the Foreman-Blades Lumber Company as were received by the railroad company at Mackeys, and subject to my instruction to you with reference to the market price of logs and mine props. As between the railroad company and Foreman-Blades Lumber Company, I instruct you that there is no evidence from which you can find that these logs had any value as mine props, and your inquiry would be, what were the logs worth in the condition that they were when delivered by the railroad company to the Foreman-Blades Lumber Company? There is no evidence here from which you can find that for the purposes of the value that these were mine props with respect to this issue; but, gentlemen of the jury, you will consider all the evidence here to determine what that value is."

In giving these instructions, his Honor probably had in mind the law applicable to consequential damages or the loss of profits. Upon the first issue he permitted consideration of the "higher value" of the logs only in case the plaintiff had notice that they were mine props; and upon the second he withdrew from the jury all evidence of their value as props, and in effect confined the estimate to the market value of mill logs as the limit of the lumber company's liability. This, we think, was prejudicial to the plaintiff. True, it is held that in the absence of the carrier's actual or constructive notice that the claimant relies on special circumstances for damages additional to such as are the natural and probable result of the wrong, consequential damages cannot be recovered, whether the cause of action be treated as a breach of contract or as a negligent omission to perform a public duty arising out of contract. *Sharpe v. R. R.*, 130 N. C., 614; *Lee v. R. R.*, 136 N. C., 533; *Lewark v. R. R.*, 137 N. C., 384; *Development Co. v. R. R.*, 147 N. C., 504; *Furniture Co. v. Express Co.*, 148 N. C., 88; *Coppersmith v. R. R.*, 184 N. C., 26; *Causey v. Davis*, 185 N. C., 155.

But, according to the evidence as we understand it, the amount that may be recovered against the plaintiff or the lumber company is not necessarily dependent upon the question of notice. There is another theory upon which the controversy may turn. There was evidence tending to show that at the time the shipment was to be delivered, both mill logs and mine props had a market value, and that the value of the props was greater than that of the logs; that logs cut in multiples of eight and nine feet might be recut to the proper length for mine props; that the logs purchased by Houtz were cut for mine props according to specifications; that the lumber company was engaged in selling both

logs and props, and that props may be cut into mill logs. There was other evidence tending to show that mine props are not cut under eighteen feet in length, and that the timber shipped was from twelve to sixteen feet in length and known as mill logs. In several particulars the evidence concerning these questions was inconsistent, if not conflicting.

It is therefore apparent that the jury should first find from the evidence whether the logs shipped to Houtz were mine props or mill logs, and then determine their market value at the place of destination at the time when they should have been delivered to the purchaser. If they were mine props and, as such, had a market value when they should have been delivered to Houtz, delivery by mistake to the lumber company did not alter either their quality or their value. The test is their value on the market. If, on the other hand, they were mill logs and not props, neither the plaintiff nor the lumber company would be liable for anything more than the market value of such logs. If they were suitable for either purpose, the want of notice to the plaintiff or to the lumber company of probable loss arising from special circumstances would not preclude the jury from considering the higher market value. The issues should be considered in accordance with these principles, and to this end a new trial is necessary. Of course, evidence as to the payment of freight charges, if any, must not be overlooked. Sutherland on Damages (3 Ed.), secs. 910, 1098; Hale on Damages, 252; *Howard v. Ross,* 3 N. C., 333; *Denby v. Hairston,* 8 N. C., 316; *Fowler v. Ins. Co.,* 74 N. C., 89; *Grubbs v. Ins. Co.,* 108 N. C., 472; *Hart v. R. R.,* 144 N. C., 91.

New trial.

J. H. HALE v. ROCKY MOUNT MILLS.

(Filed 12 September, 1923.)

1. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Exception to the statement of the contentions of the parties by the trial judge in his charge to the jury must be aptly taken before verdict.

2. Appeal and Error — Instructions — Objections and Exceptions — Indefiniteness.

Exceptions to the charge of the court will not be considered on appeal when they are too general and indefinite.

3. Evidence—Nonsuit—Negligence—Machinery.

Evidence in this case that plaintiff, an employee of the defendant cotton mill company, was uninstructed and inexperienced, and had his hand

caught and injured by a concealed belt with sharp pins therein, rapidly revolving in a cylinder, to carry off lint cotton, which the plaintiff was required to clean at certain intervals of the day: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to refuse defendant's motion as of nonsuit.

APPEAL by defendant from *Kerr, J.*, February Term, 1923, of NASH.

The plaintiff was an employee of the defendant, and was injured while cleaning out a machine known as the Garnet hard-waste machine, a very large machine, through which lint cotton was carried.

The plaintiff's duties required him to clean the screens at least twice a day. The machine was composed of three sections, each section containing a beater and a screen. The beater was a rapidly revolving cylinder, on which there were sharp pins. This caught the cotton, separated it, and a draft of air threw it on the screens, from which it passed into another section. These screens were operated by a belt, and the beater by a different belt. This was a nearly new machine, having been installed not more than a year before the plaintiff was injured.

At the time of his injury the plaintiff was 58 years of age and had worked for the defendant about six years, but not in connection with this machine, which was new work to him. There was a belt-shifter which controlled the screen and the moving platform, and another belt which controlled the beater.

In order to clean the screen, the plaintiff would open a glass door, insert his hand and pull the waste cotton off of the screen and out of the machine. Before operating the machine at which he was injured, the plaintiff had worked in the card room. He knew nothing about operating this machine until about two months before he was injured. He testified that Moore, who was overseer and assistant superintendent of the mill, sent him to one Dillard Ellis, who was operating the machine, to take Ellis' job and send him upstairs in the mill for other work. The plaintiff had had no experience or instruction in the operation of this machine. The witness testified as to the manner in which he was injured: "I stopped the screens. They do not stop together. And then I went around and threw the beater loose, and went out and talked to my brother, I suppose, five or ten minutes, and then went back, and went to cleaning out the screens as I was told to do. If the waste gets in where it runs under the lint, it will cause the machine to burst, and it did burst one time. Some of the waste got caught on my fingers and jerked me down in it. The place where I had my hand was stopped, and I was doing exactly as I had been told to do. The waste got caught round my fingers. I had stopped the beater before I went out to talk to my brother, and I had pulled the loose pulleys on both. I stopped it the way I was shown, by pulling the lever; it draws the belt on the

loose pulley. Then I went out to talk to my brother, who worked in another room, and then I went back in there and went to cleaning the screens. You can't see the beater at all, and can't tell by sign or noise that it is running. I had not been told that when the belt was shifted on the loose pulley the beaters did not stop. I thought they would. Nobody had ever instructed me about the running, but I learned afterwards that it stopped or continued to run. I was hurt by the revolving of the beaters after I had taken every precaution as told. Two of the screens rolled together. The beater has shags, or nails." The witness further stated that he stopped both the screens and the beater by throwing the belt on the loose pulley, and that when he came back from seeing his brother five or ten minutes, he went to cleaning out the screens. The screens stopped at once. "You clean it by running your hand in the door. When I opened the door, there was nothing in there that I could see to tell that the beater was running, nor could I hear it. Some of the waste got caught on my hand and jerked it into the beater. I lost four fingers."

The motion of the defendant for nonsuit was overruled, and the defendant excepted. The jury found upon the issues that the plaintiff was injured by the negligence of the defendant, as alleged in the complaint; that he was not guilty of contributory negligence, and assessed his damages. Judgment upon the verdict, and appeal by the defendant.

Manning & Manning, Finch & Vaughan, and M. S. Strickland for plaintiff.

Battle & Winslow and L. V. Bassett for defendant.

CLARK, C. J. All the assignments of error, other than the one to the nonsuit, are that the several instructions given were erroneous, in that "They were not justified by the allegations in the complaint and the evidence." These exceptions do not entitle the defendant, as its brief admits, to a new trial, for the reason that the exceptions to the statement by the judge of the contentions of the parties must be made before verdict. Besides, they are too general and indefinite. And as to the nonsuit, the evidence was sufficient to submit the case to the jury.

No error.

J. T. SAWYER v. W. CECIL PRITCHARD ET ALS.

(Filed 12 September, 1923.)

1. Deeds and Conveyances—Contracts — Interpretation — Intent — Evidence.

In construing deeds or other written contracts, the intent of the parties is to be given effect as expressed in the instrument by the language used, when it is explicit in terms and plain in meaning, which may not be explained or modified by parol evidence unless it is capable of more than one construction, in which event the court may admit evidence of extraneous circumstances relevant to the inquiry and which may naturally tend to aid it to a correct conclusion of the meaning intended by the parties.

2. Same.

The heirs at law of the original owner of forty acres of land, after the death of his widow, took possession of twenty acres thereof which had been assigned to her as her dower, as against her grantee thereof who sued to recover possession. It was made to appear that the defendants, during the existence of the dower interest, filed their petition to sell the whole of the forty-acre tract for a division, the decree directed a sale of the land described in the petition, the commissioner appointed to sell reported he had sold to the plaintiff the entire tract of forty acres, and upon decree conveyed to the plaintiff, the purchaser, the entire tract by metes and bounds, "containing forty acres, excepting, however, so much thereof as was assigned to the widow as her dower interest": *Held*, the commissioner's deed conveyed the entire forty acres to the plaintiff as purchaser, excluded only the dower interest of the widow, not the entire land on which it had been allotted.

APPEAL by plaintiff from *Connor, J.*, at January Term, 1923, of PASQUOTANK.

Civil action, to recover possession of a tract of land containing forty acres, known as the Albertson lands, formerly owned by W. J. Albertson, deceased.

Defendants, the children and heirs at law of W. J. Albertson, resist recovery of twenty acres of said lands, same being the portion formerly covered by the allotment of dower therein to the widow of said W. J. Albertson and disclaimed as to the other twenty acres. At close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Aydlett & Simpson for plaintiff.
W. L. Small and Ehringhaus & Hall for defendants.

HOKE, J. On the hearing it was properly made to appear that the entire tract of forty acres was formerly owned by W. J. Albertson, deceased; that on his death his widow had her dower duly allotted in said land and covering twenty acres of same by metes and bounds; that

the widow sold her dower interest to N. J. Williams, who occupied and controlled same till her death, prior to commencement of present action, when defendants assumed possession of this twenty acres, claiming to own same as children and heirs at law of W. J. Albertson; that in 1919, during the existence of the dower estate, defendants filed their petition to sell the forty acres of land for division; a sale was ordered, and plaintiff purchased the land, and on confirmation of same and payment of purchase price, received the commissioners' deed and offered same in evidence, together with the court proceedings on which same is based.

Defendants, admitting control and possession of the twenty acres, resist recovery:

First, on the ground that the commissioner's deed on its face did not convey or purport to convey the twenty acres of land covered by the allotment of dower.

Second, if it did, there was no agreement or intent or purpose to convey that portion of the land, and the deed, therefore, was so drawn by mutual mistake, etc.

From a perusal of the court proceedings introduced by plaintiff, it appears further that in the petition filed by defendants for sale of their father's land the entire tract is described, "and as containing forty acres." The decree directs a sale of the land "described in the petition." The commissioner in his report states that he had sold the entire boundary, "containing forty acres." The decree of confirmation recites a sale of the land as described, and the deed of the commissioner conveys the entire tract by metes and bounds, "containing forty acres, excepting, however, so much thereof as was assigned to Mrs. Bertie Albertson as her dower interest."

It is well recognized with us that in the interpretation of deeds and written contracts the object is to ascertain and give effect to the intent of the parties as expressed in the instrument, and that while the language therein, which is explicit in terms and plain of meaning, may not be explained or modified by parol evidence, yet when the written words are capable of more than one construction, the court may hear evidence of extraneous circumstances relevant to the inquiry and which will naturally tend to aid it to correct conclusion as to which meaning was intended. *Montague v. Simpkins,* 178 N. C., 270-273; *Bank v. Furniture Co.,* 169 N. C., 180; *McCallum v. McCallum,* 167 N. C., 310; *Triplett v. Williams,* 149 N. C., 394; *R. R. v. R. R.,* 147 N. C., 368-382; *Merriam v. United States,* 107 U. S., 437-441; *Adams v. Frothingham,* 3 Mass., 352; 2d Devlin on Deeds (3d Ed.), 1523-1536; 1st Beach on Modern Law of Contracts, secs. 702-719.

In *R. R. v. R. R., supra,* it is held: "The object of all rules of interpretation is to arrive at the intention of the parties as expressed in the

contract; and in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument; and while in arriving at this intent, words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the context or admissible evidence shows that another meaning was intended."

In *Merriam v. United States, supra, Associate Justice Woods,* delivering the opinion, said: "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."

And in the citation to Beach the principle is stated as follows: "Where the language of an instrument is ambiguous and susceptible of more than one construction, that construction will be adopted which, in the light of surrounding circumstances and upon a view of the whole instrument, is in accordance with the apparent intent of the parties. In order to arrive at the intention of the parties, inquiry may be made as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution."

Considering the commissioner's deed to plaintiff in the light of these principles, we think the same, as now drawn, conveys, as stated, the entire forty acres of land, and that the dominant and controlling words of the exception are the "dower interest of the widow." And if there is sufficient doubt of this construction, the same is put at rest by the attendant circumstances appearing in the petition, decrees, report, etc., confirming the view that the entire tract is conveyed, subject only to the dower interest of the widow, and no more.

This will be certified, that the judgment of nonsuit be set aside without prejudice, and the cause further proceeded with as the parties may be advised.

Reversed.

BROCK & SCOTT PRODUCE COMPANY AND SWIFT & COMPANY v. C. A. BROCK.

(Filed 12 September, 1923.)

1. Actions—Misjoinder—Parties—Causes of Action.

An action brought by the payee of a negotiable note, and the endorser, against the maker, who has defaulted in payment, alleging ownership of the note sued on, is not a misjoinder of causes of action or parties, but a single cause of action by both plaintiffs against the defendant, and a demurrer on that ground is bad.

2. Pleadings—Demurrer—Allegations of Complaint.

Upon demurrer to a complaint, the allegations therein are taken for the purpose as correct and as made.

APPEAL by defendant from *Connor, J.*, at March Term, 1923, of PASQUOTANK.

Civil action to recover upon a promissory note, given to Swift & Company by the defendant, and endorsed, or payment guaranteed, by Brock & Scott Produce Company.

The defendant demurred upon the ground that there was a misjoinder, both of parties and of causes of action. Demurrer overruled. Defendant excepted and appealed.

R. C. Lawrence, W. L. Small, and Ehringhaus & Hall for plaintiffs.
Aydlett & Simpson for defendant.

STACY, J. On 1 May, 1922, the defendant gave to Swift & Company a sixty-day note for $380 in payment for certain commercial fertilizers which he had purchased from said Swift & Company through its agent, Brock & Scott Produce Company. This note was endorsed, or payment guaranteed, by Brock & Scott Produce Company. The present action is to enforce collection of said note, default having been made in the payment of same at maturity and after demand.

The basis of the defendant's demurrer is that there is a misjoinder, both of parties plaintiff and of causes of action, and for this position he relies upon the cases of *Shore v. Holt,* 185 N. C., 312; *Roberts v. Mfg. Co.,* 181 N. C., 204; *Thigpen v. Cotton Mills,* 151 N. C., 97, and others to like effect. But the plaintiffs have set up and alleged in their complaint a single cause of action, rather than two separate causes, as interpreted by the defendant. It is not alleged that Brock & Scott Produce Company has paid any part of said note, and, therefore, it is entitled to recover of defendant as a guarantor who has been required to pay, separately and distinct from the right of Swift & Company, the payee, to enforce collection, but the allegation of the complaint is that both plaintiffs are the owners of said note, and that the same is now due and unpaid.

For the purpose of a demurrer, the allegations contained in the preceding pleadings are to be taken as correct and as made. *Davies v. Blomberg,* 185 N. C., 496; *Sandlin v. Wilmington,* 185 N. C., 257. We think the demurrer in the instant case was properly overruled.

Affirmed.

R. L. WILSON v. SUNCREST LUMBER COMPANY.

(Filed 12 September, 1923.)

1. Appeal and Error—Harmless Error—New Trials.

For a new trial to be granted on appeal, it must not only appear that error has been committed on the trial in the Superior Court, but that it was material and prejudicial, amounting to a denial of some substantial right of the appellant.

2. Same—Negligence—Employer and Employee—Master and Servant—Safe Appliances.

The plaintiff, while engaged in the course of his employment of the defendant lumber company, fell to his injury from a tree he had been climbing under the instruction of the defendant's foreman and superintendent, while putting up, taking down, etc., skidder lines, or overhead cables, used in connecting with skidding logs out of the woods, and alleged negligence of the defendant in failing to provide him with a proper small wire cable, an end of which was permanently fastened into a ring on his belt, the other, passing around the tree, run through a ring on the opposite side of the belt and twisted around and fastened, so as to hold the plaintiff in the tree while engaged at his work: *Held*, testimony of non-experts that the wire cable furnished was unsuitable and improper for the work was erroneously admitted, but constituted harmless error, there being no serious contest as to defendant's liability on all the evidence.

APPEAL by defendants from *Ferguson, J.*, at January Term, 1923, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury.

Upon denial of liability and issues joined, there was a verdict and judgment in favor of the plaintiff. Defendants appealed, assigning errors.

Morgan & Ward and Smathers & Robinson for plaintiff.
Alley & Alley for defendants.

STACY, J. Plaintiff was employed by the Suncrest Lumber Company as a "skidder rigger," and it was his duty to put up, take down, repair and remove skidder lines, or overhead cables, used in skidding logs out of the woods, whenever instructed to do so by his foreman and superintendent, Burt Evans. On 9 August, 1921, while engaged in the discharge of his duties, the plaintiff was seriously injured by falling from the top of a tree to the ground, a distance of about 35 feet. For the purpose of climbing up and down the trees, which he was required to do in the discharge of his duties, plaintiff was furnished with climbers, or spurs, for his feet, together with a leather belt to go around his body, and a small wire cable, one end of which was permanently fastened into a ring on his belt, and the other, after going around the tree, was to be run through a ring on the opposite side of the belt and twisted around

and fastened, so as to hold the plaintiff while he was thus engaged at his work. It is alleged that this small wire cable was unsuited and unsafe for the kind of work plaintiff was doing, and that it came loose while he was working in a tree, through no fault of his, causing him to fall to the ground, and from which he sustained serious and permanent injuries.

At least two witnesses were permitted to testify that this wire cable was an unsafe and unsuitable appliance, the following questions having been asked and answered, over objection of the defendants:

"Q. I wish you would state whether or not a wire cable, nine-sixteenths of an inch, six strands, without hooks in either end, would be a proper and suitable or safe attachment to be used in going around the tree and attaching in the safety belt. (Defendants object; overruled; exception.)

"A. No, sir. (Motion to strike out; overruled; exception.)

"Q. Now, Mr. Taffer, I'll ask you, basing your answer on your long experiences in this kind of work, if a wire cable like Wilson was using there on that occasion, if it wasn't a very unsafe and unsuitable appliance for that purpose? (Defendants object; overruled; exception.)

"A. It wasn't if a man had to untie it to come down.

"Q. If he had to untie it to come down, it would be unsafe?

"A. It would not be safe." (Motion to strike out; overruled; exception.)

The admission of this evidence, in the manner and form in which it was offered, is in direct conflict with the decisions of *Marshall v. Tel. Co.*, 181 N. C., 292; *Kerner v. R. R.*, 170 N. C., 97; *Marks v. Cotton Mills*, 135 N. C., 287; *Raynor v. R. R.*, 129 N. C., 195; *Phifer v. R. R.*, 122 N. C., 940; and we should be constrained to hold it for reversible error if it were not for the fact that upon the instant record it appears to be harmless. There is no evidence tending to show that such a cable was generally used and approved by others engaged in similar work, nor that it was such an implement as a reasonably prudent master would have furnished his servant, under the circumstances here disclosed. Indeed, the defendant's own testimony is just to the contrary. Upon all the evidence, there seems to be no serious contest on the question of liability. 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 complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right. *In re Ross*, 182 N. C., 477; *Burris v. Litaker*, 181 N. C., 376.

After a careful consideration of the whole record, we have found no reversible error; and this will be certified.

No error.

HOLMES & DAWSON v. EAST CAROLINA RAILWAY ET AL.

(Filed 19 September, 1923.)

1. Carriers—Railroads—Bills of Lading—Contracts—Torts—Penalties.

The liability of a common carrier for loss of shipment is not confined to the carrier's obligation resting under its contract of carriage, or bill of lading, for, aside therefrom, the law, in its policy, charges the carrier with the loss of property in tort entrusted to it for transportation.

2. Same.

A verdict will be interpreted and allowed significance by proper reference to the pleadings, the evidence and the charge of the court, and where one of the issues in an action against the carrier fails to inquire upon the question of negligence and it properly appears, under the principle stated, that the action was founded in tort, the issue will be construed accordingly.

3. Carriers—Railroads—Bills of Lading—Contracts—Damages—Torts—Notice.

In an action against the carrier, founded on the contract of carriage of an interstate shipment, for damages for the loss of a shipment, the claimant must file his written demand with the proper carrier within four months after a reasonable time wherein the goods should have been delivered; but where the action is for negligence arising in tort, notice or demand upon the carrier, in accordance with the contract of carriage, is not necessary to a recovery.

4. Same—Commerce—Interstate—Federal Law.

The parties to a contract of carriage between the carriers and consignor may agree upon a shorter period in which action may be brought than that allowed by the general statute of limitations, in the absence of any unusual or extraordinary circumstance, and a stipulation in an interstate bill of lading that action must be commenced within two years and a day after a reasonable time has elapsed after the loss of a shipment is *held* valid, and where the shipment is interstate, the Federal law will control.

5. Carriers—Railroads—Bills of Lading—Separate Shipments—Torts—Actions.

Where there are separate shipments of baled cotton by the same common carrier from the same consignor, the delay of a part of each of these shipments constituted a separate and distinct cause of action, and recovery may be had only as to the bales of cotton that the carrier has unreasonably and negligently delayed.

6. Carriers—Bills of Lading—Contracts—Interpretation.

The stipulations of an interstate bill of lading as to the time demand for damages for loss shall be made upon the carrier are interpreted not only with reference to the language therein used, but also with regard to the law bearing on the subject of contracts.

APPEALS by plaintiffs and defendants from *Kerr, J.*, at June Term, 1923, of EDGECOMBE.

Civil action to recover for the loss of one bale of cotton and for delay in delivering nine others.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Did the defendant, the East Carolina Railway, receive from the plaintiff ten bales of cotton referred to in the complaint and contract to carry the same from Macclesfield, N. C., to the consignee in Norfolk, Va., on a through bill of lading as alleged? Answer: 'Yes.'

"2. Did the defendants fail to transport and deliver one bale of said cotton on shipment of 22 November, 1919, in accordance with the terms of the bill of lading? Answer: 'Yes.'

"3. Did the defendants negligently delay the delivery of nine bales of said cotton as alleged in the complaint? Answer: 'Yes.'

"4. Did the loss occur on the East Carolina Railway? Answer: 'Yes.'

"5. Did the loss occur on the Atlantic Coast Line Railroad? Answer: 'No.'

"6. What damage, if any, is plaintiff entitled to recover for loss of said one bale of cotton? Answer: '$194.94.'

"7. What damage, if any, is plaintiff entitled to recover for damages sustained in the delay in shipment of nine bales of cotton? Answer: '$998.13.'

"8. When was the claim for said cotton filed with the delivering carrier? Answer: '15 May, 1920.'

"9. When was the action to recover said loss begun? Answer: '27 February, 1922.'

"10. Did the Coast Line Railroad have a custom and agreement with the consignees of cotton at Norfolk, Va., that claims for loss should not be filed until the end of the cotton season in order that it might make delivery? Answer: 'Yes.'"

Judgment for $998.13 rendered in favor of plaintiffs, from which defendants appealed. Plaintiffs' motion for the further sum of $194.94 to cover the one lost bale denied for the reason that written claim was not filed therefor within four months after a reasonable time for delivery. From the denial of judgment in accordance with this motion, plaintiffs appealed.

W. O. Howard for plaintiffs.
John L. Bridgers for defendants.

STACY, J. This action is to recover damages for the loss of one bale of cotton and for delay in shipping and delivering nine others.

On 22 November, 1919, J. T. Winstead, one of the plaintiffs, shipped to Holmes & Dawson at Norfolk, Va., nine bales of cotton, delivering

same to defendant, East Carolina Railway, at Macclesfield, N. C., and taking therefor a through bill of lading containing the following stipulation:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

There was no provision in this bill of lading as to when suit should be brought for any breach of the contract, hence the three years statute of limitations would apply.

It is agreed that ten days was a reasonable time within which this shipment should have been delivered. Seven of these nine bales were delivered within a reasonable time; one of the value of $194.94 was lost and never delivered; the ninth and last bale of this shipment was delivered on 29 September, 1920, more than eleven months after shipment was made.

Written claim was filed with the Atlantic Coast Line at Norfolk, Va., on 15 May, 1920, for the loss of the two bales of cotton out of this shipment. On 9 November, 1920, after one of these bales had been delivered, 29 September, 1920, the plaintiffs filed an amended claim crediting the defendants with the value of the bale delivered.

Plaintiffs, Holmes & Dawson, of Norfolk, Va., had an agreement with the delivering carrier, Atlantic Coast Line Railroad Company, that claims for loss, damage or delay should not be made until the end of the cotton season, and, for this reason, plaintiffs delayed until 15 May, 1920, to file claim for loss on said shipment. This agreement, it is alleged, was made for the benefit of the delivering carrier; and therefore, according to plaintiffs' contention, the defendants are now estopped to assert that notice of claim was not filed within the requisite time. Without expressing any opinion on this point, we think there is another ground upon which the plaintiffs are entitled to recover. But see *Rogers v. R. R., post,* 86.

The jury has found that the one bale of this shipment, delivered on 29 September, 1920, was delayed in transit by the negligence of the defendants. This bale is included in the nine mentioned in the third issue. The lost bale is covered by the second issue. True, in the second issue the word "negligently" does not appear, but it is alleged in the complaint "that by reason of the negligent failure of the defendants to deliver the bales of cotton within a reasonable time as required by law, and the negligent failure to deliver the one bale as alleged, the plaintiffs have been damaged," etc. And it is stated in the record that his Honor properly instructed the jury as to the law arising on the evi-

dence. From the evidence there is a presumption of negligence (*Galveston, etc. R. R. Co. v. Wallace,* 223 U. S., 481), and this is entirely unrebutted. The case was tried upon the testimony offered by the plaintiffs, the defendants introducing none.

The liability of a common carrier does not rest in contract alone, but the law imposes a liability also. This latter exists outside of the contract of carriage. It has its foundation in the policy of the law and upon this legal obligation the carrier is charged with the loss of property entrusted to it for transportation. *Merritt v. Earle,* 29 N. Y., 122; *Peanut Co. v. R. R.,* 155 N. C., 148, and cases cited; 4 Elliott on Railroads, sec. 1454.

It is a recognized principle with us, in our liberal system of procedure, that a verdict may be interpreted and allowed significance by proper reference to the pleadings, the evidence and the charge of the court. *Reynolds v. Express Co.,* 172 N. C., 487; *Kannan v. Assad,* 182 N. C., 77.

Applying this principle to the facts of the instant record, we think the action, with respect to the lost bale of cotton, as well as the nine bales delayed in transit, should be construed as an action in tort based on the alleged negligence of the defendants.

Where this is the case, in suits brought for loss or damage in transit of an interstate shipment caused by the carelessness or negligence of the carrier, no notice of claim nor filing of claim is required as a condition precedent to recovery. *Morris v. Express Co.,* 183 N. C., 147; *Mann v. Transportation Co.,* 176 N. C., 105; *Mfg. Co. v. C. and O. Ry. Co.,* 115 S. E. (W. Va.), 877. The pertinent provisions of the "Cummins Act," approved 4 March, 1915, are as follows: "*Provided further* that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

In the provisions of the act preceding the provisos (set out in full in *Mann v. Transportation Co., supra*) the carrier, on receiving property for an interstate shipment, is required to issue a receipt or bill of lading therefor and is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property may be delivered," etc.

Reading the second proviso above quoted, in connection with the language contained in the preceding provisions of the act, we think it is

apparent that if the loss, damage, or injury complained of be due to delay in the delivery of such property, or if the property is damaged while being loaded or unloaded, or is damaged in transit by the carelessness or negligence of the defendant, then no notice of claim nor filing of claim is required as a condition precedent to recovery. *Gillette Safety Razor Co. v. Davis,* 278 Fed., 864; *Hailey v. Oregon Short Line R. R. Co.,* 253 Fed., 569.

With the record affording a presumption of negligence, and nothing to explain or to rebut it, we think the plaintiffs' claim for the loss of the one bale of cotton should be held to come within the terms of the statute, which deprives the defendants of any defense arising from the failure of plaintiffs to give notice of claim.

From the foregoing it follows that plaintiffs are entitled to judgment on the sixth issue in accordance with the jury's answer.

It also follows, from what is said above, that plaintiffs are entitled to recover for the loss sustained by reason of the delay of more than eleven months in delivering one of the bales of cotton contained in this shipment of 22 November, 1919.

But the remaining eight bales which go to make up the total of nine bales delayed in transit, and covered by the third issue, were shipped under different bills of lading. Hence they must be considered with reference to other provisions.

On 4 November, 1919, Winstead shipped to Holmes & Dawson fifteen bales of cotton; on 19 November, 1919, he shipped five bales more; and again on 16 January, 1920, he shipped two bales. All these shipments were made from Macclesfield, N. C., to Norfolk, Va. It is agreed that ten days was a reasonable time within which each of these shipments should have been made. Fourteen bales of the shipment made on 4 November, 1919, were delivered within a reasonable time, while one bale of this shipment was not delivered until 20 August, 1920. The five bales shipped on 19 November, 1919, were not delivered until 26 September, 1920; and the two bales shipped on 16 January, 1920, were not delivered until 28 September, 1920. Written claim was filed with the Atlantic Coast Line at Norfolk, Va., on 15 May, 1920, for the loss of said cotton, and changed from claim for loss to claim for delay after actual delivery was made. This suit, as stated above, was instituted on 27 February, 1922.

Each of the three bills of lading covering the last-mentioned shipments contained the following stipulation in regard to time for bringing suit: "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 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.,* 184 N. C., 33, and cases cited.

This being a contract for an interstate 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 and P. R. R. Co. v. Leatherwood,* 250 U. S., 478, and *Missouri K. and T. R. 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.

But plaintiffs say that this suit was brought within two years and one day after delivery of the property. Actual delivery was made in August and September, 1920, and suit was instituted 27 February, 1922. The cotton should have been delivered within ten days—a reasonable time—from date of shipment. This was required by the contract.

In *Georgia F. and A. R. Co. v. Blish Milling Co.,* 241 U. S., 190, 60 L. Ed., 948, it is said that the word "delivery" as here used "must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required." See, also, *Mfg. Co. v. C. and O. Ry. Co.* (decided in 1923), 115 S. E. (W. Va.), 877; *Kahn v. Amer. Ry. Express Co.,* 106 S. E. (W. Va.), 126.

In the light of this authoritative interpretation, we think the provision now under consideration must be held to mean that suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, when delivered within a reasonable time, or, in case of failure to make delivery within a reasonable time, then within two years and one day after a reasonable time has elapsed. Without regard to the contract of carriage, when a common carrier takes into its possession goods for transportation, the law imposes upon the carrier the duty (1) to transport said goods safely, and (2) to deliver them within a reasonable time. Therefore the stipulation inserted in each

of the instant bills of lading should be interpreted, not only with reference to the language used, but also with regard to the law bearing on the subject of the contracts.

It follows that plaintiffs are not entitled to recover on the last three shipments, involving the eight bales in question, as suit therefor was not brought within the time limited in each of the several contracts. The delay of a part of each of these shipments, in reality, constituted three separate and distinct causes of action; and, as plaintiffs have lost their rights in respect to these causes of action, recovery for the eight bales in question must be denied. There will be a new trial to ascertain the loss sustained by reason of the one delayed bale in the shipment of 22 November, 1919.

On plaintiffs' appeal, error.

On defendants' appeal, new trial.

HAYWOOD GARDNER v. UNITED STATES RAILROAD ADMINISTRATION ET AL.

(Filed 19 September, 1923.)

Railroads — Pleadings — Allegations—Negligence—Demurrer—Employer and Employee—Master and Servant.

In order to recover damages in an action against a railroad company, there must be a breach of some duty owed by the defendant to the plaintiff, contractual or otherwise; and a demurrer to the complaint is properly sustained that alleges, in effect, that the foreman took a motor car of defendant and carried the plaintiff a distance on its track at plaintiff's request and sole personal convenience, and that plaintiff was injured by an automobile crossing the railroad track and colliding with the car on which he was thus riding.

APPEAL by plaintiff from *Kerr, J.*, at April Term, 1923, of WASHINGTON.

This is a civil action for damages, brought by plaintiff against United States Railroad Administration; W. G. McAdoo, Director General of Railroads; Atlantic Coast Line Railroad; United States Railroad Administration, W. D. Hines, Director General of Railroads; Atlantic Coast Line Railroad, Jno. Barton Payne, agent of the President and Atlantic Coast Line Railroad Company, a corporation.

For a proper understanding of the case, the allegations of paragraph two of the amended complaint are set forth in full:

"That during the month of November, 1918, this plaintiff was in the employ of the defendant, and by virtue of such employment had the right and privilege of riding upon the defendant's trains, motor cars

and any and all of the same for the purpose of going to and from various points upon the said line of railroad, either while engaged in the discharge of the duties of his employment or while attending to his own personal affairs; that during the month of November, as aforesaid, to wit, on .... November, 1918, the plaintiff, having fully discharged the duties of his employment in laying certain cross-ties along the track at or near the defendant's station at Darden, N. C., and having thereafter, at his own request, been transported to Plymouth by the defendant company upon one of its motor cars, for purposes purely personal to himself, to wit, registering for the draft, and while being transported upon said motor car back from the town of Plymouth, and while said motor car was traveling at a very low rate of speed, and when said motor car had reached a point where said railroad track is crossed by the main public road leading from Plymouth, North Carolina, to Mackeys, North Carolina, a point in the suburbs of the town of Plymouth, or thereabouts, said motor car was struck by an automobile moving along the said county road, and said motor car was wrecked, and this plaintiff severely and permanently injured, as hereinafter set out."

The allegations in the third paragraph of the amended complaint set forth in detail the alleged negligence of the defendant in reference to the Atlantic Coast Line Railroad track and its approaches crossing a public highway where the injury complained of occurred. In the decision of this case it will not be necessary to consider the allegations in this paragraph.

The evidence of plaintiff was that in 1918 he was working for the Atlantic Coast Line. He had been employed by them ten or eleven years. On the day he was hurt he had been working at Darden. R. U. Roberson was foreman in charge. Plaintiff and others were putting out cross-ties along the track. Later he had to go to Plymouth to fill out his questionnaire. The foreman Roberson took him to Plymouth to fill out the questionnaire. He had ridden on the motor car for some time; it was usual and customary for section men to ride on the motor car. He and Roberson left at the dinner hour to go to Plymouth. He filled out the questionnaire and started back to Darden about 2:20 in the afternoon, and was injured about 3 p. m. on his return. They were not going fast. When the motor car reached the public highway which crosses the railroad track it was struck by an automobile traveling along the public highway which crossed the track at the place where he was injured. Roberson was running the motor car, and it was run by gasoline. Plaintiff gave the extent of his injuries and stated that defendant sent him to a hospital at Rocky Mount and also to see a specialist in Richmond and paid his expenses.

W. L. Whitley for plaintiff.

F. S. Spruill, Zeb Vance Norman and F. S. Spruill, Jr., for defendant.

CLARKSON, J. The defendant, at the close of the evidence, moved for judgment as of nonsuit, which the court granted, and the plaintiff excepted and appealed to this Court.

The evidence in a case of nonsuit is taken in a light most favorable to plaintiff. The facts show that the plaintiff was working for the defendants as a section hand, under the foreman Roberson. He and Roberson "knocked off" at the dinner hour. Roberson took him to Plymouth, at his request, on a purely personal errand to have his "questionnaire" filled out. It was an act of accommodation and gratuity on the part of Roberson to help one who was working under him. They quit work at dinner time, and when the injury occurred the plaintiff was not doing work or labor of his ordinary calling for the company. They took the company's motor car and started back, after the 2:20 o'clock p. m. train had come to Plymouth, and he was hurt about 3 o'clock p. m. on his return, not by the railroad but by an automobile running into the motor car where the public highway crossed the railroad track. It was usual and customary for section men to ride on the motor car, but in this instance it was a trip not on the company's business. The plaintiff was seriously hurt, and from the record it is to the credit of the defendant that it acted humanely and gave the plaintiff medical and hospital aid and paid the expenses.

From the facts we can see no duty that defendant owed to the plaintiff that it failed to discharge. It was a kindly, gratuitous and friendly act that one man was showing to another by borrowing the defendant's motor car, and the use of its track, to do a neighborly act. Now shall the defendant respond in damages? We cannot so hold. The foreman was not acting at the time in the scope of his employment. He was not about his master's business, but doing a kindly generous act on his own responsibility. The accident was unfortunate and deplorable, but we cannot charge negligence and duty to these defendants.

In *Wright v. R. R.*, 122 N. C., 852, *Montgomery, J.*, says: "The plaintiff was a section master in the employment of the defendant, and slept sometimes at Gumberry, the northern terminus of the road, sometimes at Jackson, the southern terminus, and sometimes at Mowfield, an intermediate station. After his day's work was over he went to his sleeping place on a hand-car or on the defendant's train, as suited his convenience. On the night when the plaintiff was injured he and the laborers working under him, having left off work for the day, with a light for a signal on the side of the railroad, were waiting for the train on its way to Gumberry. All were taken on, the plaintiff getting on

the engine, and the hands on the flat cars loaded with logs. No fares at any time were received or expected from the plaintiff. These facts do not, in our opinion, constitute the plaintiff a passenger on the train. He invariably used the hand-car, or the train of the company, to aid him in the prosecution of his work. The act of going to and from his work in the manner pointed out, although for the benefit of the plaintiff, connects him with the service of the company, although he was not *actually* engaged in the work for which he was employed at the time of his injury. If there had been a contract between the plaintiff and the company that the plaintiff should be carried to and from his work to his sleeping place, then certainly the plaintiff would have been injured while engaged in the service for which he was employed."

Roberson v. Greenleaf Lumber Co., 154 N. C., 328, is not in conflict with our present position, for in that case there was such a custom as to afford inference of contractual relation between plaintiff and defendant and that plaintiff was in the course of his employment. In the instant case it was a personal, single act of accommodation—no contractual relation—no custom by which a contractual relation could be inferred—but the section foreman on a single occasion, for a single purpose, accommodated one who was working with him, on an errand that perhaps plaintiff would never have to go on again. See, also, *Willis v. R. R.*, 120 N. C., 508; *Mitchell v. R. R.*, 176 N. C., 645.

Where plaintiff, when injured by the explosion of an engine, was riding on a freight train by permission of the conductor, and there was no evidence of wanton or willful injury, plaintiff could not recover. *Vassor v. R. R.*, 142 N. C., 68.

"It is evident that the liability of the carrier for injuries to passengers is different from that of an employer with reference to injuries to employees in its service. Therefore the rules of a carrier's liability as to passengers do not apply to employees in the operation of the cars or other vehicles in which passengers are being transported. Employees who are being carried back and forth to and from their work, whether on construction trains or passenger trains, and although they have no connection with the operation of the train and are carried outside of the hours of employment for which they are paid, without the payment of fare, are generally not to be considered as passengers; and this is also true of an employee who voluntarily rides on a train to his work, without payment of fare, and without any arrangement in regard thereto with the company, or of employees who borrow a car and engine without the company's consent for their own purposes." 10 C. J., sec. 1054, p. 632; 33 Cyc., p. 817.

The court below made no error in rendering judgment of nonsuit.

Affirmed.

PAINT AND LEAD WORKS v. B. F. SPRUILL.

(Filed 19 September, 1923.)

1. Seller and Purchaser—Vendor and Purchaser—Warranty—Right of Inspection—Carriers—Railroads.

Where one purchases goods upon the representation and warranty as to quality by the seller's agent, to be shipped from a distant point, without express agreement as to the time the purchaser may take for inspection, the law gives him a reasonable time after the goods have reached their destination for that purpose, and he may reject them without liability if they should not be as warranted.

2. Same—Title—Delivery to Carrier.

Where the law gives the purchaser a reasonable time to inspect goods received by common carriage after they reach destination, delivery to the carrier is not constructive delivery to the consignee in the sense to deprive him of his right of inspection under the seller's warranty of quality.

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

The seller's agent warranted to the purchaser that the paint he was selling was fireproof and would be shipped in metal drums, and not in wooden barrels, which were improper for the purpose, the purchaser refused the shipment and payment therefor, and the action is to recover the purchase price: *Held*, a warranty of quality; and it was error for the trial judge to reject evidence offered to show that paint exactly similar and sold by the same agent to others failed to come up to the guarantee that the article was fireproof; and that a direction of a verdict for the plaintiff was reversible error.

4. Same—Fraud—Deceit—Evidence—Questions for Jury.

And upon the evidence in this case tending to show that the agent's representations as to quality were knowingly false and fraudulent, and induced the defendant to purchase, the case in that respect also should have been submitted to the jury.

APPEAL by defendant from *Kerr, J.*, at January Term, 1923, of WASHINGTON.

Plaintiff complained and offered evidence tending to show that, pursuant to contract of sale, the Standard Paint and Lead Works, of and from Cleveland, Ohio, shipped to defendant at Roper, N. C., four barrels of liquid roofing cement, containing 240 gallons, at $1.15 per gallon—$276. That the cement was not shipped in steel drums, the usual method, but being unable at the time to procure the steel drums, the order was shipped in wooden barrels, the difference in price or value between them being about $10 per barrel or $40. That said shipment reached Roper, N. C., in due course of shipment, and defendant declined to receive or pay for same on ground that the paint was not in compliance with the contract.

There was allegation with evidence of defendant permitting the inference that the paint was sold under a contract of warranty that same was to be shipped in metal barrels and that same was fireproof. That before the cement was accepted or received, defendant, seeing that the paint was not contained in the metal barrels, which the vendor's agent had assured defendant was necessary to a proper shipment for that kind of cement, and having reason to believe the article shipped was not "fireproof" as stipulated, declined to accept same and has never received or used the shipment or any part of it. In this connection defendant offered to prove by a witness that the latter had bought some of this kind of paint from the same agent of defendant, represented as fireproof, and that he had tested same and it was neither fireproof nor would it stop leaks as represented. The proposed evidence was excluded by the court, and defendant excepted.

There was also allegation with evidence on part of defendant permitting the inference that the contract of sale was procured by false and fraudulent representations on part of plaintiff's agent at the time contract was entered into, and as an inducement thereto. And an issue directly presenting this question was tendered and refused, and defendant excepted.

The cause was submitted and verdict rendered under the following issues:

"1. Did plaintiff contract to ship the paint in steel drums as contended by defendant? Answer: 'Yes.'

"2. If so, what was the difference in value of the steel drums and the wood barrels in which it was shipped? Answer: '$40.'

"3. What amount is defendant indebted to plaintiff for the paint sold and delivered to the transportation company? Answer: '$276 int.'"

The court charged the jury as follows:

"Gentlemen of the jury, there are three issues submitted to you in this case:

"1. Did the plaintiff contract to ship the paint in steel drums as contended by defendant? The court instructs you that if you believe the evidence you will answer the first issue 'Yes.'"

(To the foregoing instruction of the court the defendant in apt time excepted.)

"2. If so, what was the difference in the value of the steel drums and wooden barrels in which it was shipped? The court instructs you that if you believe the evidence you will answer that $40."

(To the foregoing instruction of the court the defendant in apt time excepted.)

"3. What amount is defendant indebted to the plaintiff for the paint sold and delivered to the transportation company? You will answer that $276 and interest from 23 November, 1918, less $40."

(To the foregoing instruction of the court the defendant in apt time excepted.)

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

Zeb Vance Norman for plaintiff.
W. L. Whitley for defendant.

HOKE, J. In 23 R. C. L., 1433, it is said: "That where goods are ordered of a specific quality, which the seller undertakes to deliver to a carrier to be forwarded to the buyer at a distant place, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination. In such case the carrier is not the agent of the buyer to accept the goods as corresponding with the contract, although he may be his agent to receive and transport them." This is the rule very generally prevailing on the subject, and obtains in this jurisdiction whether there has been an express warranty of quality or otherwise. *Richardson v. Woodruff,* 178 N. C., 46; *Huyett & Smith Mfg. Co. v. Gray,* 124 N. C., 322; *Pope and Another v. Allis,* 115 U. S., 363; *Pierson v. Crooks et al.,* 115 N. Y., 539; *Alden v. Hart,* 161 Mass., 576; *Eaton v. Blackburn et al.,* 52 Oregon, 300; reported also in 16th Anno. Cas., 1198.

In the headnotes of this last case, appearing in 16th Anno. Cases, and quoted with approval in the *Richardson and Woodruff case, supra,* the principle referred to is very well stated as follows:

"Under an executory contract for the sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality the vendee is not bound to accept them, and unless he does so, he is not liable therefor. This necessarily gives to the vendee the right of inspection, and he must be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides.

"A vendee of merchandise shipped from a distant point, under a contract specifying the quality of the merchandise and providing for its delivery f. o. b. at the point of shipment, but which contains no provisions as to the time or place of payment, inspection or acceptance, is entitled to a reasonable time after the merchandise arrives at its

destination in which to inspect it at that point, and to reject it if it does not comply with the contract.

"Assuming, without deciding, that where merchandise is sold under a contract providing for its delivery to a carrier f. o. b. at the point of shipment, title vests in the vendee, for some purposes, at the time when the merchandise is delivered to the carrier, such title is, nevertheless, conditional as between the vendor and vendee, the condition being that the merchandise shall be found to be of the quality called for by the contract; and such conditional vesting of title in the vendee does not prevent the latter from exercising his right of inspection when the merchandise arrives at its destination."

And where there is an express warranty of quality the rule governing the right of the parties is stated in *Huyett's case, supra,* as follows: "It seems that the law governing purchases with warranty and the rights of the parties may be correctly stated as follows: That if the property purchased is present and may be inspected, the warranty is collateral to the contract and the title to the property immediately passes to the purchaser. And if the warranty is false, the purchaser's redress is an action for damages upon the warranty. But if the property is not present, where it might be inspected, the warranty may be treated as a condition precedent, as well as a warranty. And if the property purchased is not what it was warranted to be, the purchaser upon delivery of the property, may treat the warranty as a condition precedent and refuse to receive or accept the property, and notify the party from whom he purchased; and if he has not paid for the property, he need not do so; and if he has paid the purchase money or any part of it he may recover the money so paid from the seller."

In the testimony of defendant received on the trial he stated, among other things: "I had a new house, which had been put up about a year and a half, and he (plaintiff's agent) insisted upon my buying some paint for it, and said, 'You have no fire protection and I will guarantee if you put this paint on there you can't set it on fire,' and I bought it to be a fireproof paint. We were standing at the time by a Standard Oil Co. barrel (a metal drum) and he said, 'It won't do to ship this paint in wooden barrels. It won't be shipped in wooden barrels. It will be a barrel like this galvanized drum.' "

On this testimony and the corresponding averments of the complaint, it was error for the court to direct a verdict for plaintiff on the evidence, and it was also error to exclude the evidence offered to the effect that paint exactly similar and sold by the same agent failed to come up to the guarantee that the article was fireproof, such evidence being directly pertinent to a principal question presented in the pleadings.

Again, there was allegation and evidence on the part of defendant permitting the inference that the assurances of the agent were both false and fraudulent, and defendant was entitled to have the case submitted in that aspect.

There is error, and this will be certified that the cause may be again tried on appropriate issues.

New trial.

W. R. MANN v. W. J. ARCHBELL ET AL.

(Filed 19 September, 1923.)

1. Boundaries—Proceedings to Establish—Statutes—Clerks—Judgments—Exceptions—Courts—Jurisdiction Appeal.

Upon petition to the clerk to establish the true boundaries between the adjoining owners of land, under the provisions of the statute, the clerk is required to order a survey by the county surveyor and that the surveyor make a report thereof with a map, the clerk to determine the true location, with judgment: *Held*, on appeal the cause was then jurisdictional in the Superior Court, and objection by appellant is untenable that the cause was not properly there, on the ground that appellee, having excepted, had not appealed in due time from the clerk's judgment, the only question being whether the line had been run in accordance with the clerk's order. As to whether the clerk should have heard appellant's exceptions is not presented upon the facts of this case.

2. Issues.

Issues are sufficient when they present to the jury proper inquiries as to all the essential matters or determinative facts in dispute.

3. Boundaries—Proceedings to Establish—Statutes—Burden of Proof.

The burden is on the plaintiff to show by the greater weight of the evidence that the true divisional line is the one he claims it to be, in proceedings originating before the clerk and appealed from, to determine it under the provisions of the statute.

APPEAL by plaintiff from *Kerr, J.*, at January Term, 1923, of EDGECOMBE.

Civil action to establish a boundary line.

Paragraph four of the complaint is as follows:

"That the plaintiff desires to establish the boundaries of a portion of the said tract of land which are in dispute, as follows: Beginning at a white oak, Sarah Arrington and William Archbell's corner; thence continuing up said branch S. 62 degrees W. 25 poles to a pine, said Archbell's corner; thence N. 67 degrees W. 167 poles to a post oak (now a rock), corner of said land and Henry Whitley's in said Archbell's line."

The defendants filed an answer admitting that the boundary was correctly described by the plaintiff and agreeing that it should be established as the true boundary "if correctly and properly run." The clerk then made an order directing the county surveyor to run and mark the dividing line and to file a map and make a report of his proceeding. The surveyor made a report in which he said that the white oak was 28 feet from the center of the branch, and in a separate paper notified the clerk that he was unable to begin at a white oak on the branch.

The defendants filed exceptions to the report on the ground that the line was not run from the true beginning corner and that the boundary therefore was not properly located. The clerk transferred the cause to the civil docket and at the trial the plaintiff insisted that the only question was whether the line had been run in accordance with the clerk's order and that the exceptions should be dismissed, the defendants not having appealed in due time from the clerk's order. Upon denial of his motion the plaintiff tendered this issue which the court declined to submit: "Did B. J. Downey, surveyor appointed by the clerk to run and mark the line directed by the clerk under the order of 12 November, 1920, run and mark the line as he was directed to do?" The jury answered the issue submitted as follows: "What is the true boundary line between the plaintiff's and defendants' land?" "D E C appears on map."

To the several rulings and to a portion of the charge the plaintiff duly excepted. Judgment was rendered on the verdict and the plaintiff appealed.

Thorne & Thorne for the plaintiff.
Manning & Manning and Finch & Vaughan for the defendants.

ADAMS, J. The clerk's appointment of the surveyor, with instructions to make a report of his proceeding, was dated 12 November, 1920; the survey was made 25 June, 1922; the report was filed 29 September, 1922. On the day the report was returned, the defendants entered of record written exceptions thereto, on the ground that the line as run by the surveyor was improperly located, and the clerk transferred the case to the civil docket for trial by a jury. The plaintiff argues here that the cause was not properly constituted in the Superior Court; that the clerk defined the true boundary line; and as the defendant did not appeal from his order, the one question is whether the surveyor obeyed the instruction. To this argument we are unable to assent.

The statute provides that the owner shall file his petition, under oath, stating therein facts sufficient to constitute the location of the line as

claimed by him; . . . and if the defendants fail to answer, judgment shall be given establishing the line according to the petition; but if the answer deny the location as set out in the petition, the clerk shall issue an order to the county surveyor . . . to survey said line, or lines, according to the contention of both parties, and make a report of the same, with a map, . . . and the cause shall then be heard by the clerk upon the location of said line, or lines, and judgment given determining the location thereof.

The plaintiff contends that the beginning corner of the disputed boundary is at a white oak situated 28 feet from the center of the branch, and that the true location of the line is represented on the plat by A B C; and the defendants contend that the beginning is at a white oak which formerly stood in the branch, the location of the line being as represented by D E C. On the trial there was evidence in support of each contention.

The complaint describes the disputed boundary, but contains no definite allegation as to the location of the white oak or the line. The answer admits the description, and alleges that if the line is properly located it will be found that the acts of which the plaintiff complains were committed by the defendants on their own land. So the question of location was not definitely presented until the defendants filed their exceptions to the surveyor's report. Whether the clerk should have heard the exceptions and determined the location, we need not now consider; for, after the cause was transferred to the civil docket, the Superior Court had jurisdiction to hear and determine all matters in controversy. C. S., sec. 637; *Roseman v. Roseman,* 127 N. C., 497; *Wooten v. Cunningham,* 171 N. C., 123; *Ryder v. Oates,* 173 N. C., 569; *In re Stone,* 176 N. C., 337.

His Honor properly declined to submit the issue tendered by the plaintiff. The clerk directed the running and marking of the line, but not its location. Moreover, a categorical answer to this issue would not have determined the controversy. The issue submitted enabled the parties to present the various phases of the evidence relating to the location, and the plaintiff on this score has no just cause of complaint. Issues are sufficient when they present to the jury proper inquiries as to all the essential matters or determinative facts in dispute. *Power Co. v. Power Co.,* 171 N. C., 248; *Carr v. Alexander,* 169 N. C., 665; *Roberts v. Baldwin,* 155 N. C., 276.

The instruction as to the burden of proof was free from error. The plaintiff claimed the true location of the dividing line to be as represented on the plat by the letters A B C, and it was incumbent upon him to establish his contention by the greater weight of the evidence. *Tillot-*

son v. Fulp, 172 N. C., 500; *Garris v. Harrington,* 167 N. C., 86; *Woody v. Fountain,* 143 N. C., 66. Of course, the location of the line was peculiarly a question for the jury.

As none of the exceptions can be sustained, the judgment is

Affirmed.

HENRY ALLEN; EDISON HICKS, TRUSTEE; T. T. HICKS AND W. C. HIGHT v. THOMAS STAINBACK, J. C. KITTRELL, EUGENE WORTHAM AND MYRTLE WORTHAM, HIS WIFE.

(Filed 19 September, 1923.)

1. Deeds and Conveyances—Mortgages—Contemporaneous Acts—Registration—Liens.

A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon.

2. Same—Description—Reference to Prior Mortgage.

Where a mortgage is executed and registered contemporaneously, a reference in the former to a sufficient description in the latter makes it a part thereof, supplying any deficiency of the description therein.

3. Same—Reference to Prior Mortgage—Notice.

A note secured by a mortgage reciting that the note constituted a lien upon the lands, puts a subsequent mortgagor upon inquiry, and fixes him with notice as to the amount of the prior lien, and it does not lose its priority upon prior registration by the failure of the mortgage to recite it.

4. Same—Omission to State Amount of Lien.

The omission of a prior registered mortgage to state the amount of the lien created by it cannot prejudice the rights of the holder of a second and later registered mortgage, wherein is recited that this mortgage was subject to the first one.

5. Deeds and Conveyances — Mortgages — Probate — Irregularities—Presumptions—Statutes.

The admission to registration of a mortgage raises a presumption that the probate was by the proper officer and regular, which has to be met by the evidence of a later registered mortgage claiming its invalidity: and *Held, further,* the validity of the probate of the mortgage in this case was established by C. S., sec. 3331, validating orders of probate by the clerk made prior to 1 January, 1919.

APPEAL by plaintiffs from *Daniels, J.,* at February Term, 1923, of VANCE.

On 3 December, 1918, Joseph M. Stainback conveyed to Henry Allen 42½ acres for the consideration recited in the deed of $2,532, and, as a

part of the same transaction, executed a deed of trust on said land to J. C. Kittrell, trustee, to secure two notes for the balance of the purchase price. The deed and deed of trust were simultaneously filed upon the record in the register's office of said county on 21 December, 1918. The deed of trust does not state the amount of the notes therein secured, but they are thus referred to in the deed: "Whereas the said Henry Allen is indebted to the said Joseph M. Stainback in the sum of $....., for which the said Henry Allen has executed and delivered to the said Joseph M. Stainback, as aforesaid, the bonds of even date with this deed, in the sum of $....., payable on the....., with interest thereon until paid, at the rate of 6 per cent per annum, payable annually on 1 December hereafter; and it has been agreed that the payment of said deed shall be secured by the conveyance of the land herein described (here follows the conveyance and description), same being the land this day bought of Joseph M. Stainback, and this deed of trust is to secure the purchase price thereof."

On 29 November, 1919, Henry Allen purchased of John Stevenson a tract of 50 acres, paid $1,000 in cash, and executed a deed of trust to secure the balance of the purchase money to E. T. Hicks, trustee, and as additional security, after the description of the 50 acres that day bought, added the following: "Also another tract of land, near the tract above described, and bounded by the lands of Breedlove, Mosely, Mumford, Jones, Harris, and others, containing 42⅕ acres. See deed from Joe Stainback to Henry Allen on record for description. This last tract is subject to a prior mortgage to Mr. Stainback for $1,260." This second deed of trust was not registered until 1 December, 1919. The question for this Court to decide is, which of these deeds of trust is the prior lien on 42⅕ acres of land?

The case came on to be heard before *Daniels, J.* There was submitted to the determination of the court the validity of the deed of trust from Henry Allen to J. C. Kittrell, trustee, and the question of its priority over the deed of trust to A. T. Hicks, the parties admitting that the said Stainback estate had no other security for its debt, and that if the deed of trust to Kittrell, trustee, is valid, the security of A. T. Hicks, trustee, will not be sufficient to pay their debt. The court held, upon the evidence and foregoing admission, that the trustee in the debt of Joseph M. Stainback, referred to as the trustee of J. C. Kittrell, takes precedence over the debt and trustee of A. T. Hicks, and that the plaintiff is not entitled to recover on the said lien in preference to that of the said Stainback. The plaintiff excepted and appealed.

T. T. Hicks & Son for plaintiff.
Kittrell & Kittrell for defendant.

CLARK, C. J. The deed of trust from Henry Allen to J. C. Kittrell is a valid and first lien on the 42⅕ acres. The deed and a mortgage securing the purchase price constituted one act, and such mortgage, executed and registered at the same time with the deed, has priority. *Trust Co. v. Sterchie,* 169 N. C., 23; *Hinton v. Hicks,* 156 N. C., 24; *Bunting v. Jones,* 78 N. C., 242. This being so, an omission in one instrument will be supplied by a statement in the other; and in the case now before the Court the stated consideration of the amount of the purchase money of the 42⅕ acres, which appears in the deed, at least designates a limit beyond which the purchase price, as referred to in the deed of trust, could not possibly go.

The reference in a mortgage to a note secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry, and fixes them with notice. In *Harper v. Edwards,* 115 N. C., 246, where the defendants objected that the mortgage was void for uncertainty in the amount of the debt intended to be secured thereby, the condition in the deed which recited that the "parties of the first part have executed to the parties of the second part certain promissory notes bearing even date with these presents, due and payable 1 January, 1887, and which this mortgage is given to secure, it was held that the mortgage was valid, and its registration was sufficient to put subsequent persons upon inquiry and fix them with notice."

To the same purport, *In re Hawkes,* 204 Fed., 319, and *Cutler v. Flynn* 46 Ark., 70. Also to the same purport there is a very clear statement in *Fetes v. O'Laughlin,* 62 Iowa, 532, with the citation of numerous authorities, and including the following statement: "The record of the mortgage imparted notice of the amount of the debt for which it was given as security, and is a lien prior to the mortgage under which the defendant claims title to the land." In that case, as in this, the amount of the promissory note secured thereby was left blank, but its date and the land upon which it was secured was sufficiently given, as in the present case.

In the present instance there was nothing misleading in the deed of trust from Henry Allen to J. C. Kittrell, trustee, and the plaintiffs in the present case could not have been misled. The plaintiffs (in this case) were directed by said deed of trust to the record for correct information, and they got that information and wrote into it their mortgage, so that all who held under them should have notice of the fact that they held their mortgage on said tract of land (42⅕ acres) themselves as a second lien.

The said deed of trust to J. C. Kittrell, trustee, had been on record almost a year when the deed of trust to E. T. Hicks was executed, and the deed of trust to Hicks shows that Henry Allen intended to convey

to E. T. Hicks, trustee, said 42⅕ acres, for it recites that it was "subject to a prior mortgage to Mrs. Stainback." In *Hinton v. Leigh,* 102 N. C., 28, it was held that such an express second mortgage would be subject to the first mortgage, *even though registered first.* This case was not overruled by *Blacknall v. Hancock,* 182 N. C., 369, but was cited with approval therein to the statement of the ground why it did not apply.

In the case now before the Court the second deed of trust not only recognized the first deed of trust, but the first deed of trust was actually registered more than eleven months before the second deed of trust was written.

As to the contention that the deed of trust of J. C. Kittrell, trustee, was registered on an insufficient probate and is therefore a nullity, the record shows that it was registered 21 December, 1918, and its admission to registration raises a presumption that the probate was by a proper officer and regular. *Moore v. Quickle,* 159 N. C., 129. No proof was offered to the contrary. The plaintiff admitted the deed of trust to Kittrell, together with the notice in the lower court, without objection as to the evidence. If there was any question of the probate of this deed of trust, it is sufficient to call attention to C. S., 3331, which provides that "Where deeds, etc., which prior to 1 January, 1919, have been ordered registered by the clerk of the Superior Court . . . and actually put upon the books in the office of the Register of Deeds as if properly proven and ordered to be registered, all such probates are hereby validated and made as good and sufficient as though such instruments had been in all respects properly proven and recorded."

The judgment of the court below is

Affirmed.

IN RE WILL OF L. D. GULLEY.

(Filed 19 September, 1923.)

1. Wills—Clerks of Court—Courts—Executors and Administrators—Qualification of Executors—Statutes.

It is required of the clerk of the court to require a nonresident named as executor in a will to give a bond in double the value of the personal property of the estate (C. S., sec. 34) before he takes the oath (C. S., sec. 39), the amount of the bond to be ascertained upon examination of such person, or some other competent person under oath (C. S., sec. 33): *Held,* where such person has taken possession of the personalty and has peculiar knowledge of it, refused information to the widow and all others, and to be examined by the clerk while passing upon his fitness, it is proper for the clerk to refuse to issue the letters of administration to him.

2. Wills—Clerks of Court—Courts—Executors and Administrators—Refusal of Letters.

Where the clerk of the court has refused to issue letters of administration to the one named as executor in the will, and has exercised his discretion in appointing another—in this case the widow—the letters issued to the widow are effective.

3. Wills—Clerks of Court—Courts—Executors and Administrators—Judgments—Appeal—Review.

The adjudication by the clerk of the unfitness of one named in a will as executor is subject to review by the Superior Court judge, and as to matters of law, in the Supreme Court on appeal.

4. Wills—Clerks of Court — Courts — Disqualification of Executor — Caveat—Executors and Administrators.

Where a will has been admitted to probate, reserving by mutual consent the question of the fitness of the person therein named as executor, upon the appointment of another by the clerk, the rights of interested parties to file a caveat to the will is not impaired.

APPEAL by E. K. Gulley from *Daniels, J.*, at chambers, 16 July, 1923.

This was a judgment by the clerk of the Superior Court of Wayne denying the application of E. K. Gulley for letters testamentary. On appeal to *Daniels, J.*, at chambers, the judgment was affirmed and E. K. Gulley appealed. L. D. Gulley, resident in Wayne County, died at a hospital in Miami, Florida, 19 February, 1923, leaving a will purporting to have been executed on 7 January, 1923.

E. K. Gulley offered the said will for probate on 28 May, 1923. The widow and certain of the children as well as E. K. Gulley were represented by counsel. Counsel for both sides being present in the offices of the clerk, it was agreed that the probate of said will in common form should in no way prejudice the rights of the parties and especially the right to contest the qualification of the said E. K. Gulley as executor.

On 30 May, 1923, the said E. K. Gulley appeared before the clerk of said court and demanded that letters testamentary be issued to him, counsel for both sides being present, and the widow of said testator and certain of her children contesting his appointment as executor.

It also appeared that on 7 January, 1923, the date of the execution of the will, E. K. Gulley was present with the deceased at the hospital at Miami, Florida, and also on 17 January, 1923, when a check was executed in blank by the testator and filled in at the direction of said E. K. Gulley for the sum of $18,600 payable to the said E. K. Gulley, the said amount being all the funds the testator had in the bank.

The alleged will gave very broad powers to the executor, conferring power to sell at his discretion all the valuable real estate and other property belonging to the testator upon such terms and at such price

as he should see fit. The said E. K. Gulley is not a resident of North Carolina, but is, and has been for many years, a resident of Worth County, Georgia.

At the time of the hearing before the clerk of the Superior Court on 30 May, 1923, counsel for those opposing E. K. Gulley as executor asked that he be sworn in order "that he might disclose his knowledge of the estate of the testator and of what property it consisted, and also that he might be examined for the purpose of throwing light upon his fitness or unfitness to be qualified as such executor. He declined to testify or to make any statement concerning his knowledge of the affairs of the estate, though he had in his possession since the death of the testator a satchel containing the valuable papers and securities of the testator. Upon such refusal to be examined by the clerk or to give evidence as to the value of the property of the estate, the clerk denied his application for letters as executor, especially as he had refused also to give to his mother and brothers and sisters information as to the affairs of said deceased and as to what securities and papers he had in his hands relating thereto, and had also declined to disclose to them the contents of another and prior will of the testator which he claimed to have in his possession.

From the refusal of the clerk thereupon to appoint the said E. K. Gulley as executor, he appealed. It was agreed between the parties that the hearing on appeal before the judge of the Superior Court should be *de novo*. On the hearing before the judge, E. K. Gulley and the parties opposing his appointment were represented and affidavits were filed on his behalf.

After considering such affidavits and argument by counsel for both sides, Judge Daniels affirmed the judgment rendered by the clerk of the Superior Court, and E. K. Gulley appealed.

J. Faison Thompson and N. Y. Gulley for appellant.

Geo. E. Hood, D. H. Bland, D. C. Humphrey, Paul Edmondson, Outlaw & Loftin, Dickinson & Freeman, and Langston, Allen & Taylor for appellees.

CLARK, C. J. The application for letters testamentary was made by E. K. Gulley and counsel were heard on both sides, as was also the hearing before the judge on the appeal from the clerk. The applicant for letters of administration, E. K. Gulley, was a nonresident and was required by the statute to give bond. C. S., 34. It was necessary for him to take the oath prescribed, C. S., 39, and that the amount of the bond should be fixed by the clerk of the Superior Court at "at least double the value of all the personal property of the deceased, such value

to be ascertained by the clerk by examination on oath of the applicant or some other competent person." C. S., 33.

E. K. Gulley, who offered himself, as executor, having refused to make any statement disclosing the nature and the amount of the property in his hands belonging to the estate, the clerk was justified in refusing to allow him to qualify as executor. Under section C. S., 31, the clerk is given power to revoke letters testamentary, and for the same causes he would certainly have the right to refuse to issue letters testamentary. In this case, the misconduct having occurred prior to the issuing of the letters, the clerk was authorized to refuse to issue letters testamentary to one who had refused to obey the legal orders of the clerk in taking proper steps under the statute for supervision of the administration of the estate and the action of the judge in approving the order of the clerk is approved.

The clerk was authorized to issue letters to any suitable person in the place of the defaulting applicant. It appears that prior to the application of E. K. Gulley the widow had qualified as administratrix and had by injunction stopped the payment of an alleged draft for $18,600 given by the testator on his deathbed to said E. K. Gulley. Had letters testamentary been issued to the executor, the appointment of the widow as administratrix should have been set aside, but, as upon the aforesaid action of the executor the clerk refused to issue letters testamentary to him, and that has been approved by the judge, the duly issued letters of administration to the widow remain in full force and effect.

It is in the province of the clerk of the Superior Court to pass upon the matter of qualification of an executor, subject to the right of the judge of the Superior Court to review his judgment on appeal, and subject to the right of appeal to the Supreme Court as to matters of law only.

This appeal affects and approves the refusal of the letters testamentary. It will in no wise affect the rights of parties in interest to file caveat, if so advised, as to the will.

Affirmed.

BARTHOLOMEW & COMPANY v. S. L. PARRISH.

(Filed 19 September, 1923.)

Verdicts—Appeal and Error—Compromise—New Trials.

The jury should arrive at their verdict upon the evidence, under their oaths, and upon discussion a juror should yield in his view only upon being convinced of its error, and not reach a unanimity otherwise;

and a verdict clearly appearing to be a compromise, and so stated therein, is a compromise verdict, not allowed by law, and should be set aside after its rendition, and a new trial ordered.

APPEAL by defendant from *Kerr, J.*, at April Term, 1923, of NASH.

This is a civil action brought by the plaintiffs against the defendant to recover the sum of $366.51 for goods and merchandise sold to Spencer Parrish, a tenant of the defendant, upon the credit of the defendant. The defendant admitted that he authorized the plaintiff to sell his tenant Spencer Parrish, goods and merchandise upon his credit not exceeding the amount of $100.

From the evidence it appears that the defendant went to Russell Bartholomew, who was in charge of plaintiff's business, and said to him, "My tenant, Spencer, wants you to furnish him some goods; go ahead and do so and I will pay for them"; or, to use the exact language, "let him trade and I will see that it is paid." Bartholomew knew the defendant, and that he was solvent, and agreed that he would accommodate Spencer, the nephew of the defendant, for what he wanted; and he did sell and deliver to him goods and merchandise amounting to $366.51.

The defendant denies that he made any agreement for so large an amount, but alleges that he told Bartholomew, "This boy (meaning Spencer) wants $50 or $75. Don't let it exceed $100, and I will be responsible for it."

The following issue was submitted to the jury:

"What, if any amount, is plaintiff entitled to recover of the defendant for merchandise sold Spencer Parrish, upon the defendant's credit for the year 1920? Answer: ——."

The court below, after reciting the contentions of the parties, charged the jury as follows:

"As to this issue, the burden is on Mr. Bartholomew to satisfy you as to his contention by the evidence and by the greater weight of the evidence. If you are satisfied from the evidence and by the greater weight of the evidence that Sidney Parrish went to Bartholomew's place of business and told him to sell Spencer Parrish anything he wanted at that time or at any other time upon the credit of Sidney Parrish, Bartholomew reserving the right and insisting on that right to collect out of Sidney Parrish and nobody else, and that they did under that contract sell him $366.51, then it would be your duty, if you find these facts by the evidence and by the greater weight of the evidence, to answer the issue $366.51.

"If you are not satisfied from the evidence and by the greater weight of the evidence, then you would answer this issue one hundred dollars, because that is the amount Mr. Parrish says he is willing to pay."

In answer to the issue, the jury rendered a verdict in word and figures as follows: "Compromise, $283.25."

After the rendition of the verdict, and before signing the judgment, the court of its own motion struck out the word "compromise." The defendant moved to set aside the verdict as being contrary to and inconsistent with the evidence in the case, and contrary to the charge of the court, and as being a compromise verdict, insufficient and illegal.

After the verdict, and the jury had been excused, and after plaintiffs and their attorneys had left the courthouse, several of the jurors, by request of defendant's counsel, came into court room in open court and, in answer to question, stated that the verdict was reached as a compromise.

The court then signed the judgment set out in the record.

Defendant filed exceptions and appealed to the Supreme Court.

E. B. Grantham and Harold D. Cooley for plaintiffs.

W. H. Yarborough, Finch & Vaughan, Murray Allen and W. B. Snow for defendant.

CLARKSON, J. The sole question in the case presented by the exceptions is whether the verdict rendered was illegal and the court erred in not setting it aside.

The following issue was submitted to the jury:

"What, if any, amount is plaintiff entitled to recover of the defendant for merchandise sold Spencer Parrish, upon the defendant's credit for the year 1920?" The jury answered the issue, after the word "Answer": "Compromise $283.25."

It is always for the best interest of society that those who have differences should try and amicably adjust them. When parties decide to litigate their rights, they have an orderly way to proceed in the courts established for this purpose.

In this case the plaintiffs and defendant have seen fit to contest their rights in the court. The issue was framed and presented to the jury. The witnesses were required to be sworn. The jury that tried the case was sworn and took the following oath: "You and each of you swear (or affirm) that you will well and truly try all civil actions which shall come before you during this term, and true verdicts give according to the evidence: So help you God." The word verdict is derived from the Latin *vere dictum*—a true declaration.

"A verdict which is reached only by the surrender of conscientious convictions on one material issue by some jurors in return for a relinquishment by others of their like settled opinion on another issue, and the result is one which does not command the approval of the whole

panel, is a compromise verdict. Such a verdict is improper and should be set aside as being founded on conduct subversive of the soundness of trial by jury. Thus in a prosecution of joint defendants, where certain of the jurors believe that all of the defendants should be convicted and others that all should be acquitted, a verdict reached by an agreement by which the acquittal of some is exchanged for the conviction of others is a compromise verdict and as such cannot stand. And it has been held that where, in an action for personal injuries the severity of the injury was beyond contention, a verdict for a grossly inadequate sum was in itself almost a conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. However, while the jury cannot go to the extent of bartering their convictions in order to reach an agreement, the law contemplates that they shall by their discussions harmonize their views if possible. Therefore, a verdict which is the result of real harmony of thought growing out of open-minded discussion between jurors with a willingness to be convinced, with a proper regard for opinions of others and with a reasonable distrust of individual views not shared by their fellows, and a fair yielding on one reason to a stronger one, each having in mind the great desirability of unanimity both for the parties and for the public, is not open to criticism." 27 R. C. L., 850.

Where it is clear that the verdict of a jury is based on a compromise of the differences of opinion of its individual members, it should be set aside. The law contemplates that the jurors "shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement." 22 Enc. P. and P., 855.

"Where the verdict which the jury return cannot be justified upon any hypothesis presented by the evidence, it ought obviously to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for $100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for $50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume, in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim." 2 Thompson on Trials, sec. 2606.

In the instant case it will be seen that the sum of $283.25 is arrived at by taking one-half of the $366.51 and adding to it $100, the sum admitted by the defendant to be due to the plaintiffs.

In *Nall v. McMath,* 177 N. C., 183, *Allen, J.,* said *obiter dictum:* "We would not be understood as holding that the jury has the right to compromise the claims of litigants, and if it clearly appeared that they had done so and had returned the verdict with nothing to sustain it, and that there was no notice of the purpose to do so, the parties would be entitled to relief."

From the judge's charge and the evidence, the differences between the parties were irreconcilable, and the jury so understood and returned the verdict "Compromise $283.25." We do not mean in the least to criticize the jury. We have no doubt that they acted with the highest motives, but they did what the law does not permit in such cases.

The verdict of a jury is a solemn deliberation. The system is often spoken of as the "Bulwark, or palladium, of our liberty." In the centuries of its existence no better form has ever been suggested, or perhaps ever will be, for the trial of causes. When a verdict is rendered, it imports verity. What is done in the jury room should be jealously guarded by the jurors who try the case, and it is doubtful propriety to discuss their deliberations outside of the jury room after the verdict is rendered. Their verdict should be above suspicion. "The people of the American Union, and especially the people of this State, have, ever since their existence as a people, regarded and treated this provision (a trial by jury) in their organic law as an essential feature in free government, and as one of the fundamental bulwarks of their civil and political liberty." *S. v. Holt,* 90 N. C., 749, at p. 751.

Merrimon, J., in *Johnson v. Allen,* 100 N. C., 131, has well said: "Evidence to impeach the verdict of the jury must come from sources other than the jurors themselves. Otherwise, motions for a new trial would frequently be made, based upon incautious remarks of jurors, or declarations by them, procured to be made by the losing party, or some person in his interest, and thus the usefulness and integrity of trial by jury would be impaired. Moreover, controversies thus arising would lead to unseemly confusion." *S. v. Tilghman,* 11 Ired., 513; *S. v. Smallwood,* 78 N. C., 560; *S. v. Brittain,* 89 N. C., 481; *S. v. Royal,* 90 N. C., 755.

Stacy, J., says, in *Rankin v. Oates,* 183 N. C., 517: "The court was without authority to reverse the jury's finding on the second issue, answer it himself, and then render judgment on the verdict as amended." *Garland v. Arrowood,* 177 N. C., 373; *Sprinkle v. Wellborn,* 140 N. C., 163; *Hemphill v. Hemphill,* 99 N. C., 436.

In the present case the jury said by their verdict that it was a "compromise." Under the court's charge and the law this could not be done. Because of this error a new trial is ordered.

New trial.

ROGERS & COMPANY v. EAST CAROLINA RAILWAY, ATLANTIC COAST LINE RAILROAD COMPANY AND JAMES C. DAVIS, AGENT, UNITED STATES RAILROAD ADMINISTRATION.

(Filed 19 September, 1923.)

Commerce—Railroads—Carriers of Goods—Bills of Lading—Federal Statutes—Contracts—Invalid Agreement—Notice of Claim—Limitation of Actions.

The stipulations in a bill of lading accepted by the consignee in interstate commerce for a transportation over connecting lines of carriage, and accepted by the Interstate Commerce Commission, among other things, requiring that when there is a loss of shipment by the carrier, written notice must be given to either the originating or terminal carriers within six months after a reasonable time for delivery has elapsed, and suits for loss or damage in such case must be brought within two years and one day, are reasonable and valid under the provisions of the Carmack Amendment to the Federal statute controlling in such matters, and constitute the sole contract of carriage between the parties, without power on their part to extend the time of such notice or the bringing of the action.

APPEAL by plaintiff from *Kerr, J.*, at June Term, 1923, of EDGECOMBE.

The plaintiffs alleged that on 28 September, 1918, they delivered through their agent to the East Carolina Railway at Macclesfield five bales of cotton for shipment to Norfolk; that this railway issued to the plaintiffs, as consignees, a through bill of lading of standard form, agreeing to carry and deliver the cotton to a connecting carrier; that the shipment was carried over the line of the East Carolina Railway from Macclesfield to Tarboro, and from Tarboro over the Coast Line to Norfolk, and was lost in transit. The damage was alleged to be $851.57, with interest from 9 October, 1918.

All the defendants filed answers, denying the material allegations of the complaint and setting up special defenses.

The verdict was as follows:

"1. Did the defendant, the East Carolina Railway Company, receive from the plaintiff the five bales of cotton referred to in the complaint, and did it contract to carry the same from Macclesfield, N. C., to the consignee in Norfolk, Va., on a through bill of lading, as alleged? Answer: 'Yes.'

"2. Did the defendants fail to transport and deliver the said cotton to the consignee in accordance with this contract? Answer: 'Yes.'

"3. Did the loss occur on the East Carolina Railway? Answer: 'Yes.'

"4. Did the loss occur on the Atlantic Coast Line Railroad? Answer: 'No.'

"5. What damage, if any, is plaintiff entitled to recover for loss of said cotton? Answer: '$634.81.'

"6. When was the claim for said cotton filed with the delivering carrier? Answer: '27 August, 1919.'

"7. When was the action to recover said loss begun? Answer: '27 February, 1922.'

"8. Did the Coast Line Railroad have a custom and agreement with the consignee of cotton at Norfolk, Va., that claims for loss should not be filed until the end of the cotton year, in order that it might make delivery? Answer: 'Yes.'

"9. Is this action barred by the statute of limitations? Answer: 'Yes.'"

The fourth, sixth, and seventh issues were answered by consent, and the ninth, with the assent of the parties, was answered by the court as a legal conclusion arising from the answers to all the preceding issues. By consent, judgment was rendered in favor of the Atlantic Coast Line and James C. Davis, agent, and upon the verdict in favor of the East Carolina Railway. From the latter judgment the plaintiffs appealed.

Don Gilliam for the appellant.
John L. Bridgers for appellee.

ADAMS, J. The cotton was shipped on 28 September, 1918. The loss occurred on the line of the East Carolina Railway. The claim for loss was filed with the Atlantic Coast Line on 27 August, 1919, and suit was instituted on 27 February, 1922.

The bill of lading contains these provisions: "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed; and 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."

A witness for the plaintiffs testified that ten days was a reasonable time in which to transport the cotton from Macclesfield to Norfolk, and as there was no evidence to the contrary, we presume the plaintiffs adhere to the statement. Therefore, according to the stipulation in the bill of lading, claim for loss should have been filed within six months after the lapse of such reasonable time for transportation and delivery. *Georgia, etc., Railway Company v. Blish Milling Company,* 241 U. S., 190.

The plaintiffs say that the provision for filing written notice of the claim was rendered ineffective and unenforceable by the answer to the eighth issue; but it will be noted that, so far as it relates to this controversy, the custom referred to affected only the consignees and the terminal carrier. There is no finding by the jury that the initial carrier was a party to, or even had knowledge of, such a custom or agreement; and the plaintiffs' argument is rested on the assumption that the Atlantic Coast Line Company was the agent of the initial carrier, and, as such, had power to bind its principal by the alleged custom. We cannot concur with the plaintiffs in this conclusion.

By virtue of the Carmack Amendment, delivery to and acceptance by the shipper of an interstate bill of lading constitutes it a binding contract on his part as to the valid provisions therein, although he has not, by any act, other than the acceptance of the bill, signified his assent to the written stipulations; and it has been held that the provision with respect to giving the notice is valid. *Boston & Maine R. R. v. Hooker,* 233 U. S., 97; *Railway Company v. Blish Milling Co., supra; Railway v. Starbird,* 243 U. S., 592; *Bryan v. R. R.,* 174 N. C., 177; *Aman v. R. R.,* 179 N. C., 310.

It is equally conclusive, we think, that the provisions in the bill of lading cannot be waived by the parties to the contract of shipment. *Railway Company v. Starbird, supra; Railway Company v. Blish Milling Company, supra.* In *Texas & Pacific Railway Company et al. v. Leatherwood,* 250 U. S., 478, it was decided that the parties to an interstate bill of lading cannot waive its terms; that the carrier cannot by its conduct give the shipper a right to ignore them; and that "a different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." There, *Mr. Justice Brandeis* said: "The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute of which all affected must take notice."

"The true ground upon which the written bill of lading must be held to control the rights of the parties," said *Brown, J.,* in *Bryan v. R. R., supra,* "is founded on the Carmack Amendment to the Interstate Commerce Act. That amendment requires the carrier to issue a bill of lading, the terms of which are fixed by the Interstate Commerce Commission, whereby such contracts are made uniform through the United States. The defendant has no authority to enter into any other contracts."

Accordingly, the custom alleged to have been recognized by the consignees and the terminal carrier, as shown in the answer to the eighth

issue, was ineffectual as a waiver of the written stipulation relating to the filing of the plaintiffs' claim of loss.

There is another circumstance which is fatal to recovery by the plaintiffs. The parties stipulated in the bill of lading that suit for loss should be instituted within two years and one day after the lapse of a reasonable time for the delivery of the cotton. U. S. Compiled Statutes, sec. 8604-a, and amendments. There is nothing in the Carmack Amendment which prohibits this agreement; in fact, similar agreements for a much shorter period have been held to be reasonable. In *Railway Company v. Harrimon,* 227 U. S., 657, there was a stipulation in the shipping contract that no suit should be brought after the lapse of ninety days from the happening of the loss or damage, and in an opinion sustaining the stipulation *Mr. Justice Lurton* used this language: "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of 29 June, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question, to be determined under the general common law, and, as such, is withdrawn from the field of State law or legislation." *Adams Exp. Co. v. Croninger,* 226. U. S., 491; *Michigan C. R. Co. v. Vreeland,* 227 U. S., 59. "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence." *Adams Express Company v. Croninger, and Michigan C. R. Co. v. Vreeland,* cited above; *York Mfg. Co. v. Illinois C. R. Co.,* 3 Wall, 107; 18 L. Ed., 170; *New York C. R. Co. v. Lockwood,* 17 Wall, 357; 21 L. Ed., 627; *Southern Exp. Co. v. Caldwell,* 21 Wall, 264, 267; 22 L. Ed., 556, 558; *Hart v. Penn. R. Co.,* 112 U. S., 331; 28 L. Ed., 717.

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court."

The amended statute forbids a common carrier to provide, by rule, contract, regulation, or otherwise, any period less than two years for the institution of suits. In the instant case the limitation was fixed by contract at two years and a day. The suit was not brought until after

the lapse of this period, whether the time be computed from 27 August, 1919, as contended by the plaintiffs, or from the expiration of "a reasonable time" for delivery after 28 September, 1918, as contended by the defendant. In either event the plaintiffs' action is barred.

We find no error in the record which entitles the plaintiffs to a new trial.

No error.

W. D. CARSTARPHEN AND T. L. SMITH v. TOWN OF PLYMOUTH, E. W. CHESSON, TAX COLLECTOR, AND MRS. M. W. CAHOON.

(Filed 19 September, 1923.)

1. Taxation—Payment Under Protest—Actions—Rights and Remedies.

Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. C. S., sec. 7979.

2. Taxation—Personal Property—Liens—Levy.

The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon (C. S., secs. 7986, 2815), subject to certain exemptions specified in Const., Art. V, secs. 3 and 5.

3. Same—Vendor and Purchaser—Rights and Remedies—Statutes.

Chapter 38, Public Laws of 1921, requires the owner, etc., to list his property for taxation in a manner prescribed, as of the first day of May, making his willful failure to do so a misdemeanor, with provision for his punishment, the lists to be given in by him to the proper authorities in the months of May and June, giving power to the county board of commissioners or governing body of any municipal corporation, on his failure to have done so, to enter or list the same, with certain penalties added, for a period of five back years, etc.: *Held*, where a seller of a stock of merchandise had failed to list it, and, after the first of May, had sold it to the plaintiff, and the county commissioners or governing body of a municipality had failed to list the same as the statute requires, no lien attaches against the stock of merchandise in the purchaser's possession, and he holds the same, free from any lien or demand for the payment of the taxes on the unlisted personalty, the remedy of the municipality being against the seller, constituting a lien on his other personal property from time of levy, and on his real property from 1 June. C. S., sec. 7987, for the time prescribed.

APPEAL by defendant from *Kerr, J.*, at April Term, 1923, of WASHINGTON.

The essential facts are set forth in the case agreed between the parties, and are as follows:

"1. That on 9 May, 1922, and prior thereto, Mrs. M. W. Cahoon was the owner of a stock of merchandise and certain store fixtures in the town of Plymouth, N. C., and conducted a retail mercantile business.

"2. That on 19 May, 1922, in consideration of the sum of $12,000, Mrs. M. W. Cahoon conveyed said stock of merchandise and fixtures to W. D. Carstarphen and T. L. Smith; that a copy of her conveyance is hereto attached and marked 'Exhibit A.'

"3. That on 7 June, 1922, the list-taker of Plymouth Township, Washington County, listed said stock of merchandise for taxation, the same not having been listed by either the plaintiffs or the defendant, Mrs. M. W. Cahoon.

"4. That on 13 February, 1923, E. W. Chesson, said tax collector of the town of Plymouth, demanded payment of the taxes assessed against the said stock of merchandise, said taxes amounting to $141.60, and threatened to levy upon said property immediately if same were not paid, and that said amount was paid by said Carstarphen and Smith under their protest, in writing, in proper form, to said tax collector.

"5. That on or about 19 February, 1923, the plaintiffs, Carstarphen and Smith, caused to be served upon the said E. W. Chesson, tax collector, and the surety upon the official bond of said officer and the town of Plymouth, notice in due and proper form, demanding a refund of the said sum of $141.60, same being taxes on said stock of goods paid by them under protest.

"6. That plaintiffs, Carstarphen and Smith, have also made demand upon Mrs. M. W. Cahoon for the sum of $141.60, alleging that said amount was due said Carstarphen and Smith by virtue of the clause of warranty contained in her bill of sale.

"7. That neither Mrs. M. W. Cahoon nor said E. W. Chesson, tax collector, has refunded the said sum of $141.60, and refuse so to refund the same."

EXHIBIT A.

NORTH CAROLINA—Washington County.

Know all men by these presents: That I, Mrs. M. W. Cahoon, of the State and county aforesaid, for and in consideration of the sum of $12,000 to me this day secured by W. D. Carstarphen and Thomas L. Smith, of said county and State, do hereby sell, assign, transfer, and set over to the said W. D. Carstarphen and Thomas L. Smith, their heirs and assigns, forever, all of the following-described personal property:

All of that certain stock of dry-goods, merchandise and wares now in the store building in the town of Plymouth owned by Mrs. L. M. Hampton and formerly used by Cahoon's Quality Shop as a place of business,

said business being owned by me in my own right, together with all furniture and store fixtures, including counters, show-cases, chairs, and all other fixtures now in said place of business and formerly used in connection therewith.

To have and to hold the same unto said W. D. Carstarphen and Thomas L. Smith, their heirs and assigns, forever.

And the said Mrs. M. W. Cahoon, for herself, her heirs and assigns, covenant with and represent to the said W. D. Carstarphen and Thomas L. Smith, their heirs and assigns, that the said property is hers, absolutely, and that the same is free and clear of all liens and incumbrances, and that she will forever warrant and defend the title to the same against all lawful claims and demands.

Said W. D. Carstarphen and Thomas L. Smith accept the said property in the condition that the same is now, and agree that in the future purchase of stock and other property for said business that they will purchase the same in their own names and apprise any creditors that they are sole owners of said business, and will do nor permit nothing to be done which will entail further liability or responsibility on the part of the said Mrs. M. W. Cahoon in their operation of the same.

In witness whereof, the said Mrs. M. W. Cahoon has hereunto set her hand and seal, this the 9th day of May, 1922.

Witness: A. L. OWENS. MRS. M. W. CAHOON. [Seal]

The court below rendered the following judgment:

"This cause coming on now to be heard at this term of the court, before his Honor, J. H. Kerr, judge presiding, upon the agreed statement of facts, and being heard:

"It is, therefore, ordered, adjudged and decreed by the court that the plaintiffs are not liable for the taxes collected from them, under protest, by the defendant tax collector, and that they took the said property free and discharged of any lien for said taxes upon the same, and to that end it is adjudged that they have and recover of the defendant tax collector and the town of Plymouth the sum of $141.60 paid by them under protest, as set forth in the agreed statement of facts, together with all costs of this action, to be taxed by the clerk. It is further adjudged that plaintiffs are entitled to interest on said sum from 13 February, 1923, being the date upon which same was paid, until paid. It is further adjudged that, inasmuch as the defendant, Mrs. M. W. Cahoon, owned said personal property in question on the first day of May, 1922, that the taxes aforesaid should have been listed by her, and that she is liable for the same; and this judgment is without prejudice to the rights of the tax collector to proceed to make said taxes out of other property of

the said Mrs. M. W. Cahoon, it being found as a fact by the court that she owns and possesses other property out of which said taxes can be made."

To this judgment defendants excepted and appealed.

W. L. Whitley for plaintiffs.
Zeb Vance Norman for defendants.

CLARKSON, J. "Every person owning property is required to list, and shall make out, sign, and deliver to the list-taker a statement, verified by his oath, of all the real and personal property, moneys, credits, investments in bonds, joint-stock companies, annuities, or otherwise, and the value of improvements on real estate since same was assessed, *in his possession or under his control on the first day of May* (italics ours), either as owner or holder thereof, or as parent, guardian, trustee, executor, executrix, administrator, administratrix, receiver, accounting officer, partner, agent, factor, or otherwise." (The provisos of this section are not material for the decision of this case.) Public Laws 1921, ch. 38, sec. 30. *Hyatt v. Walston,* 174 N. C., 55; 37 Cyc., 788.

Section 33 of the act, *supra,* provides: Where personal property shall be listed. Section 38 of the act, *supra,* provides that the taxpayer shall take an oath that the property listed "is a full, true and complete list of all and each kind of property owned by me," . . .. "and that I have not neglected to list for taxation for the year all of each and every kind of property of which I am the owner," etc.

"If any person liable to be charged with taxes shall wilfully refuse to answer any questions respecting his property, or refuse to file, sign, and swear to his returns, he shall be guilty of a misdemeanor, and on conviction liable to be punished by a fine not exceeding fifty dollars, or imprisonment not exceeding thirty days, or both; and it shall be the duty of the assessors or list-taker to have the offender prosecuted; and the list-taker shall complete the list from the best information he can obtain. Every list-taker and chairman of the board of county commissioners shall have power to send for persons and papers, and to examine witnesses and administer oaths." Public Laws 1921, ch. 38, sec. 71. (Same provision in Public Laws 1923, ch. 12, sec. 65.)

"Taxes shall not be a lien upon personal property, except where otherwise provided by law, but from a levy thereon (italics ours): Provided, that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon said property for the payment of the State, county and municipal taxes assessed against the same; but the sheriff or other tax collector levying upon such property, for the purpose of

collecting the taxes due thereon, shall give due notice to the mortgagee or trustee of such property of the amount of such taxes at least ten days before the sale of the same, and such trustee or mortgagee shall have the right to pay said taxes and the costs incident to making the levy, when the sheriff or tax collector shall release the same to such trustee or mortgagee, and the amount so paid by said trustee or mortgagee shall constitute a part of the debt secured in the mortgage or deed of trust. C. S., sec. 7986.

"All persons who own property and willfully fail to list it within the time allowed before the list-taker or the board of commissioners shall be guilty of a misdemeanor, and the failure to list shall be *prima facie* evidence that such failure was willful, and it shall be the duty of the board of commissioners to present to the grand jury the names of all such persons." Public Laws 1921, ch. 38, sec. 82. (Same provision in Public Laws 1923, ch. 12, sec. 75.)

"The lien of the State, county, and municipal taxes levied for any and all purposes in each year shall attach to all real estate of the taxpayer situated within the county or other municipality by which the tax list is placed in the sheriff's hands, which lien shall attach on the first day of June, annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid." C. S., sec. 7987.

"The lien for taxes levied for any and all purposes in each year shall attach to all the real estate of the taxpayers within the city on the first day of May, annually, and shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid. *But there shall be no lien for taxes on the personal property of the taxpayer but from a levy thereon.*" (Italics ours.) C. S., sec. 2815.

The plaintiffs pursued the lawful and correct remedy by conforming strictly to the statute, paying the money under protest and suing to recover same. C. S., sec. 7979.

There is an old saying that there are only two things certain on this earth—"taxes and death." It is impossible to escape either.

Every citizen has to aid in supporting the government under which he lives, and this cannot be done without taxes. The burden should be borne equally by all, and all public officials, whose duty it is to do so, shall expend same legally, with economy and efficiency. Taxes have priority over homestead and personal property exemptions. There is no lien on personal property for taxes but from a levy thereon. *Shelby v. Tiddy,* 118 N. C., 792; *Wilmington v. Sprunt,* 114 N. C., 310.

Const., Art. V, sec. 3, exempts certain notes, mortgages, etc., given in good faith for purchase price of a home, when purchase price does not exceed $3,000, and when notes, mortgages, etc., to run for not less

than five or more than twenty years, provided the interest on notes, mortgages, etc., does not exceed 5½ per cent. Exemptions allowed on incomes; married man and wife living together; widow or widower having minor child or children, natural or adopted, not less than $2,000. All other persons not less than $1,000, and there may be allowed other deductions (not including living expenses), so that only net incomes are taxed. The rate of tax on incomes shall not exceed 6 per cent.

The Constitution allows certain property to be exempt from taxation. "Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars." Const., Art. V, sec. 5.

"The list shall be given by the person charged during the months of May and June, as herein described." (Proviso not quoted.) Public Laws 1921, ch. 38, sec. 31.

The board of county commissioners and governing body of any municipal corporation are given power to enter or list real or personal property and add 25 per cent to same for each year unlisted—for five back years in which the property was not listed. Laws 1921, ch. 38, secs. 81 and 82. (Laws 1923, ch. 12, secs. 74 and 75, have practically the same provisions.)

From the facts agreed, on the first day of May, 1922, and prior thereto, Mrs. M. W. Cahoon owned a stock of merchandise and store fixtures in Plymouth, N. C. On 9 May she sold the personal property to the plaintiffs for $12,000; that neither the plaintiffs or defendants listed the said property for tax, but on 7 June, 1922, the list-taker for Plymouth Township listed the stock of merchandise for taxation, and on 13 February, 1923, demanded payment of the plaintiffs, and they paid same under protest and in accordance with the statute, and bring this action to recover of the defendants $141.60 and interest on same from date of payment.

We have recited the law in reference to listing, etc., of taxes fully, as applies to this case. It was the duty of Mrs. M. W. Cahoon to return her tax on the personal property that she sold the plaintiffs during the months of May and June to the proper list-taker. Said return should have been on the personal property and its value as 1 May. If she did not return it herself, or by an authorized agent, the proper official should have listed it in her name on the tax books. The proper officer could have levied on any real or personal property that she owned to

collect the tax, except that exempted by constitutional and legislative enactment in conformity thereto. No homestead or personal property exemptions can be claimed against taxes. Mrs. M. W. Cahoon having sold the personal property after 1 May to plaintiffs, they obtained a good title, free from taxes. A lien could only be on personal property for taxes from the levy.

It is a misdemeanor for anyone not to list the property he or she owns for taxes. The town of Plymouth, E. W. Chesson, tax collector, has no authority by law to collect the tax from plaintiffs.

Under the agreed state of facts, Mrs. M. W. Cahoon is liable for the tax. The proper officer shall list same in her name and collect from her the taxes in the manner provided by law.

There is no error in the judgment of the court below.

Affirmed.

M. P. HUBBARD COMPANY, INC., v. C. S. BROWN, NORMAN HALL, AND J. R. WEAVER.

(Filed 19 September, 1923.)

1. Bills and Notes—Guarantor of Payment—Evidence—Seller and Purchaser—Endorser.

Where the defendants deny individual liability as purchasers of plaintiff's fertilizer, but contend they were acting merely as agents for the sale, to others, and refuse to endorse their customer's notes, which the plaintiff insists they had contracted to do, evidence that one of them had agreed to endorse them for a consideration is competent as tending to show he had agreed to become a guarantor of payment.

2. Principal and Agent—Evidence—Seller and Purchaser.

Defendants having apparently signed a contract for the purchase of fertilizer individually, denied in the seller's action individual liability, and contended they were acting only as agents in the sale to others: *Held*, competent for the plaintiff to show that a defendant gave orders as to whom the fertilizers were to be shipped, and introduce a contract of the previous year, executed in like manner, showing individual liability, and introduce evidence that plaintiff had sold the fertilizer upon the defendants' individual responsibility, after investigating them.

3. Bills and Notes—Endorser—Renewal—Extension of Time—Releasing Endorser.

Upon the issue of whether the payee of a note had released the defendants from an agreement to become endorsers, by renewals and extension of time of payment without their knowledge: *Held*, competent for plaintiff to show defendants' knowledge and consent, and what one of them had said to its agent in respect thereto; also, admissions of liability made to the agent two years after the execution of the contract of sale.

4. Appeal and Error—Questions and Answers.

Where the record shows exceptions to unanswered questions, without more, the exceptions will not be considered on appeal.

5. Appeal and Error—Instructions—Requests for Instruction.

The refusal to give a requested instruction is not error, when correctly stated by the judge in his general charge, or when it is more favorable to appellant than he had requested.

6. Instructions—Requests for Instructions—Evidence—Assumption of Fact.

A request for instruction that assumes as a fact an issuable question is properly denied.

APPEAL by defendant from *Allen, J.*, at February Term, 1923, of HERTFORD.

On 6 January, 1920, the plaintiff and defendants entered into a written contract for the sale of a certain quantity of fertilizer to be shipped from the plaintiff's factory in Baltimore to the defendants, in Hertford County, North Carolina.

The contract provides, in part, that all goods delivered under said contract would be due 1 July, 1920, and the defendants were to make full settlement on or before 1 July, either in cash or by note. If paid in cash, the defendants were entitled to a 5 per cent discount if settlement was made on time. Notes were to be given by the purchasers to whom the fertilizer was sold, said notes to be endorsed by the defendants and made payable to some bank not later than 1 July, 1920, and if any of said notes were unpaid ninety days after maturity, the said defendants were to pay them.

The defendants ordered under said contract about $28,000 worth of fertilizer; the defendants sold said fertilizer to various farmers and took their notes, which notes were worthless to the plaintiff unless endorsed by the defendants as agreed upon in their contract. The plaintiff knew none of the purchasers of the fertilizer, but relied solely upon the defendants for payment of all goods shipped on their order.

Most of the purchasers of the fertilizer thus bought were insolvent, and the credit extended them was in reliance upon the endorsement of the defendants, the plaintiff looking to the defendants alone for the purchase price of the fertilizer.

After taking the aforesaid notes from the purchasers of the fertilizer, which purchasers the defendants had selected, the latter sent these notes to the plaintiff in Baltimore without endorsement; the plaintiff refused to accept said notes until properly endorsed. The defendants, in sending these notes to the plaintiff, endorsed only some of them. The plaintiff knew none of the parties to the transaction, except the defendants,

and no fertilizer, according to the testimony, would have been sold by the plaintiff unless Norman Hall, one of these defendants, had signed the contract.

There was testimony on the trial that the defendants took security from several of the purchasers, and after their failure to pay the defendants, the defendants sold the land of such purchasers and bought it in, in their own name, but refused to pay the plaintiff the price of the fertilizer.

The plaintiff also produced testimony in the trial that Norman Hall, one of the defendants, declined to sign the contract and thereby become responsible for the fertilizer, unless the plaintiff could give him a certain sum for his guarantee. The plaintiff offered $2 per ton for such guarantee. To this said Hall replied, saying that he would not "accept less than $2.50 a ton," which the plaintiff agreed to pay him, and has paid him to the amount of $1,250.

In their original answer in this cause, filed 8 December, 1922, the defendants unconditionally admitted execution of the contract as alleged, and not until the trial had begun on 1 March, 1923, did the defendants contend that they had executed the contract other than as individuals, and by leave of the court they filed an amended answer, denying that they had executed said contract as individuals, and claimed that they had signed only as a corporation. This is the only defense that the defendants have set up. The defendants do not allege any defect in the fertilizer.

The defendants are all colored, as also the purchasers whom they selected to take over the fertilizer.

The contract is set out in full signed by the plaintiff company, and underneath its signature is written "The above contract is hereby accepted in all of its conditions. (Signed) C. S. Brown, Norman Hall, J. R. Weaver. 6 January, 1920."

The issues to the jury were as follows:

"1. Did the defendants sign said contract as a committee or agent, and not as individuals, and with the knowledge of the plaintiff? Answer: 'No.'

"2. Did the plaintiff receive notes in settlement of the account under the contract, and thereafter take renewals of the same, and extend the time of payment without the consent of the defendants? Answer: 'No.'

"3. What amount, if any, are the defendants indebted to the plaintiff? Answer: '$12,091.46, with interest.' "

Upon the above verdict, the court entered judgment against the defendants for the above sum of $12,091.46, and the defendants appealed.

W. W. Rogers and Stanley Winborne for plaintiff.

Jno. E. Vann, R. C. Bridger and Winston & Matthews for defendants.

CLARK, C. J. The exceptions present very little for the consideration of the Court, the questions before us being almost entirely issues of fact whether the contract was the individual obligation of the three defendants who signed the same or whether in fact they signed with the understanding that they represented a partnership consisting of a league of colored farmers which was not a corporation.

The court properly permitted the witness McGinnis to state what commission was paid to the defendant Hall by the plaintiff as a consideration for his signing the contract, the purpose being to show that said Hall was the guarantor for a consideration. *Farquhar Co. v. Hardware Co.*, 174 N. C., 376.

The main issue raised by the defendants was whether the defendants signed the contract as individuals or as a committee, and the court therefore properly admitted evidence that Brown, one of the three defendants who signed the contract individually, gave orders as to whom the fertilizer contracted for should be shipped.

The defendants having testified that they signed the contract previous to 1920, in the same manner in which they had executed this 1920 contract, the court properly permitted to be put in the evidence the contract for 1919. It appeared therefrom that the defendants executed that contract as individuals. It was competent to permit the plaintiff to show that before they accepted this contract signed by the defendant, and especially by the defendant Hall, that they had investigated the financial standing of the three defendants before entering into the contract.

The defendant Hall having testified that he had not consented to taking the renewal notes, there was no error in the court permitting the plaintiff's witness to testify upon the second issue as to whether the renewal notes were taken with the knowledge and consent of the defendants, and the statement as to what Hall had said to him in regard to taking said renewal notes.

The contract on its face having been signed by the defendants as individuals, and the defendants having, in their amended answer and by their testimony, undertaken to show that it was not their intention to sign as individuals but as committeemen, the court properly admitted testimony as to statements made by the defendants to its agent admitting their individual responsibility some two years after the contract had been executed.

The eighth and ninth exceptions cannot be considered, for the questions excepted to by the defendants were not answered, and the tenth exception, for the refusal to give a prayer for instructions, cannot be sustained because it assumed as true statements of facts which were controverted.

The eleventh exception was also properly refused because the court went further than the request and charged the jury "that if the defendants signed the contract as agents or as a committee, it was not necessary for them to have added committee thereto, but it would have been better for them to have done so."

As to the twelfth exception, the defendants cannot complain of the refusal of the court to give the third prayer to charge because it was already fully covered in the charge as given on the second issue and also on the third issue, in which the court instructed the jury, "If you find that the defendants signed the contract as committeemen with the knowledge of the plaintiff, and afterwards extended the time and took the renewals without the consent of the defendants, you will answer the third issue 'Nothing.' "

If the court committed any errors in the trial of this cause they were in favor of the defendants.

In consideration of all the exceptions, we find nothing in the trial of which the defendants can complain.

No error.

CORNELIA T. JESSUP AND JOSEPH T. NIXON v. THOMAS NIXON.

(Filed 19 September, 1923.)

1. Executors and Administrators—Deeds and Conveyances—Sales—Purchaser—Fraud—Irregularities—Instructions.

The presumption is, certainly after the long lapse of years, in favor of the validity or regularity of a deed made by a mortgagee of the deceased owner of lands to the administrator who became the purchaser at the mortgage sale individually, and received the surplus as administrator and accounted for it to the clerk in his final settlement of the estate; and the burden of showing any irregularity in the execution of the power of sale being upon the heirs at law, whose action is to declare the sale void, a peremptory instruction of the judge to answer the issue in their favor, is reversible error.

2. Same—Heirs—Creditors—Homestead—Dower.

Where the deed of a mortgagee in executing the power of sale to the administrator of the deceased owner, who became the highest bidder, individually, recites that the widow's dower and homestead had been reserved, and it is found as a fact by the verdict that the price was a fair one, and that nothing was done by him at the sale to suppress or chill the bidding, and it appears that as administrator he had received and accounted for the surplus without objection from the creditors of the estate, who received only a proportionate and less amount of their claims: *Held*, the reservation from the sale and deed made in pursuance thereof, of the dower and homestead exemptions, was not an irregularity of which the heirs at law could complain; and a peremptory instruction in their favor in their action to set aside the sale for irregularity or fraud, was reversible error.

3. Same—Statute of Limitations.

Held, under the evidence in this case, it was reversible error for the court to instruct the jury that the plaintiff's cause of action was not barred by the ten-year statute of limitations.

4. Mortgages — Deeds and Conveyances — Patent Error — Sales —Irregularities.

The recitation in a mortgage authorizing and empowering the mortgagor to execute the power of sale upon default in payment, upon giving notice to the party of the first part (himself), is patently a clerical error, which will not nullify the sale or deed to the purchaser thereat.

APPEAL by defendant from *Connor, J.*, at April Term, 1923, of PERQUIMANS.

This was an action begun 11 August, 1921, to set aside a sale made 1 July, 1896, under a mortgage. The plaintiffs are the heirs at law of Francis Nixon, deceased, who on 3 September, 1889, executed a mortgage to David Cox, duly recorded, to secure an indebtedness of $350. Francis Nixon died 30 March, 1896, in possession of the premises—104 acres of land.

The plaintiff contends that the sale at which the defendant purchased was invalid because not preceded by due notice and advertisement as required in the mortgage, and because the dower and homestead were reserved, and not sold, contrary to the terms of said mortgage and because the defendant was the administrator of the mortgagor when he became purchaser.

That, as further alleged, he purchased the land at a grossly inadequate price, giving those present at the sale to understand that he was buying for the widow and plaintiffs, thereby inducing others not to bid. The court instructed the jury to answer the first issue "Yes" and the second issue "Yes."

The jury found as to the third issue that the fair market value of the land at the time of the sale was $1,250. Fourth issue, that the defendant did not fraudulently procure the foreclosure of said mortgage and the sale of the land, nor cause same to be sold subject to the dower interests of the widow and the homestead of the children, and thereby obtain the same at a grossly inadequate price as alleged in the complaint; and fifth issue, that the defendant did not, with the purpose of purchasing the property in question at an undervaluation, cause or knowingly permit it to be understood at such sale that he was purchasing such property for the benefit of the heirs of the mortgagor, deceased, as alleged.

The sixth issue was, "Is the plaintiffs' cause of action barred by the ten-year statute of limitations as alleged in the answer?" which the court instructed the jury to answer "No."

The court entered judgment on the verdict that the plaintiffs are entitled to redeem the land described in the complaint, and decreed that the purchaser held the same upon the trust imposed by the mortgage deed, appointed a referee to state an accounting between the parties and refused a motion for a new trial upon the first, second and sixth issues. Appeal by defendant.

Ehringhaus & Hall and Meekins & McMullan for plaintiff.

Charles Whedbee, Thompson & Wilson, Ward & Grimes, and Stephen C. Bragaw for defendant.

CLARK, C. J. There was no evidence that due notice and advertisement of sale were not given in 1896, or that the mortgage sale was not regular. It was therefore error to instruct the jury to answer the first issue "Yes." The ordinary presumption is, certainly after the lapse of 25 years, as in this case, that notice and advertisement of sale were given; but even if that were not so, there was no presumption that they were not given so as to justify the court in instructing the jury, as a matter of law, they were not.

If the sale was made subject to the widow's dower and the homestead, this was for the benefit of the widow and children, and is not a matter for which they can complain after the lapse of 25 years so as to have this sale declared invalid. Their creditors might have protested this reservation, but that they gave up to the widow a dower which she had released and thus reduced the amount available for the payment of debts does not give the plaintiffs an equity to have the sale set aside after this lapse of time and to charge the defendants with the rents of the land. Certainly it was not proper for the court to instruct the jury peremptorily to answer the second issue as asked by plaintiffs and given.

The jury have found that the defendant did not fraudulently procure the foreclosure of said mortgage and the sale of said land and cause the same to be sold subject to the dower interests of the widow and the homestead rights of the children, and thus obtain the same at a grossly inadequate price as alleged in the complaint.

The jury have also found the fifth issue that the defendant did not, while administrator, and with the purpose of purchasing the property in question at undervaluation, cause or knowingly permit it to be understood at the mortgage sale that he was purchasing such property for the benefit of the heirs of Francis Nixon, deceased, as alleged, and it was error for the court to charge the jury that the plaintiffs' cause of action was not barred by the statute's limitation.

The presumption of law is in favor of regularity in the execution of a power of sale, and if there was any failure to advertise the property,

the burden is upon the party alleging it. *Jenkins v. Griffin,* 175 N. C., 184; *Troxler v. Gant,* 173 N. C., 422; *Cawfield v. Owens,* 129 N. C., 286. After a lapse of more than 25 years and after the death, as in this case, of every witness who would have knowledge of the matter, this presumption would go, not only to the regularity in advertising, but is in favor of the regularity of the execution of the power of sale. Certainly the court could not instruct the jury to answer affirmatively that the sale was made without notice and advertisement.

The estate of Francis Nixon, Jr., the mortgagor, was fully administered and the final account filed on 27 July, 1897, duly audited and approved. The assets therefrom were distributed to creditors as shown by the accounts, who received in the distribution 53 per cent of their claims.

The court should not have held that there was no evidence to rebut the presumption that the notice and advertisement required by the mortgage and by law had been given and made. Second, the court should have held that these plaintiffs could not be heard to assert claims to this land based upon an irregularity in reserving dower and homestead from the mortgage sale, the irregularity inuring to their benefit and causing them no loss.

The estate of the mortgagor was settled and the report filed and recorded 30 July, 1897, which showed that after payment of the mortgage debt the assets were $611.49 and the indebtedness was $1,156.78, the creditors receiving a dividend of 53 per cent. The plaintiffs must show that the assets of the estate were sufficient to pay his debts before they could ask the court to decree that they recover this land and its rents when the creditors had not been paid in full.

The reservation of the homestead was to the detriment solely of the creditors and not of the heirs at law. In *Highsmith v. Whitehurst,* 120 N. C., 123, where the land was purchased by the administrator, the court held that as the land brought full value and the price paid, which the creditors (as in this case) had ratified by accepting the proceeds which, together with the other assets, were not sufficient to pay the debts of the estate in full, the heirs never had any legal right to the land nor any equitable ground upon which to have the sale set aside or to have the purchaser declared a trustee for them. This has been followed in *Russell v. Roberts,* 121 N. C., 322; *Winchester v. Winchester,* 178 N. C., 483.

The dower of the widow is not involved as she is not a party to this action. In the light of the findings against the plaintiffs as to the allegations of fraud, we have a case in which the administrator bought at a sale under the mortgage, paying a fair price for the property, acting in good faith though buying for himself, paying the money; the

proceeds being applied in payment of the debts of the decedent, but the assets being insufficient to pay more than 53 per cent of the debts. The administrator not procuring the land to sell for less than its value, and the creditors, whose interest it was to see that it brought its fair value, taking no exceptions, the heirs of the mortgagor cannot have the deed set aside on account of alleged technical irregularities in order to recover the land which would not have been theirs had the irregularities not occurred.

The mortgage from Francis Nixon and wife, 23 September, 1889, is in all respects regular except that by a patent inadvertence it recited that if there should be default in payment of any part thereof, the said party of the first part, etc., is hereby empowered and authorized, etc., to execute the power of sale upon giving notice to the party of the first part, etc. The clerical inadvertence is patent and the sale was made, under the power of attorney, by the party of the second part, the mortgagee, David Cox, and his deed to the purchaser, recites that the property was offered for sale at the courthouse door, subject to the dower of the widow and the homestead rights of the children; that Thomas Nixon was the highest and best bidder at $675 and was declared to be the purchaser; that after the said sum had been paid, $428 had been applied in payment of the notes secured and costs of sale, and the balance, to wit, $247, paid over to Thomas Nixon, administrator of Francis Nixon, and conveyance was made in due form by David Cox as mortgagee to Thomas Nixon, subject to the dower rights of the widow and the homestead rights of the minor children. This deed is in due form and was registered 4 July, 1896.

The complaint does not seek to have this deed to Thomas Nixon declared to be in trust for the widow and children, but to have the court declare it a "nullity," and that the heirs at law may be permitted to redeem the mortgage and for an accounting by the administrator for the timber sold or removed, and for rents and profits of the land.

The sale was not made by Thomas Nixon as administrator or at all, but by the mortgagee, David Cox. The recital in the deed from Cox is that "Thomas Nixon" bought and paid for the land for himself, and the surplus, "after the payment of notes and costs of sale," was paid over to him "as administrator." There is nothing in this which entitles the plaintiffs to have him decreed a trustee for them, especially in view of the express findings of the jury that he had no part in procuring the sale of the land and that he did not buy at an under price nor chill the sale. The $247 which was paid to him "as administrator" was duly accounted for in his final account.

Error.

FRANCIS HALL ET AL. v. SETTLE ARTIS ET AL.

(Filed 26 September, 1923.)

1. Clerks of Court—Jurisdiction—Appeal.

If an action or proceeding is instituted before the clerk of which he has no jurisdiction, and on any ground is sent to the Superior Court before the judge, the judge has jurisdiction to retain and hear the cause as if originally instituted in the Superior Court. C. S., sec. 637.

2. Same—Actions—Motions in the Cause.

Where a suit is brought before the clerk for partition of lands, involving the establishing of a parol trust in favor of one of the tenants against the other, which is resisted upon the ground that the trust had been later discharged by the receipts of rents and profits from the land, an independent equitable action, and not a motion in the original cause, is the defendant's remedy after a final judgment had therein been rendered.

CLARK, C. J., concurring.

CIVIL ACTION, heard by *Grady, J.*, at February Term, 1923, of GREENE.

The plaintiffs instituted a proceeding before the clerk for the ultimate purpose of selling for partition the land described in the complaint, and as preliminary thereto of setting up a parol trust in the land. When the complaint and answer were filed—the defendants having pleaded sole seizin—the clerk transferred the cause to the civil-issue docket for trial. In the Superior Court the defendants moved for judgment of nonsuit on the ground that the alleged cause of action is cognizable only in a court of equity, and that the clerk had no jurisdiction. The motion was allowed, and the plaintiffs excepted and appealed.

George M. Lindsay for plaintiffs.
J. Paul Frizzelle for defendants.

ADAMS, J. The plaintiffs alleged that the land described in the complaint was devised by Daniel Artis to Henry Artis and charged with the payment of one-fourth the amount of a pecuniary legacy bequeathed by the testator to Clara Edwards; that in due time the legatee brought suit to subject the land to the payment of this charge, and obtained an order of sale; that the defendant Settle Artis bought the property under an agreement that he should hold it in trust for Henry Artis and his children until repaid the purchase money, and that the full amount of the purchase price had been repaid him from the annual rents. The object of the action is to establish a parol trust and to have the land sold for partition among the plaintiffs and the defendants as tenants in common.

The defendants contend that the clerk had no jurisdiction of an action or proceeding instituted to establish a parol trust; that the jurisdiction of the Superior Court was entirely derivative, and that the judgment dismissing the action should therefore be affirmed. On the other hand, the plaintiffs insist that the judgment is not erroneous even if it be granted that the clerk was without jurisdiction.

There is a general rule, frequently approved in our decisions, that if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon the appellate court. 3 C. J., 366, sec. 123; *Gordon v. Sanderson,* 83 N. C., 1; *Boyett v. Vaughan,* 85 N. C., 364; *Raisin v. Thomas,* 88 N. C., 148; *Markham v. Hicks,* 90 N. C., 1; *Robeson v. Hodges,* 105 N. C., 49; *Cheese Co. v. Pipkin,* 155 N. C., 395; *McLaurin v. McIntyre,* 167 N. C., 350; *Holmes v. Bullock,* 178 N. C., 376; *Commissioners v. Sparks,* 179 N. C., 581; *Sewing Machine Co. v. Burger,* 181 N. C., 241.

But the application of this rule is not unlimited. In *Robeson v. Hodges, supra,* it is said: "In *Capps v. Capps,* 85 N. C., 408, it is held that when a case which is properly cognizable in the Superior Court, but erroneously brought before the clerk, gets into the Superior Court, by appeal or otherwise, the latter court will amend the summons and treat the action as if originally brought in the Superior Court, and proceed; but when the action is properly triable in the Probate Court, it is error in the Superior Court, on appeal, to allow the complaint to be amended by engrafting new matter, cognizable only in the Superior Court at term"; and in *Elliot v. Tyson,* 117 N. C., 114, *Clark, J.,* stated that such amendment of process may be presumed. To the same effect are *McLean v. Breece,* 113 N. C., 391; *Baker v. Carter,* 127 N. C., 92; *Ewbank v. Turner,* 134 N. C., 77; *Ryder v. Oates,* 173 N. C., 569. Referring to the question, in *Anderson's case,* 132 N. C., 244, *Montgomery, J.,* said: "Although the proceedings originally had before the clerk were a nullity, for the reasons already pointed out, yet when the matter got into the Superior Court by appeal, that court then acquired jurisdiction. *Roseman v. Roseman,* 127 N. C., 494; *Ledbetter v. Pinner,* 120 N. C., 455; *Faison v. Williams,* 121 N. C., 152." See, also, C. S., sec. 637.

The defendants further contend that the plaintiffs should have sought relief by motion in the original cause, and not by an independent action. We do not consider the question whether the Superior Court had the legal right to treat the proceeding as a motion, because, as we understand the record, a final judgment had been rendered in the original cause, and the plaintiffs' right to insist upon the execution of the parol trust arose after the purchaser had been reimbursed the amount of his expenditure. Under these circumstances, the plaintiffs could resort to

an independent equitable action. *Smith v. Fort,* 105 N. C., 446; *McLaurin v. McLaurin,* 106 N. C., 331; *Bunker v. Bunker,* 140 N. C., 18.

We are of opinion that the Superior Court had jurisdiction, and that the judgment dismissing the action should be set aside. The judgment is therefore

Reversed.

CLARK, C. J., concurring: C. S., 637, provides: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

This statute was passed in 1887 (chapter 276). As stated in *Roseman v. Roseman,* 127 N. C., 497, its enactment was caused by the inconveniences resulting from the course of practice prescribed in *Brittain v. Mull,* 91 N. C., 498. The office of probate judge having been abolished, the duties thereof devolved upon the clerk of the Superior Court, and he had, therefore, two sets of judicial powers—one in the exercise of the special judicial powers of his distinct tribunal, and the other which he exercised for the court as its clerk, with the result that there was "oft confusion worse confounded." This act, now C. S., 637, was passed to simplify the procedure. It was much needed and has worked effectively.

Roseman v. Roseman, supra, has been very often cited and is now the settled practice. See citations to C. S., 637, which hold that "Under this section the judge to whom a cause is sent by appeal, or otherwise, from the clerk, has the full jurisdiction to hear and fully determine the cause, or to make orders thereon and send it back to the clerk to be proceeded with by him." Under this statute and the decisions construing it, when the appeal reaches the Superior Court, "on any ground whatever," the judge has the right, under the statute, to assume jurisdiction and to dispose of the case as if it had originally begun there.

It should be noted that the decision which formerly held that as to a certain class of cases a clerk had no jurisdiction because he had no equitable powers, was the survival of outworn ideas and without any foundation in the Constitution.

The Constitution, it will be noted, absolutely abolished "all distinctions between actions at law and suits in equity and the forms of all such actions and forms." No jurisdiction of any court or cause is now based upon the presence or administration of equitable ingredients.

Therefore, when a case goes up from the clerk to the judge, there is no distinction of jurisdiction based upon the ground of an action being equitable or otherwise, and when the case reaches the judge he is vested with full jurisdiction to retain the cause and proceed with it, or to make appropriate orders and remand it to the clerk to be proceeded with, and of this the judge of the Superior Court is the sole judge. His discretion in this respect cannot be reviewed by this Court on appeal.

The cases to the above effect are fully cited in the opinion-in-chief in this case, and others still are cited in the notes to C. S., 637, and other cases have been decided since the annotations in the C. S.

Indeed, there is nothing which deprives even a justice of the peace of the right to pass upon equitable matters when within the amount allotted for his jurisdiction. It is true that a justice of the peace cannot issue an injunction or *mandamus,* or take action in some other matters, but this is not because the Legislature cannot confer jurisdiction in those matters, but because in allotting the distribution "of that portion of the judicial power and jurisdiction which does not pertain to the Supreme Court among the courts inferior to the Supreme Court," the Legislature has not conferred upon justices of the peace jurisdiction of injunctions, *mandamus* and other remedies. Const., Art. IV, sec. 12.

J. J. SANDERS v. E. H. MAYO.

(Filed 26 September, 1923.)

1. Seller and Purchaser—Vendor—Fraud—Deceit—Pleadings—Motions—Nonsuit—Questions for Jury—Trials.

In an action to recover upon a note given for shares of stock, the defendant admitted the execution of the note and alleged and offered evidence tending to show that the plaintiff, while an officer of the corporation and having peculiar and superior knowledge of its financial affairs, had induced him to purchase, knowingly representing that the corporate indebtedness was much less than it actually was, and that otherwise he would not have made the transaction: *Held,* upon plaintiff's motion as of nonsuit, the issue of fraud and deceit was for the jury.

2. Same.

Held, upon the evidence in this action upon a note given for the purchase of shares of stock in a corporation, it was for the jury to determine whether the misrepresentations were of such character and were made under such circumstances as were calculated to impose upon or deceive the defendant, as a person of ordinary prudence, and whether he, as such, should have relied upon them.

3. Evidence—Corporations—Books—Secondary Evidence.

Upon an issue of plaintiff's fraud and deceit in this action in inducing the defendant to purchase stock on the former's misrepresentation of the indebtedness of a corporation: *Held*, parol testimony was unobjectionable as secondary evidence, when it was made to appear that the corporation's books did not disclose the amount of its indebtedness.

CIVIL ACTION, tried before *Kerr, J.*, and a jury, at April Term, 1923, of NASH.

On 24 May, 1919, the defendant executed and delivered to the plaintiff four promissory notes, under seal, in the aggregate sum of $5,782.50, with interest from the respective dates of maturity. The defendant admitted the execution of the notes, but denied liability on the ground that they had been procured by fraud. The verdict was as follows:

"1. Did the defendant execute the notes sued upon? Answer: 'Yes.'

"2. What amount is due thereon? Answer: '$5,782.50 and interest, as appears on face of the four notes.'

"3. Were the said notes obtained from the defendant by fraud, as alleged in the answer? Answer: 'Yes.' "

Judgment for the defendant, and appeal by the plaintiff.

I. T. Valentine, Albert L. Cox, and Carroll W. Weathers for plaintiff.
Finch & Vaughan and Manning & Manning for defendant.

ADAMS, J. The defendant alleged that the consideration of the notes sued on was fifty-five shares of stock held by the plaintiff in the Farmville Lumber Company, a corporation; that prior to the execution of the notes the plaintiff had managed and controlled the business of the company and knew how much it owed; that the defendant, at the time he purchased the stock, made specific inquiry as to the indebtedness, and was told by the plaintiff that the debts outstanding were only $6,500; that he relied upon this statement, and afterwards found it to be false and fraudulent, the indebtedness being in fact about $18,000; and that he was thereby deceived and induced to purchase the plaintiff's stock and to execute the notes.

In his answer the defendant admitted that at the time he purchased the plaintiff's shares he owned stock in the corporation of the par value of $600, but alleged he knew nothing of the indebtedness. All the allegations of fraud were denied by the plaintiff, who contended that he took no part in the management of the business after 1 January, 1918, and that he never made any statement to the defendant concerning the financial condition of the company.

At the close of the defendant's evidence the plaintiff moved for judgment, on the ground that the defendant had admitted the execution of

the notes, and that there was not sufficient evidence of fraud, and excepted to the court's denial of his motion. The agreement of the appellant rests chiefly on the contention that the defendant had a better opportunity than the plaintiff to know the financial condition of the concern, and bought the stock upon his own judgment in order to control the business.

In these circumstances the controversy was resolved into a question of fact for determination by the jury. In view of the allegations in the answer, supported as they were by evidence on behalf of the defendant, the plaintiff was not entitled to judgment on the pleadings under the decision in *Cash Register Company v. Townsend,* 137 N. C., 652, and in similar cases. The plaintiff's alleged statement was not a mere matter of opinion.

It is not necessary to discuss the exception at length, for the reason that the principles which are applicable to this evidence have been declared and maintained in a number of our decisions. *Walsh v. Hall,* 66 N. C., 233; *Machine Co. v. Feezer,* 152 N. C., 516; *Leonard v. Power Co.,* 155 N. C., 10; *Pate v. Blades,* 163 N. C., 267; *Bell v. Harrison,* 179 N. C., 190; *Williams v. Hedgepeth,* 184 N. C., 114; *Currie v. Malloy,* 185 N. C., 213.

We do not understand the appellant to contend in his argument here that the defendant was necessarily charged with the legal duty to verify the plaintiff's representations, for upon the evidence introduced it was the province of the jury to say whether the representations were of such a character and were made under such circumstances as were calculated to impose upon or deceive a person of ordinary prudence, and whether the defendant, as a reasonably prudent person, should have relied on them. *Blacknall v. Rowland,* 108 N. C., 555; *S. c.,* 116 N. C., 389; *May v. Loomis,* 140 N. C., 350; *Sewing Machine Co. v. Bullock,* 161 N. C., 1; *Miller v. Mateer,* 172 N. C., 401.

The defendant was permitted to testify that after he assumed the management of the business, which was about two weeks after he purchased the stock, he learned that the total indebtedness of the company was about $33,000, and to this evidence the plaintiff excepted, on the ground that the books were the best evidence. But it does not appear that the various items of the indebtedness were entered on the books; on the contrary, this witness said that the "books did not show anything," and another testified that there was nothing in the books "to disclose the bank indebtedness."

The remaining exceptions are obviously untenable and require no discussion. We find no reversible error.

No error.

A. W. McNAIR, ASSIGNEE, v. O. Y. YARBORO.

(Filed 26 September, 1923.)

1. Pleadings—Verification—Statutes—Clerks of Court.

A verification to a complaint that the statements therein contained are true, to the best knowledge, information and belief of the plaintiff, save those matters which are stated on information and belief, and as to those he believes it to be true, is not sufficient compliance with C. S., sec. 529, requiring a statement that "the facts set forth in the designated pleadings are true, except those stated on information and belief, and as to those matters he believes them to be true."

2. Same—Money Demand—Judgments Set Aside.

Sufficient verification, as the statute (C. S., sec. 529) requires, not appearing in the complaint in an action upon a money demand in an amount certain, etc., will be treated as a nullity and irregularity, and judgment by default final, etc., thereon will be set aside on motion of defendant made before the clerk in apt time, on a proper show of merits. C. S., sec. 595 (1).

3. Same.

The requirement of C. S., sec. 595 (1), that to obtain judgment by default, etc., in an action upon a money demand, the complaint must be properly verified (C. S., sec. 529), is not affected by chapter 92, Extra Session of 1921, requiring a copy of the verified complaint to be served on the defendant with the summons; C. S., secs. 595, 596, and 597 expressly affirming the provisions of section 595 (1).

4. Same—Powers of Trial Judge.

Chapter 92, Laws of 1921, sec. 3, prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by C. S., sec. 536, upon the judge, to the effect that when the cause is properly before him "he may in his discretion, and upon such terms as may be just, allow an answer or reply to be made or other acts done after the time, or by an order to enlarge the time."

MOTION to set aside judgment by default final, heard on appeal from clerk before *Kerr, J.*, at March Term, 1923, of EDGECOMBE.

On the hearing it was made to appear that the summons in an action for a moneyed demand for a sum certain was issued from clerk's office on 8 February, 1923; that the same, together with a copy of complaint, purporting to be verified, was served on defendant on 10 February, the verification being in form as follows: "A. W. McNair, being duly sworn, deposes and says that the statements contained in the foregoing complaint are true, to the best of his knowledge, information and belief, save those matters which are stated on information and belief, and as to those matters he believes them to be true." Signed, sworn to, etc. That in twenty-one days after service of summons and complaint, to wit, 4 March, defendant submitted a duly verified answer, setting

forth a defense apparently meritorious, and the clerk, being of opinion that same should not be considered, on 5 March, the first Monday thereafter, entered judgment by default final for the amount due, as alleged in the complaint. On 4 March, defendant, on notice and affidavits setting forth merits, moved to set the same aside for irregularity, in that there had been no proper verification, and for other reasons there alleged. Motion refused, and defendant appealed.

On the hearing of the appeal in the Superior Court, there was judgment setting aside the judgment by default final, and directing that defendant be allowed to answer. Plaintiff excepted and appealed.

George M. Fountain for plaintiff.
S. A. Newell for defendant.

HOKE, J. The statute establishing a proper form for verification of pleadings (C. S., sec. 529) requires a statement by affidavit in substance and effect that "the facts set forth in the designated pleading are true, except as to those matters stated on information and belief, and as to those matters he believes them to be true." And it has been held in various decisions construing the section that the attempted verification in the present instance is not a sufficient compliance. *Carrol v. McMillan,* 133 N. C., 140; *Cowles v. Hardin et al.,* 79 N. C., 577.

This being true, our legislation is to the effect, further (C. S., sec. 595, subsec. 1), that in order to judgment by default final in a moneyed demand, properly stated, the pleading should be verified as the statute requires, and our cases on the subject hold that a judgment by default final in that kind of suit, on an unverified complaint, is irregular and will be set aside on motion made in apt time and on a proper show of merits. *Miller v. Curl,* 162 N. C., 1; *Cowan v. Cunningham,* 146 N. C., 453; *Becton v. Dunn,* 137 N. C., 562.

It is earnestly insisted for appellant that, under subsequent legislation amending the Consolidated Statutes, more especially chapter 92, Extra Session 1921, a verified complaint is no longer required for a judgment by default final, where a copy of complaint, properly setting forth the cause of action, is served on the defendant with the summons, but we do not so interpret the amendments referred to. On the contrary, the statute relied upon (section 1, subsection 9) provides in terms that if no answer is filed, the plaintiff shall be entitled to judgment by default final, or default and inquiry, as authorized by sections 595, 596, and 597 of the Consolidated Statutes, thus expressly affirming the requirement of section 595, subsection 1, to the effect, as stated, that on a moneyed demand a verified complaint is required to a proper judgment by default final. Appellant cites and relies chiefly upon subsections 11 and 12 as

modifying subsection 9 in the respect suggested, but we do not so construe the law. In our opinion, a proper perusal of subsection 11 refers to the time when judgments shall be entered before the clerk, where a copy of the complaint has been served on defendants or any of them. And subsection 12 contains an enumeration of the cases wherein the clerk is authorized to enter judgment, but neither 11 nor 12 contains any modification of the provision of section 595 of Consolidated Statutes, expressly affirmed in subsection 1, and wherein it is provided that a verified complaint is required—in suits on a moneyed demand.

It may be noted that, under section 595, subsection 4, in actions to recover real property, a verified complaint is not always required. *Patrick v. Dunn,* 162 N. C., 19. And we consider it well to state further that, while this chapter 92, in section 3, provides that "where copy of the complaint has been served upon each of the defendants, the clerk shall not extend the time for filing answer beyond twenty days after such service." This restriction applies to the clerk, and does not and is not intended to impair the broad powers conferred on the judge in this respect by section 536 of Consolidated Statutes, to the effect that where the cause is properly before him, "he may, in his discretion and upon such terms as may be just, allow an answer or reply to be made or other act done after the time or by an order to enlarge the time." The judgment of his Honor, therefore, is affirmed in its entirety, that the judgment by default final be set aside and defendant allowed a reasonable time to answer.

Affirmed.

STATE v. HERBERT MURPHREY.

(Filed 26 September, 1923.)

1. Criminal Law—Pleas—Presumptions—Evidence—Questions for Jury—Trials.

The plea of not guilty raises a presumption of innocence of the defendant, disputes the credibility of the State's evidence, and raises the question of his guilt for the jury to determine.

2. Spirituous Liquor—Evidence—Instructions—Verdict Directing—Appeal and Error.

In an action for the unlawful sale of liquor the evidence tended to show that the witness, a physician, obtained the liquor from the defendant for a patient, for which the defendant received money offered by the witness: *Held,* the transaction was an unlawful sale, coming within the inhibition of the statute, and an instruction by the court for the jury to find a verdict of guilty, if found to be true, was correct, there being no other evidence in the case.

STATE *v.* MURPHREY.

CRIMINAL ACTION, tried before *Grady, J.*, and a jury, at February Term, 1923, of GREENE.

The defendant was indicted for the unlawful sale of spirituous liquor. Dr. W. E. Dawson, who was the only witness, testified for the State as follows: "I was on my way to see a patient suffering with influenza, when I met Herbert and asked him if he had any whiskey, and he said that he could let me have a quart. I said, 'Shoot it over,' and gave him two one-dollar bills, and he gave me one quart of whiskey. He did not make any charges. I simply gave him two dollars and asked him if that was all right, and drove on. I have purchased whiskey from others and used it in treating my patients suffering with influenza."

His Honor instructed the jury as follows: "I charge you, gentlemen, if you believe the evidence in this case, you will return a verdict of guilty. You may retire and make up your verdict, or you may sit where you are." The defendant excepted. The jury returned a verdict of guilty, upon which judgment was pronounced, and the defendant appealed.

Attorney-General and Assistant Attorney-General for the State.
Richard T. Martin and Walter G. Sheppard for defendant.

ADAMS, J. The defendant entered a plea of not guilty and thereby put in issue not only his guilt, but the credibility of the State's evidence; for evidence tending to show guilt is disputed even when uncontradicted, there being a presumption of innocence which can be overcome only by the verdict of a jury. *S. v. Hill,* 141 N. C., 770. The State introduced only one witness, and the defendant offered no evidence. To establish guilt under these circumstances, it was incumbent on the State to show that Dawson's testimony, if accepted by the jury, was sufficient to show a breach of the statute. The substance of his testimony was this: He inquired whether the defendant had any whiskey; the defendant said he could let him have a quart; he gave the defendant two dollars, and the defendant delivered the liquor.

True, the witness said the defendant made no charges, but the testimony, if believed, clearly shows that the defendant received the money as a consideration for the transfer of his title to the whiskey. This transaction constituted a sale (*S. v. Colonial Club,* 154 N. C., 177), and the credibility of the testimony was submitted to and determined by the jury.

His Honor's instruction is sustained by several decisions. In *S. v. Vines,* 93 N. C., 493, there was only one witness, and the court charged the jury, if they believed the testimony, the prisoner was guilty of manslaughter. Discussing the prisoner's exception, *Merrimon, J.*, said: "It

was insisted on the argument here that the judge invaded the province of the jury in instructing them that, 'if they believed the testimony of the witness, the prisoner was guilty of manslaughter.' We do not think so; this contention has not the slightest foundation. The judge did not intimate in the least degree, in terms or by implication, that he did or did not believe the evidence to be true, nor did he tell the jury that they should believe it, or any part of it; he, in effect, told them that, in any possible view of the evidence (and taking it most favorably for the prisoner), if they believed it to be true, then, as a conclusion of law, he was guilty of manslaughter. This was unobjectionable in this case. There was but one witness; there was no conflict of testimony; there were no alternative aspects of it to be submitted. The credit of the witness and the sufficiency of his testimony to produce conviction upon their minds was broadly and without qualification left to the jury. *S. v. Walker,* 4 N. C., 662; *S. v. Hildreth,* 31 N. C., 429; *S. v. Ellick,* 60 N. C., 450; *S. v. Baker,* 63 N. C., 276; *S. v. Elwood,* 73 N. C., 189; *S. v. Burke,* 82 N. C., 551."

In *S. v. Riley,* 113 N. C., 648, *Clark, J.,* observed: "The evidence for the State being uncontradicted, the court told the jury, if they believed the evidence, to return a verdict of guilty. This was correct, upon the evidence set out, and if the jury had returned a verdict, there would be no ground for exception"; and in *S. v. Hill,* 141 N. C., 769, *Hoke, J.,* concluded that where, in any aspect of the testimony, the defendant's guilt is manifest, the judge may tell the jury, " 'if they believe the evidence,' or 'if they find the facts to be as testified,' they will return a verdict," etc. *S. v. Woolard,* 119 N. C., 779; *S. v. Winchester,* 113 N. C., 641.

Our conclusion is not at variance with the decision in *S. v. Singleton,* 183 N. C., 738, or *S. v. Estes,* 185 N. C., 752, for in each of these cases it was held that the evidence, if true, did not necessarily establish the guilt of the defendant, and that under a proper charge the matters in controversy should have been submitted to the jury.

We have directed attention to the fact that the testimony in the case at bar is uncontradicted; but even in instances of this character it would be more satisfactory if the court's instruction to the jury followed the usual formula on the question of "reasonable doubt."

We find no sufficient cause for a new trial.

No error.

WOODLAND & COMPANY v. SOUTHGATE PACKING COMPANY.

(Filed 26 September, 1923.)

Evidence—Questions for Jury—Findings of Judge—Appeal and Error.

Upon the denial of liability as a partnership by defendant for fertilizer sold and delivered, the evidence was conflicting as to whether it was purchased and used by the firm, or one of two members thereof, presenting an issue of fact to the jury: and *Held*, error for the judge, without the consent of the parties, to find that it was a partnership indebtedness and render judgment accordingly.

APPEAL by defendant from *Grady, J.*, at June Term, 1923, of CARTERET.

Civil action to recover of the defendant, Southgate Packing Company, the purchase price of certain commercial fertilizer, alleged to have been sold to the defendant by the plaintiff. The defendant denied liability. From a judgment in favor of plaintiff and against T. S. Southgate, the said defendant appealed.

C. R. Wheatly for plaintiff.
Julius F. Duncan for defendant.

STACY, J. There was allegation and proof to the effect that plaintiff sold and delivered certain fertilizer to the Southgate Packing Company, a partnership composed of T. S. Southgate, G. D. Potter, J. C. Malbon and Elias Etheridge. There was other evidence tending to show that T. S. Southgate was the sole owner of the Southgate Packing Company, and that the fertilizer in question was shipped to and received by said packing company. G. D. Potter, a witness for the defendants, testified that he had been manager of Southgate Packing Company for 12 years, but that the fertilizer here in question was purchased by him individually and not for the packing company.

At this point the court stopped the trial, found as a fact that G. D. Potter was the general agent of Southgate Packing Company, and rendered judgment for the amount of plaintiff's claim against T. S. Southgate as the sole owner of the packing company. Defendant excepted and appealed.

The judgment appealed from is against T. S. Southgate and not against G. D. Potter, who admitted his individual liability. The jury returned no verdict in the case. There was no agreement that the judge should hear the evidence and find the facts, and the defendants have not waived their right to a jury trial. Hence we think the cause must be remanded for another hearing. Art. I, sec. 13, State Constitution.

In this jurisdiction, as was the rule at common law, it is the province of the jury to determine the facts, and that of the trial court to state the law. And where the testimony is conflicting, as it is here, the case presented is one for the jury. *Russell v. R. R.*, 118 N. C., 1098.

New trial.

MRS. IDA BURWELL v. RALEIGH BANKING AND TRUST COMPANY, TRUSTEE AND EXECUTOR OF L. D. BURWELL, DECEASED, AND THE TOWN OF LILLINGTON.

(Filed 26 September, 1923.)

1. Wills—Interpretation—Estates—Possession—Remainders.

Unless a contrary intent appears from the construction of a will, a devise of real property to one for life, remainder over gives to life tenant the right of possession and control during the continuance of his estate, subject to the debts against the estate: the same principle usually prevailing as to direct bequests of personal property, except where it is given as a residuary bequest, to be enjoyed by persons in succession, etc., when the property is converted into money and the interest paid to the legatees during the continuance of their respective estates.

2. Same—Powers—Deeds and Conveyances.

A devise of testator's real and personal property to his wife, to have and to hold and to use as her own as her necessities may demand during her life, and no more, and with further limitation in trust of the property left on hand, the personalty having been exhausted to pay decedent's debts: *Held*, the will expressed the intent that the widow should have possession and enjoyment only of the land during her life estate, under the prevailing rule of law, without power to sell or convey in fee.

CIVIL ACTION by the widow and devisee to recover control and possession of the real estate of L. D. Burwell, deceased, heard by *Horton, J.*, at chambers, 17 January, 1923, from HARNETT, on facts submitted.

It appeared that the rights of the parties are dependent upon the proper construction of the will of L. D. Burwell, deceased, and thereupon the court entered judgment, as follows:

"This cause coming on to be heard before his Honor, J. Lloyd Horton, and all parties thereto being present, in person or by attorney, and the plaintiff, prior to the hearing, having withdrawn all charges as to the mismanagement of the estate by the Raleigh Banking and Trust Company, executor, Marshall T. Spears, heretofore attorney for Mrs. L. D. Burwell, and Jones & Jones, attorneys for the Raleigh Banking and Trust Company, and having withdrawn all objection to said banking company as executor for the estate of said Burwell for the purposes of

administration, and having further withdrawn all claims against said banking company, and the issue being submitted to the court as to the right of Mrs. L. D. Burwell to have possession of the real estate belonging to the late L. D. Burwell not necessary for the payment of debts of said estate without supervision of the Raleigh Banking and Trust Company:

"It is considered, ordered and adjudged that Mrs. L. D. Burwell is entitled to the possession and control of all the real estate of the late L. D. Burwell not necessary to pay the debts of said estate, and that same be turned over to her; and it is further ordered that an account be made by the Raleigh Banking and Trust Company of all rents received by them from the real estate of said Burwell, and all moneys paid by them to Mrs. Burwell for maintenance, and that any sum in excess of payments by said bank to Mrs. Burwell received from said rents be paid to Mrs. Burwell without deductions for commissions on said rents.

"It is further ordered and adjudged that Mrs. L. D. Burwell shall keep said property, now insured by said banking company, insured by some reliable insurance company, in such amounts as the clerk of the Superior Court of Harnett County shall direct, and that she further pay the taxes for 1922 on said property now due and to become due during her lifetime.

"It is further ordered, by consent of all parties hereto, that the real estate of the said L. D. Burwell, deceased, may be sold for assets to pay debts, without reference to an automobile and household and kitchen belongings to the late L. D. Burwell, which is now used by Mrs. L. D. Burwell, and also stock in the Cape Fear Gin Company and the Lillington Warehouse Company.

"And it is considered, ordered and adjudged that the restraining order heretofore issued in this cause is hereby annulled and dissolved, and that the cost of this action be paid out of the funds of the estate.

"J. LLOYD HORTON, *Judge.*"

Defendant, the town of Lillington, excepts and appeals.

Baggett & McDonald and J. Crawford Biggs for plaintiff.
Charles Ross for defendant, the town of Lillington.

HOKE, J. The portions of the will which are controlling on the questions presented are as follows:

"Item 1. I give and devise to my beloved wife, Ida Burwell, all of my real estate that I may own at my death, and also all personal property, money and choses in action of every kind and description, for her to have and to hold and to use as her own as her necessities may demand

during her life, and no more, and at her death all of said property, including the land and personal property and moneys then on hand, I give and devise as follows:

"Sec. 1. That my executor, and trustee hereinafter named, shall take full charge of all my property left on hand at the death of my wife, Ida Burwell, and shall convert all personal property, choses in action and accounts into money, and the said executor and trustee shall rent out all of my real estate to the best advantage, and if at any time any of said real estate will not bring sufficient rent to make a reasonable income from said property, and the enhancement in value in the judgment of the said executor and trustee would not justify the holding of the same, then the said executor and trustee is hereby authorized to sell such property on such terms as to the said executor and trustee may seem best and most profitable to the said estate."

The remainder of the will constitutes the property coming to the trustee pursuant to the foregoing sections and L. D. Burwell memorial fund, with specific directions as to its management and disposition, including the construction and maintenance in conjunction with the town authorities of a municipal building for the town of Lillington, etc.

It is fully recognized that where real property is devised to one for life, remainder over, unless a contrary intent appears in the will, the life tenant is entitled to its possession and control during the continuance of the estate, subject always to its liability to creditors, under the provisions of law. And the same principle usually prevails as to direct bequests of personal property except where it is given as a residuary bequest to be enjoyed by persons in succession, etc., in which case the property is converted into money and the interest paid to the legatees during the existence of their respective estates. *Bryan v. Harper,* 177 N. C., 309; *Simmons v. Fleming,* 157 N. C., 389; *In re Knowles,* 148 N. C., 461-466; *Britt v. Smith,* 86 N. C., 305; *Ritch v. Morris,* 78 N. C., 377; *Smith v. Barham,* 17 N. C., 420.

On the present record it appears that all the personal property has been required for the payment of the testator's debts, only the question as to the realty being presented; and this being true, not only is there no intent expressed on the face of the will in contravention of the principle as stated, but a perusal of the instrument gives clear indication that the same is in affirmance of the rule generally prevailing on the subject, and that it was the intent of the testator that his entire property was to pass into the control and possession of his widow, "to have, hold and use as her own as her necessities may demand." And that only such of the property as is "left on hand" at the death of the wife is devised to the trustees to be converted into the memorial fund above referred to.

It may be well to note that under the terms of the will passing the property to the wife for her life, the added expression, devising to the trustees the property "left on hand at the death of my wife," confers on the wife no right to sell and convey the realty in fee, but such powers as are conferred upon her by the will as to that part of the property are restricted to proper enjoyment of the estate and interest given her, to wit, a life estate and "no more." *Miller v. Scott,* 185 N. C., 556; *Herring v. Williams,* 158 N. C., 1.

In our opinion the rights and interests of all the parties have been properly safeguarded, the judgment of his Honor is in accord with our decisions on the subject, and the same is in all respects

Affirmed.

L. O. BATTS v. HOME TELEPHONE AND TELEGRAPH COMPANY.

(Filed 26 September, 1923.)

1. Negligence—Personal Injury—Permissive Use of Alley.

Where the owner of a building in a town has continuously permitted his alley between his and an adjoining building to be used as a passage-way by the public, and knowingly and negligently allowed it to become obstructed and dangerous, causing injury therein to the plaintiff, it is sufficient evidence upon the issue of actionable negligence, etc., to be submitted to the jury, and defendant's motion as of nonsuit is properly overruled.

2. Negligence—Personal Injury—Measure of Damages—Instructions—Appeal and Error.

An instruction on the issue as to the measure of damages in a personal-injury case, not resulting in death, failing to limit such damages to the present net cash value of the diminution of the plaintiff's earning capacity, caused by the injury, is reversible error; and the rule of damages in such instances given in *Ledford v. Lumber Co.,* 183 N. C., 614; *Johnson v. R. R.,* 163 N. C., 451, cited and approved.

APPEAL by defendant from *Kerr, J.,* at June Term, 1923, of EDGECOMBE.

Civil action to recover damages for an alleged negligent injury.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Did the defendant company and owner of the alley between its building and the Masonic Temple building permit the same to be used by the public as a passage-way between Main and Washington streets in the city of Rocky Mount? Answer: 'Yes.'

"2. Did the defendant company knowingly and negligently allow said passage-way and alley to become obstructed, or permit an opening

thereon to be and remain open and thereby imperil and endanger those who were permitted to use the same? Answer: 'Yes.'

"3. Was plaintiff injured by reason of negligence of defendant, as alleged in the complaint? Answer: 'Yes.'

"4. Did plaintiff by his own negligence contribute to the injury complained of? Answer: 'No.'

"5. What damages, if any, is plaintiff entitled to recover? Answer: 'Eight thousand dollars.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed.

J. B. Ramsey and W. O. Howard for plaintiff.

L. V. Bassett and Bynum, Hobgood & Alderman for defendant.

STACY, J. The defendant's main exception, as stressed on the argument and in its brief, is the one directed to the refusal of the court to grant its 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.

There was evidence tending to support the jury's finding on the first three issues; and this, we think, was sufficient to import liability under authority of *Campbell v. Boyd,* 88 N. C., 131; *Monroe v. R. R.,* 151 N. C., 374. See, also, 20 R. C. L., 65, where the rule applicable is stated as follows:

"Where the owner or occupant of premises, with knowledge and for a long period of time, permits the public to use the premises without objection, for the purpose of traveling across the same on a well-established and safe path or highway, he cannot, without giving notice, render the premises unsafe to the injury of those who have used such highway, and have no notice of the changed condition, without being responsible for the resulting injury." See, also, *Morrison v. Carpenter,* Anno. Cas., 1915-D, 319, and note.

But we think there was error in the charge on the issue of damages which entitles the defendant to a new trial on this issue. His Honor instructed the jury as follows:

"In determining this you will award to plaintiff, not the total amount that he could have made, if you find what he could have made, before he was injured, but the present cash value of his net income, that is to say, what he would have received after paying his own personal expenses."

Here the court, inadvertently and for the moment, no doubt, apparently fell into the error of confusing the rule with respect to the measure of damages in actions for wrongful death with that in actions for personal injuries resulting only in a diminution of the plaintiff's earning capacity.

A correct statement of the rule for the admeasurement of damages, applicable to the present case, will be found in *Ledford v. Lumber Co.*, 183 N. C., 614; *Johnson v. R. R.*, 163 N. C., 451, and it would only be a matter of repetition to restate it here.

For the error, as indicated, there must be a new trial on the issue of damages. But the new trial will be limited to this issue, as we find no error in respect to the other issues. *Pickett v. R. R.*, 117 N. C., 616.

Partial new trial.

STATE v. SUNCREST LUMBER COMPANY.

(Filed 26 September, 1923.)

1. Sunday—Criminal Law—Railroads—Logging Roads.

A lumber railroad, over which steam locomotives haul logs, comes within the provisions of C. S., sec. 3480, making it a misdemeanor for railroads to permit the operation of trains, etc., on Sunday, whether it transports freight or passengers, for hire or otherwise, and it is immaterial whether it was for the sole purpose of supplying its extensive lumber manufacturing plants on Monday.

2. Same—Constitutional Law.

The setting aside of Sunday as a day of rest and quiet is not a religious, but a police regulation, necessary to the health and welfare of the people, and it applies to railroads, including logging roads (C. S., sec. 3480), to the employees therein engaged; and the provisions of our Constitution requiring religious liberty have no application.

APPEAL by defendant from *Bryson, J.*, at July Term, 1923, of HAYWOOD.

The defendant was convicted, at July Term, 1923, of Haywood, of the offense of operating a train on Sunday. The following was the special verdict:

That the defendant, the Suncrest Lumber Company, is a corporation, duly organized under the laws of the State of Delaware, and is authorized regularly and duly licensed to do business in the State of North Carolina under its charter; that the said Suncrest Lumber Company is an industrial corporation, without authority under the laws of North Carolina to operate and maintain a public-service railroad, and owns a large boundary of timber in the mountains of Haywood County, and is engaged in cutting and removing said timber to its sawmills, where the same is manufactured into lumber; that said defendant owns two band sawmills, situate in said Haywood County, and for the purpose of conveying the logs, which are cut in the woods, to its mills, owns and oper-

ates a standard-gauge private railroad, and draws cars, loaders and other necessary instrumentalities over said railroad track by means of locomotive engines, which are propelled by steam; that on its said railroad the defendants haul only its logs aforesaid, and its necessary provisions, supplies, implements, etc., for itself and laborers employed by it, and is not now, and was not at the time of the finding of the bill of indictment in this cause, a common carrier, and was not and is not engaged as a common carrier of freight or passengers; that the defendant employs in the prosecution of its business as a lumber corporation a great number of men in the woods, on the railroad, and in its two band sawmills, and in order to have sufficient logs at its mills to operate the same on Mondays and furnish employment for its men engaged in said mills, it, at times, operates its said railroad on Sundays and delivers logs by means of operating said railroad to one or both of its said mills; that on 24 September, A. D. 1922, the same being Sunday, the defendant operated, or caused to be operated, one of its steam locomotives upon its railroad, and ran the same into the mountains, and loaded, or caused cars drawn by it to be loaded with logs, and delivered the same to its sawmill for the purpose of being sawed into lumber on the following day, to wit, Monday.

If, upon the foregoing facts and special verdict, his Honor is of the opinion that the defendant is guilty, as charged in the bill of indictment, then we, the jury, return for our verdict "Guilty"; and if, upon said facts and special verdict, his Honor is of the opinion that the defendant is not guilty, then our verdict is "Not guilty."

Upon the return of the special verdict of the jury, the court being of opinion as a question of law, the jury, upon the facts, found that the defendant is "Guilty."

Upon the verdict the court sentenced the defendant to pay a fine of $500 and costs. Appeal by defendant.

Attorney-General and Assistant Attorney-General for the State.
Merrimon, Adams & Johnston for defendant.

CLARK, C. J. The point presented for our consideration is the construction of C. S., 3480, which provides that "No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall it permit any car, train of cars or locomotive to be run on Sunday on any railroad, save in case of accident, except such as may be run for the purpose of transporting the United States mail, passengers with their baggage, and ordinary express freight in express cars exclusively, and except such as may be run for the purpose of transporting fruits, vegetables, livestock, and perishable freight."

The statute further provides that "Any railroad company violating the provisions of this section shall be guilty of a misdemeanor in any county in which such car or train of cars or locomotive shall run, or in which such freight car shall be loaded or unloaded, and upon conviction shall be fined not less than $500 for each offense."

There is no substantial difference between the language in this section, "No railroad company shall permit," etc., and the language of the Fellow-Servant Act (C. S., 3465). The expression used in the latter section is, "Any railroad company operating in this State," etc. In the latter case the Court held, in construing the statute, that it applied to lumber railroads, such as in the present case. *Hemphill v. Lumber Co.*, 141 N. C., 487. This ruling, that a lumber company comes within the words, "railroad company," has been approved some twenty times by the Court, from the *Hemphill case,* 141 N. C., 487, down to *Cook v. Mfg. Co.,* 182 N. C., 213, and *Craig v. Lumber Co.,* 185 N. C., 562.

In *Hemphill v. Lumber Co., supra,* the Court held that the terms, "any railroad company operating in this State," embraced a logging road, because, though it is not a common carrier of freight and passengers, its employees engaged in the operation of its trains are exposed to the same dangers and risks as are employees of the railroads operating as common carriers, and come within the spirit and intent of the act; and that the use of the word "railroad" designates any road operated by steam or electricity on rails.

In *Melville v. Easley,* construing what is now C. S., 3955, the Court said: "The statute in its operation is confined to manual, visible or noisy labor, such as is calculated to disturb other people; for example, keeping open shop or working at a blacksmith's anvil." The Court held that the Legislature had power to prohibit labor of this kind on Sunday, on the ground of public decency. In *Rodman v. Robinson,* 134 N. C., 503, the whole subject and history of Sunday legislation is discussed, and it is pointed out that the power of the Legislature to prohibit labor on Sunday is founded, not upon religious considerations, but for economic considerations, which require an enforced rest in the arduous and strenuous avocations in life, and out of due consideration to public opinion, which requires some pause, not only in the wearing activities of life, but some abatement of the noise and bustle around us. That case has been affirmed eight or nine times since, down to *S. v. Pulliam,* 184 N. C., 687, where the subject was again fully considered.

It plainly follows, from the consideration of the legislation and the decisions construing it, that a lumber railroad, over which steam locomotives haul logs, comes within the evil which is forbidden by C. S., 3480.

In *Rodman v. Robinson,* 134 N. C., 509, this Court, citing provisions both of the State and Federal constitutions, said that to compel anyone by statute "to observe Sunday for religious reasons would be contrary to our fundamental law. The only ground upon which Sunday laws can be sustained is that, in pursuance of the police powers, the State can, and ought, to require a cessation of labor upon specified days to protect the masses from being worn out by incessant and unremitting toil. If such days happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection, but a convenience." In that opinion it was further said: "If it was presumption in Uzza to put forth his hand to stay the tottering ark of God at the threshing floor of Chidon, it is equally forbidden under our severance of church and state for the civil power to enforce cessation of work upon the Lord's Day in maintenance of any religious views in regard to its proper observance. That must be left to the consciences of men as they are severally influenced by their religious instruction. Churches differ widely, as is well known, on this subject; the views of Roman Catholics and Presbyterians, for instance, being divergent, and the views of other churches differ from both"; citing also the fact that "as a religious day of rest the seventh-day Baptists, as well as the Hebrews and some others, keep Saturday, and the Mohammedans observe Friday." In that case (*Rodman v. Robinson*), after reviewing the history of legislation and the decisions on the subject of Sunday observance, the Court says that while the statutes of the several States still differ on the subject of Sunday legislation, all of these enactments are now based upon the police power, that some rest may be guaranteed to the workers and to avoid offense by the noise and tumult of traffic and labor to the great majority who desire a day of quiet and peace for their devotional services.

The decision in *Rodman v. Robinson* has been often cited and approved down to *S. v. Pulliam,* 184 N. C., 687, as well as the case of *Hemphill v. Lumber Co.,* 141 N. C., 487, down to *Craig v. Lumber Co.,* 185 N. C., 562.

The hammer and the anvil and the trowel have long since ceased to ring on the Sabbath in the cities and places frequented of men, but in the forests and on the mountain sides there has still been shouting and the turmoil of men engaged seven days in the week in hauling logs by railroad. It was to prevent this and other discriminations that this act was passed, for violation of which this defendant has been convicted.

It was not so very long since women and children were harnessed abreast with dogs to haul coal out of the mines in England, and in the sweatshops in this and other countries children of four years of age

were enforced to daily toil for a living. They were beneath the consideration of the law which owed them no protection.

Some years since, in response to the growing humanity of the age, the New York Legislature passed an act prohibiting the working of bakers more than ten hours a day in a temperature of over 120 degrees. It was purely a police regulation like this, which protects the workers in the forests from seven days labor, and the highest court in New York held it valid; but the Supreme Court at Washington, by a vote of five to four, held it unconstitutional, because, as the lawyers of the employers contended, the bakers had "a right to contract," and the bakers were told that they must work as long as their employers should require, and at ovens as hot as they chose to heat them. *Lochner v. New York,* 198 U. S., 45. But when the great struggle for civilization came, and the manhood and youth of the country crossed the seas in defense of human rights, the government taking over the railroads, there was enacted the Adamson eight-hour law for all railroads, and no man questions it.

But, a few years since, in North Carolina it was not unusual in some industrial establishments for twelve hours labor to be required, and there was no limit as to the age of children in any. The first protection extended to the children came, not from the legislative department, but by an equally divided decision of this Court in *Ward v. Odell,* 126 N. C., 946, which was later followed up by a majority opinion in *Fitzgerald v. Furniture Co.,* 131 N. C., 636, and that in turn was succeeded by the present child-labor law.

In the last few weeks the United States Steel Company, the most powerful corporation in this country, without the decision of any court or any statute, bowed to the irresistible force of public opinion, abolished the seven-day week and twelve-hour day, and conceded a forty-eight-hour week to its employees, and the printing fraternities throughout the country and some other vocations have gained a forty-four-hour week.

The legislation here in question, which gives to workers in the secluded forests in the strenuous toil of hauling logs by rail the protection of the law against a seven-day week, is but part of the movement of the age.

It is clearly within the power of the Legislature to enact this statute, and twenty decisions of this Court have said that it extends to all railroads, with the exceptions named therein, and embraces these logging roads.

Justice to the employees has proven to be to the profit and benefit of the employer.

While it is true that in *Williams v. Mfg. Co.,* 175 N. C., 226, it was held that the comparative-negligence statute (C. S., secs. 3467-8-9) did

not apply to lumber roads, on account of the peculiar wording of the act, "common carrier by railroad," yet the General Assembly of 1919, in answer to this decision of the Supreme Court, declared that the act aforesaid should apply to logging roads and tramroads (C. S., 3470). This latter statute also tends to sustain the view that the terms, "no railroad company," in C. S., 3480, apply to a logging road engaged in hauling logs.

While, independent of statute, any person can do the work of an ordinary avocation, if it does not amount to a public nuisance, on Sunday as well as on any other day, the Legislature evidently intended that the prohibition against the operation of any railroad on Sunday should apply to the hauling of logs by any railroad used for that purpose. The object of the statute is to conserve the health and welfare of those engaged in the strenuous work of hauling logs by rail, and to preserve a decent regard for the quiet and orderly observance of a day of rest by prohibiting hauling logs and other freight, excepting mail and express and fruit and livestock and perishable freight, on Sundays.

No error.

STATE EX REL. R. H. LEE ET ALS. v. E. E. MARTIN AND NEW AMSTERDAM COMPANY.

(Filed 26 September, 1923.)

1. Clerks of Court—Principal and Surety—Officers—Official Bonds.

In an action against a corporation, surety on the bond of a defaulted clerk of the Superior Court with whom certain moneys had been deposited for plaintiff and lost through the clerk's defalcation, it appeared that the defendant surety company had given the bond for the first term of the defaulter, and resisted payment upon his succeeding term on the ground that the clerk had then not been properly inducted into office for his failure to take the oath of office: *Held*, the written acknowledgment of the defendant surety company that the bond had then been renewed and was in force from the commencement of the second term of office, and its acceptance of the premiums therefor, estopped it to deny its liability thereon.

2. Same—Statutes.

Held, under the facts of this case, error for the trial judge to exclude liability of the surety upon the defendant's second bond, the statute giving the plaintiff the right to sue from time to time until the full penalty incurred under both of the bonds is recovered, limited solely by the amount of the bonds, etc., when incurred thereunder, though the incumbent may have held only under color of his office; and a judgment denying liability upon the ground that the incumbent was "a hold-over" from his preceding term, is reversible error. C. S., sec. 354.

3. Same—Renewals—Acknowledgment—Cumulative Liability.

Where the surety has renewed the bond of a clerk of the court upon his election to that office a second time, acknowledged its liability and received premiums thereon, its liability is cumulative for all defalcations thereunder, whether for the second term its principal was continuing to act *de facto* or *de jure*.

4. Same—Oaths of Office—Evidence—Questions for Jury.

Where the surety sued upon the bond of a defaulting clerk of the Superior Court, resists recovery as such, on the ground that the clerk had not been duly sworn and inducted into office the second and succeeding term, the best evidence is the oath filed in his office; but upon failure of this, parol evidence of the fact is admissible; and when in doubt, the issue should be submitted to the jury.

5. Same—Estoppel of Principal.

A clerk of the court or other official who has been elected to office for a second term and enters into the duties thereof, is estopped to deny the legality of his tenure; and the provisions of our Constitution requiring an oath of office before entering into the duties thereof does not affect his eligibility thereto.

6. Same—Estoppel of Surety.

A surety on the bond required by public official is estopped to deny the facts stated in its obligation.

7. Same—Limitation of Actions.

The six-year statute of limitation (C. S., sec. 439) is applicable to an action against the surety on the bond of a defaulted clerk of the Superior Court.

8. Same—Interest.

Interest which, if added to the principal, would exceed the amount limited in the bond of a surety given for a defaulted clerk, is recoverable in an action by one who has thereby suffered loss.

9. Same—Penalties—Statutes.

The sureties on the official bond of a clerk of the Superior Court are liable, under the provisions of our statute, to those suffering loss through his default, for damages at the rate of 12 per cent per annum from the time of its unlawful detention until the lawful amount has been paid, which is not affected by the consolidation of several separate actions brought by like claimants thereunder.

APPEAL by plaintiffs from *Grady, J.*, at May Term, 1923, of PAMLICO.

This action was originally brought by R. H. Lee to recover $1,172.14 from the defendant E. E. Martin, former clerk of the Superior Court of Pamlico County, and his surety and codefendant, the New Amsterdam Casualty Company. This fund was deposited in court, 20 May, 1917, by L. J. Upton & Co. for plaintiff Lee, awaiting the trial of his action against L. G. Upton & Co. After the case was disposed of in the Supreme Court (*Lee v. Upton*, 178 N. C., 198), plaintiff, on 20 October,

1919, demanded of the defendant Martin the payment of said fund, and was advised by said Martin that he would pay over the same in a few days.

The defendant Martin had been duly elected clerk of the Superior Court of Pamlico County at the general election in 1914, and on 8 December, 1914, was duly inducted into office. He was again reëlected in 1918 and duly inducted into office for a second term the first Monday in December, 1918, and held said office until his forced resignation, on 27 January, 1921. On his first induction into office he gave as surety on his official bond the New England Casualty Company of Boston. In November, 1916, his first surety, said New England Casualty Company, went out of the bonding business, and he gave another official bond in the sum of $5,000, with the New Amsterdam Casualty Company as surety, said bond being duly acknowledged and approved by the county commissioners.

The case of R. H. Lee v. E. E. Martin was tried at November (1922) Term of Pamlico, verdict and judgment being entered in favor of plaintiff for the full amount of his claim of $1,172.14. At the same term, in the case of Annie Haskins, by next friend, W. C. Aldridge, against the same defendants, there was a verdict and judgment against both these defendants in favor of said plaintiff for $215 for a small fund held by said Martin as receiver

Calvert, J., presiding at said term of court, signed an order consolidating the said two cases of Lee and Haskins with all other cases against said clerk for defalcation, which order deferred the collection of the said two judgments in the Lee and Haskins cases until the decision of the other seven cases against said clerk, the total amount involved in the nine suits against these defendants amounting to approximately $9,000. These other suits were to recover sums put in the office of the defendant Martin at various times during the years 1918 and 1919, which the jury found that said Martin collected and misappropriated.

The court held, however, that the surety, the New Amsterdam Casualty Company, was only liable for $5,000, the penalty of Martin's bond for the term of office current when it was executed, December, 1916, and that there was no liability against the surety on the bond required for the second term, upon the ground that Martin did not take the oath of office in December, 1918, and, therefore, was not properly inducted into office for the term beginning on that date. There was evidence by the chairman and another member of the board of county commissioners that the defendant Martin took the oath of office and was properly inducted into office as clerk of the Superior Court of Pamlico on the first Monday in December, 1918. Martin himself was the only witness

to the contrary, and had just been sentenced for three years in the penitentiary for embezzlement. The court (*Grady, J.*) adjudged "that the defendant Martin was clerk of the Superior Court for the remainder of his term from 1 December, 1916, until the first Monday in December, 1918, and was clerk of the court as a hold-over from the former term, from the first Monday in December, 1918, until 27 December, 1920, with the defendant, New Amsterdam Casualty Company, as his surety in the penal sum of $5,000 on the bond, No. 28863, duplicate original of which was before the court, and the said $5,000 is the limit of all liability of the defendant, New Amsterdam Casualty Company, as surety of the said E. E. Martin on his office bond or bonds," and adjudged "that the relators recover of the defendant, New Amsterdam Casualty Company, as surety of the said E. E. Martin, the following amounts in full discharge of the defendant, New Amsterdam Casualty Company, of its liability on the official bond or bonds of the defendant E. E. Martin, except its liability for costs in this action, which shall be paid in addition to said $5,000, to wit": and thereupon adjudged a *pro rata* application of said $5,000 to all the relators in the nine judgments for defalcation as clerk, as adjudged by the several verdicts and judgments obtained therefor.

The judgment of the court was that the defendant E. E. Martin had continued in office as clerk of the Superior Court until February, 1921.

The plaintiff assigned as error in the judgment:

First, that the court erred in refusing to submit to the jury whether the defendant, New Amsterdam Casualty Company, was surety on the official bond of E. E. Martin until 27 January, 1921.

Second, that the court erred in holding that there was not sufficient evidence to go to the jury that the defendant Martin qualified and was inducted in the office for his second term, beginning December, 1918.

Third, that the court erred in holding that the liability of the defendant, New Amsterdam Casualty Company, as surety, is only $5,000.

Fourth, the court erred in holding that the said defendant Martin, as clerk, was a hold-over of said office without being duly inducted and qualified for a second term.

Fifth, the court erred in holding that $5,000 is the full limit of the defendant, New Amsterdam Casualty Company's liability as surety on the defendant Martin's official bond.

Sixth, the court erred in finding that the amounts prorated to the several relators mentioned in the judgment, especially as to the relators, R. H. Lee, Annie Haskins, by next friend, W. C. Aldridge; Pamlico County, and the Board of Education for Pamlico County, B. W. Best, administrator of the estate of Pauline Ebron and Jacob Long, Andrew

Neal and others, is a full discharge of the defendant, New Amsterdam Casualty Company, for liability on the official bond or bonds of the defendant Martin.

Seventh, the court erred in finding that the amount paid into court, referred to in said judgment, is in full of all liability of said surety, except costs.

Eighth, the court erred in holding that other relators, including the relators mentioned in this exception, are barred by said judgment of all right of action and claims against the defendant, New Amsterdam Casualty Company, on the official bond of said Martin.

Ninth, the court erred in signing the judgment as set out in the record.

Z. V. Rawls for plaintiffs.

F. C. Brinson and Ward & Ward for defendant casualty company.

CLARK, C. J. Each and every one of the nine exceptions to the judgment should be sustained. Exception 1. C. S., 354 provides that the official bond of the clerk of the Superior Court shall not "become void upon the first recovery, or if judgment is given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty is recovered; and every such officer and the sureties on his official bond shall be liable to the person injured for the acts done by said officer by virtue and under color of his office."

The defendant bonding company filed in this proceeding its written admission that the bond for the second term was in full force and effect. This letter, written by Robert M. Golder, superintendent of the bonding company, 27 December, 1920, is as follows:

"Mr. Paul Woodard, Chairman, Board of County Commissioners, Bayboro, N. C. Dear Sir: On 16 November, 1916, the New Amsterdam Casualty Company became surety on the bond of Edgar E. Martin as Clerk of the Superior Court, Pamlico County, North Carolina. The bond was executed for the term beginning 1 December, 1916, and ending 1 December, 1918, or until Mr. Martin's successor was elected or appointed and qualified. The above bond has been continued from year to year by the payment of an annual premium of $25. The bond contains a clause whereby the surety may terminate its liability by giving thirty days notice in writing to the Board of County Commissioners of Pamlico County, North Carolina, and in accordance therewith, please consider this communication as our notice to terminate our liability, under Mr. Martin's bond, on and after 22 December, 1920."

The defendant, the said bonding company, had previously made the following admissions in writing:

"2 April, 1920. Messrs. McClenaghan, Griffith & Hayes, Raleigh, N. C. Gentlemen: *Re* bond of E. E. Martin, Clerk of Superior Court, Pamlico County. This bond appears to have been written, December, 1916, for four years, and we understand by your letter of 28 November, 1918, addressed to Mr. Martin, as follows, viz.: '*Re* bond 28863, self, $5,000, as Clerk Superior Court, Pamlico County. We have charged renewal premium of $25, due 18 December.' "

"2 August, 1920. Messrs. McClenaghan, Griffin & Hayes, Raleigh, N. C. Gentlemen: *Re* E. E. Martin, C. S. C., Pamlico County. Replying to your letter of the 24th ult., in reference to the above matter, beg to say that we wrote you on 2 April as follows: '*Re* bond of E. E. Martin, Clerk Superior Court, Pamlico County. This bond appears to have been written, December, 1916, for four years, and we understand by your letter of 28 November, addressed to Mr. Martin, as follows, viz.: "*Re* bond 28863, self, $5,000, as Clerk Superior Court, Pamlico County. We have charged renewal premium of $25 due 18 December." ' That the original bond is still in force and will be until the expiration of the second four-years term, beginning December, 1916. Is this correct?"

"Baltimore, Md., 10 August, 1920. *In re* bond No. 28863, Edgar E. Martin, Clerk of Superior Court, Pamlico County, N. C. McClenaghan, Griffin & Hayes, Raleigh, N. C. Gentlemen: We have your letter of 5 August with reference to the above. In reply will say that our records indicate that the above bond has been renewed until 1 December, 1920. Trusting this gives you the necessary information, we remain."

"Raleigh, N. C., 12 August, 1920. Mr. Z. V. Rawls, Attorney, Bayboro, N. C. *Re* bond 28863, Edgar E. Martin, due 1 December. Dear Sir: Reply to yours of the 2d inst. Enclosed you will find original letter of the 10th inst. from public official department of the bonding company, which reads: 'We have your letter of 5 August, with reference to the above. In reply, will say that our records indicate that the above bond has been *renewed* until 1 December, 1920. Trusting this gives you the necessary information.' With best wishes. Yours truly, C. T. McClenaghan, Raleigh, N. C."

The ruling of the court that the liability of the defendant bonding company was limited to $5,000 on its official bond of 16 November, 1916, was therefore erroneous upon the written admission of the defendant. The bond had been renewed on 1 December, 1920, and, therefore, there was accumulative liability for all defalcations as evidenced by the judgments on record not exceeding the amount of $5,000 on the first bond and of $5,000 additional on the second bond. 22 R. C. L., sec. 185, p. 503; *Whitehurst v. Hickey,* 3 Mart. N. S. (La.), 589; 15 Am. Dec.,

167, and notes; 82 Am. Dec., 764; 90 Am. St., 189. All official bonds, of course, should be recorded. However, the surety is estopped to deny the validity of the bond on the ground that it was not recorded. *U. S. v. Bradley,* 10 Peters, 343.

The authority of persons who sign a bond for a surety company cannot be questioned where the evidence establishes not only that the company, with knowledge of the bond, did not repudiate their authority, but that it received the premium owing to it by reason of being the surety on such bond. *Eichorn v. New Orleans R. R.,* 114 La., 712; 3 Anno. Cas., 98.

If the defendant Martin had executed a new bond on 6 December, 1918, said bond would have been cumulative and would have been liable, not only for the defalcations occurring during that term, but for all that had accrued after the execution of the bond in December, 1916, and which defalcations were unpaid. The fact that the company received payment of the premiums on the bond as if executed on 6 December, 1918, rendered it liable, not merely as a continuance of the liability of the bond executed in December, 1916, said bond not having been discharged, but made it liable upon the acknowledgment thereby of the obligation of surety accruing for the defaults of the *de facto* clerk under his new term of office beginning 6 December, 1918. All the defalcations as appears by the tenor of the judgments in evidence accrued either during the first bond executed in 1916, or subsequent to the acknowledgment of indebtedness upon the second bond of December, 1918, said acknowledgment being evidenced by the written admissions of the casualty company as filed in the record, and by said casualty company's receipt of the premium for assuming said liability.

Exception 4 is to that part of the judgment holding said clerk, Martin, liable only as a "hold-over" of said office without being "duly inducted and qualified for a second term." It appears in the record that Paul Woodard, chairman of the board of county commissioners, and W. R. Reel, another member of said board, both testified that Martin was duly sworn and inducted into office for a second term, beginning 1918. Of course, the best evidence of his induction into office for a second term would have been the oath of office filed in the office of clerk of the court and offered in evidence. It may well be that this oath could not be offered, because the defendant Martin may have destroyed it purposely to aid in protecting himself from liability; but that he was the *de facto* officer, acting as such and under a certified election, is sufficient to make the surety upon his bond responsible for his defalcations, and the written admission of the bonding company and its receipt of the premiums upon the bond are sufficient to fasten liability upon the bonding company for this second bond of December, 1918. Had there

been any doubt upon the matter, it would have been the duty of the judge to submit an issue whether the defendant Martin was actually inducted into office; but the bonding company admits the receipt of the fees for executing the bond, and its liability therefor for his official acts, and the fact that the clerk was a *de facto* officer, discharging the duties of the post, was not questioned.

The incumbent of an office, and performing the duties of the same, is estopped to deny the legality of his tenure. *S. v. Long*, 76 N. C., 254; *Lumber Co. v. Hutton*, 159 N. C., 445. It would be exceedingly dangerous and detrimental to the public interest if it were otherwise; and by reason of the failure of an officer occupying an official position like this, involving liabilities to infants and others for funds entrusted to his care, he could be released from all responsibilities by an inadvertence in failing to take an oath of office which he holds himself out to the public as legally occupying, or could evade all financial liability for his acts by the loss of the oath or the destruction of its record.

The Constitution of the State requires an oath of office before entering upon the discharge of its duties. But this does not affect eligibility of the officer. He must be eligible when elected. The oath is after his election and is simply his promise to be faithful to the government and to his office, which assurance is binding on his conscience. *Lee v. Dunn*, 73 N. C., 605. But the failure to take the oath does not release the incumbent of an office, whether merely *de facto* or *de jure*, from liability for his official acts.

Exception 8 is to the judgment excluding the other relators as barred from all right of action and claim against the bonding company upon the official bond of said Martin. This is in direct conflict with C. S., 439, which provides a period of six years for the commencement of an action against the official bond of a public officer.

The last paragraph of the judgment of *Calvert, J.*, consolidating the several cases at bar, does not impose any limitation upon the liability of the defendants. If the payment of premiums upon Martin's bond for the second term of office, beginning in December, 1918, had not been evidence of the execution of the bond, or at least admission of liability for his official acts during said term, even then the judgment denying the plaintiff's interest upon their judgments would have been erroneous.

When a cause of action on an official bond arises in favor of a third person he is entitled to recover interest. Although the penalty on the bond fixes the limit of the liability of the surety at the time the liability arises, yet if the principal or surety fails to discharge that liability when it matures, interest will be allowed on the amount from the time the liability accrues, even though this would make the aggregate of recovery in excess of the penalty of the bond. 22 R. C. L., 518, para-

graph 206; *Clispy v. Masten*, 150 Ala., 132; 124 Am. St., 64; *McMullen v. Bldg. Assn.*, 64 Kans., 298; 91 Am. St., 236; 56 R. L. A., 924.

The sureties on the bonds of public officers are estopped by their act of executing the bond to deny the facts recited therein. 22 R. C. L., 520; paragraph 211.

It is worthy of notice that a paragraph of defendant Martin's bond executed by the defendant bonding company in 1916, and which was in full force and effect until 22 December, 1920, and which is set out in full in the record, provides: "It is mutually understood and agreed between all parties hereto that if the surety shall so elect, this bond may be canceled by giving thirty days notice in writing to the said Board of County Commissioners of Pamlico County, N. C.; and this bond shall be deemed canceled at the expiration of said thirty days, the said surety remaining liable for all or any act or acts covered by this bond which may have been committed by the principal up to the date of such cancellation, under the terms, conditions and provisions of this liability thereunder, and, on surrender of the bond, refund the premium paid, less a *pro rata* part thereof for the time this bond shall have been in force."

The defendant surety company, having received premiums on this bond, by its own admissions, and having failed to notify the board of county commissioners, according to the terms of the said bond, until 22 December, 1920, of its election to cancel said bond, that the same would be canceled from thereafter, 22 January, 1921, is estopped from denying its liability for all the official acts of their principal and codefendant, Martin, until 22 December, 1920.

It is also clear that the plaintiff R. H. Lee, upon the face of the record, would be entitled to a modification of the judgment in his favor by adding 12 per cent interest upon the principal ($1,172.14) from October, 1919, to date of the demand; for C. S., 356, 357, provide that "When money is unlawfully detained by public officers, and the same is sued for in any manner whatever, the plaintiff is entitled to recover (on the bond), besides the sum detained, damage at the rate of 12 per centum per annum from the time of detention until payment. *Hannah v. Hyatt*, 170 N. C., 634." And the plaintiff Haskins is entitled to a modification in like manner on the judgment in her favor ($215) by computing 12 per cent interest thereon from 1 August, 1919; and the plaintiffs, Pamlico County and the Board of Education, are entitled to a modification of the judgment in their favor by calculating 12 per cent interest on the $1,040.95 principal thereof from April, 1922, the date of the summons.

In like manner the plaintiff B. W. Best is entitled to a modification of the judgment in his favor for $500 by adding 12 per cent interest

thereon from 15 February, 1923, the date of the judgment; and the plaintiff Andrew Neal, in his favor, for $51.54 by the allowance of 12 per cent interest from 15 February, 1923.

Likewise the plaintiffs in the other judgments are entitled to have the same modified, adding 12 per cent interest thereon, as follows: The plaintiff J. Y. Sawyer is entitled to recover $779.22, with 12 per cent interest thereon from 27 October, 1920; the relator, L. J. Upton & Co., should recover $754, with 12 per cent interest thereon from 15 November, 1919; the relators, Betty Mayo, Florence Mayo, and Emma Mayo, by their next friend, are entitled to recover $587.60, with 12 per cent interest thereon from 15 June, 1919; and the relator, Griffin, guardian, is entitled to recover on behalf of his wards $3,450, with 12 per cent interest on the $880 from 14 October, 1918, and on $1,440, with 12 per cent interest from 1 May, 1919, and on $1,150 thereof, with interest from 20 December, 1919.

The above sums are recoverable as aforesaid on the bond of November, 1916, and on the obligation assumed in December, 1918, when the bond was *renewed,* as stated by the bonding company in the above-written admissions, by the payment of premiums, though no physical bond may have been then executed by the said bonding company.

Upon the entire record, the judgment should be reversed and the judgment modified and entered as above stated.

Judgment for plaintiffs as modified.

J. L. HARTSFIELD ET AL. v. CITY OF NEW BERN.

(Filed 3 October, 1923.)

1. Cities and Towns—Municipal Corporations—Railroads—Public Use—Statutes—Constitutional Law.

The acquisition of land to be used to connect a railroad in which the State and counties own an interest with the city's public wharves and docks for water commerce, and necessary to continue or develop the industries of its citizens, is for a public use, and not subject to the exception that the city, in taking the right of way by condemnation from the owner, according to the provisions of its charter and the general statutes, were acting in violation of the Constitution in taking private property for a public use: and the private statutes specifically authorizing the proceedings is constitutional and valid. C. S., secs. 2791, 2792.

2. Constitutional Law—Statutes—Presumptions.

The legal presumption is in favor of the constitutionality of a statute, and the courts will not construe it otherwise unless the conflict with the fundamental law is manifest and without reasonable doubt.

3. Cities and Towns—Municipal Corporations—Condemnation—Discretionary Powers—Courts.

Held, the courts will not interfere with the exercise of the reasonable discretion of a city in determining upon the location and condemning lands for railroad purposes, when acting under the provision of constitutional acts of the Legislature.

4. Statutes—Interpretation—Compilation.

Whether a statute is private or public depends upon its purport and not upon the judgment of the person who directs the compilation in which it shall be published.

APPEAL by plaintiffs from *Grady, J.*, at February Term, 1923, of CRAVEN.

New Bern was founded by de Graffenreid and his followers on the land at the junction of the Trent and Neuse rivers, the Trent River flowing eastwardly and Neuse River flowing southwardly. The first streets laid out were East Front Street along the shore line of the Neuse, and South Front Street along the shore of Trent River. These two streets intersect at right angles at what was then, and has ever since been, commonly known as Union Point.

This place was the residence of the Indian king, Taylor, from whom de Graffenreid bought it, and erected thereon the first government house. In the angle of the two streets, extended, on the south and east, and between said streets and the channels of said rivers, lay some ten acres, more or less, of land covered by the waters of the two rivers. From the beginning, this land was regarded as community property by the Indians, by the first settlers under the proprietary government, during the colonial period, and when the State government was organized. The General Assembly, in 1779, vested the property in the commissioners of the town and their successors forever, "to and for the use of said town, and that the said commissioners, or their successors, forever, shall and may take and receive the rents, issues and profits of the same, for the use of the said town, and to and for no other use, intent or purpose whatsoever." As stated by Maj. J. R. D. Matheson, corps of United States engineers, in his report to the War Department, 31 January, 1921, "It is an ideal site for a public wharf with rail connection." By an agreement of doubtful validity, 7 February, 1885, for the sum of $1 per year, Moore & Brady attempted to lease the property for the term of ninety-nine years, with the privilege of an additional term of ninety-nine years, and establishing there an oyster-canning plant. They filled in several acres with oyster shells, and then quit business and conveyed their right to the property to E. H. & J. A. Meadows Company, which erected a wall around the property to protect it from the wash of the

rivers, and built houses thereon and occupied and used the same. More than ten years ago the board of aldermen of the city required R. A. Nunn, city attorney, to investigate the validity of the lease, and he reported, 6 August, 1913, that in his opinion the lease was voidable, because made contrary to law.

From that time until 13 January, 1923, negotiations for cancellation of the lease and surrender of the property to the city were pending. The occupants of the property claimed that the property was worth over $100,000 and that the improvements made thereon had cost them about $75,000. Disinterested citizens, considering all of the circumstances, acting at the request of all concerned, estimated that the city should pay the occupants as much as $37,000, but the city finally acquired whatever interest the holder of the lease had for the sum of $22,500.

Notwithstanding the well-known history of the property, the plaintiffs now contend that it was reacquired by the city without public necessity, at an exorbitant price, for the benefit of one or more individuals, and as a device illegally to take the plaintiffs' property from them.

The city contends that, in fact, the property has always belonged to the community, and that for many years there has been an urgent demand upon the part of the citizens generally that it be devoted to public uses, for the benefit of the great number of industrial and manufacturing and shipping interests. As set out in the eighteenth allegation of the answer, and by resolution of the board of aldermen of said city, it was duly determined that it is to the best interest of the city and, indeed, necessary for the city to acquire lands by purchase or condemnation proceedings for the public uses and purposes of extending a railroad from the main track of the Atlantic and North Carolina Railroad Company to Union Point. This railroad was built principally by the State and certain counties, and is still owned by them, Craven County owning 1,293 shares of its capital stock. Its physical connection with the waterways and wharves at New Bern will not only benefit all of the people in Craven County, but all of the people in the State living in the territory wherein freight rates are based upon rail and water competition at New Bern.

The physical connection and combined use of the rail and water transportation facilities was the very idea and hope of Murphey, Graham, Morehead, and other men who promoted internal improvements before the Civil War. The track of the Atlantic and North Carolina Railroad crosses Trent River at New Bern at an angle, and plaintiffs' narrow strip of land adjoining is so situated that by extending their line to the channel of Trent River the railroad company may be deprived altogether of reasonable or adequate docking facilities, and the railroad

company never has had anything more than a very narrow and inadequate dock and wharf until this track was constructed parallel with Trent and Neuse rivers and connecting with the Union Point property, which is to be developed as a municipal wharf, as Wilmington, Norfolk, Baltimore, New York, and many other cities and towns on the water have developed municipal wharves as public necessities.

The entire work of laying tracks, building trestles and platforms has been fully completed, and the actual operation of trains over the right of way is an established fact, existing for about thirty days prior to the hearing of this appeal, and the defendants asked that the same should be dismissed.

A temporary restraining order had been granted on 5 February, 1923, upon the complaint of the plaintiffs, which was used as an affidavit to restrain the defendants, its officers and agents from entering upon any part of the lands described in the complaint for the purpose of laying out a railroad sidetrack or for any other purpose, but upon affidavits and after a full hearing, on 16 February the restraining order was dissolved by the judge, and the action was dismissed. Appeal by plaintiffs.

A. D. Ward and T. D. Warren for plaintiffs.
Guion & Guion and R. A. Nunn for defendant, city of New Bern.

CLARK, C. J. The record discloses that the land sought to be condemned for the purposes of railroad facilities is a portion of land lying wholly within the business district of the city and devoted entirely to the wholesale business of the city, large industrial enterprises, coal yards, bottling plants, fish houses, wharves, docks and warehouses of citizens, running through the mill yards, ship yards, cotton exchange, and the valuable property of the city, known as Union Point, at the confluence of the Neuse and Trent rivers, whereon wharves and warehouses are to be erected on deep water for the loading and unloading of ships and vessels in connection with the operation of the railroad cars over the tracks laid through the district on the right of way acquired and condemned for that purpose, from which condemnation out of all of the owners whose lands have been taken for the purpose these plaintiffs only appeal, and they alone charge for the right of way.

The plaintiffs contend that this track is a private enterprise and not for the public use, and base this claim upon the ground that a railroad is sometimes termed a private carrier, but it is apparent that the construction of this track along the rivers through the business, shipping and manufacturing area of the city is one of the most valuable and

beneficial undertakings that has ever been entered upon in the city, and one from which the entire public do and will receive more actual benefit than any other public enterprise ever entered upon by the city government or the citizens of the community for the benefit of the public.

From the above it will be seen the great benefit which the defendants expect to be derived by the whole community, and not only by the whole community, but by all persons in the State interested in the freight rates at New Bern from the operation of trains from the main line of the Atlantic and North Carolina Railroad, and other roads entering the city to deep-water terminus on Neuse and Trent rivers.

The railroad track, the laying of which the plaintiffs seek to enjoin in this proceeding, has been entirely laid and the work completed, and trains have been for some time operating over the track in carrying and receiving freight to and from the numerous warehouses and wharves and places of business along the right of way.

This is not like the case where a tree has been cut down, or other irreparable act has been committed, and, therefore, we need not consider the suggestion made by the city that the completion of this work is irreparable and could not be cured if there had been error committed; for in this case, if there had been error, the tracks, though laid down, could be torn up and the *status quo ante* restored. The court would not be deciding an abstract question.

We do not think, however, there has been any error committed. C. S., 2791, provides that when, in the opinion of the governing body of any city desiring to have and exercise the management and control of wharves or other public utilities which are or may by law be owned and operated or hereafter acquired by such city or by a separate association, corporation or other organization on behalf, and for the benefit, of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such wharves, etc., or other public utility so owned, operated and maintained by or on behalf of any such city, such governing body may purchase such land, right of way, water right, privilege, or easement from the owner or owners thereof, and pay such compensation as may be agreed upon. And C. S., 2792, provides that, if such governing body is unable to agree with the owners for the purchase of such land, etc., condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, Art. II; *and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purposes shall be conclusive.*

Section 53, Private Laws 1899—*i. e.*, the charter of the city of New Bern—provides for the manner in which the board of aldermen shall straighten, widen or establish new streets when in their opinion the same shall be necessary.

The General Assembly of North Carolina, by an act ratified 19 December, 1921, chapter 128, Private Laws, Extra Session 1921, entitled "An Act to authorize the board of aldermen of the city of New Bern to open and, if necessary, to condemn land in said city for the use of a railroad side-track," authorized the board of aldermen of the city of New Bern to "lay off, establish and open, in, over, through and across the territory in said city bounded by Hancock Street, South Front Street, Neuse River and Trent River, for the use of a railroad side-track and convenience of industries already established or to be established in said territory, a right of way, not less than 20 feet in width, and extending from the main track of the Atlantic and North Carolina Railroad Company in Hancock Street to Union Point on Neuse River, in the same manner as said board is authorized by section 53 of chapter 82 of the Private Laws of 1899 to lay off and establish new streets, and all the provisions of said section shall apply if condemnation be necessary to acquire such right of way."

The plaintiffs contend that this act is void and unconstitutional, because they say that it is a private act, and thirty days notice was not given before its passage. This contention was made before the General Assembly, it appears, from the time the bill was introduced until the close of the session, but the two committees, after fully hearing, decided that there was no constitutional prohibition; that the bill was not a private one, and that public necessity required its passage over the objections of the plaintiff and the gentlemen employed to prevent its passage.

The plaintiffs' counsel, in his brief, says: "This is undoubtedly a private law. It is printed in the private laws." Whether a statute is private or public depends upon its purport and not upon the judgment of the person who directs the compilation in which it shall be published. In *Hancock v. R. R.*, 124 N. C., 222, where the Fellow-Servant Act had been printed as chapter 56, Private Laws 1897, the Court held it to be a public act, notwithstanding, and said: "The mere fact that the statute appears in, and as a section of, a private one, does not make it private. It is well settled that one part of a statute may be private, while another part may be public and general, or local. It not infrequently happens that public statutes contain provisions of a private nature, and *vice versa*." *Ruffin, C. J.*, in *Humphries v. Baxter*, 28 N. C., 437. The same ruling has been made in *S. v. Wallace*, 94 N. C., 828; *Hancock v. R. R.*, 124 N. C., 225; *S. v. Patterson*, 134 N. C., 615.

An act of the Legislature is presumed to be valid, and all doubts are resolved in its support, and it will not be held unconstitutional unless the conflict between the fundamental law and the legislation is manifest and without reasonable doubt.

The condemnation in this case is for a public purpose, and it was within the power of the eminent domain under the provision of the statute above cited to take such property for public use in the manner stated. The operation of this side-track along the river fronts of the city of New Bern must be of great benefit to all shippers, manufacturers, merchants, and industries along the right of way. It is essential that the municipal docks and wharves shall be physically connected with the railroads of the country, and this track is the only means by which this can be done in the city of New Bern.

The local office of the United States engineer completed the compilation of statistics for the commerce carried on Neuse River for the year 1922, the same being published in the public press of the State. This compilation shows a total of 277,139 tons, valued at $6,382,364 in the 1922 record, as against a record of less than half that tonnage for 1921, and not more than two-thirds of that value in the preceding year.

The lack of terminal facilities has doubtless prevented the public from enjoying the low freight rates prevailing where water transportation is obtained. To procure better freight rates has moved the people of that community to establish municipal wharves, but the wharves cannot be successfully maintained without railroad connection.

In *Bragg v. Weaver,* 251 U. S., 57, the Court held: "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. *Mississippi & River Boom Co. v. Patterson,* 98 U. S., 403; *Backus v. Union Depot Co.,* 169 U. S., 557; *R. R. v. N. Y.,* 176 U. S., 349; *Sears v. Akron,* 246 U. S., 251. Numerous cases have held that "the necessity and expediency of taking property for public use is a legislative and not a judicial question, and is not open to discussion." Neither is it any longer open to question that "the Legislature may confer upon a municipality the authority to determine such necessity for itself. The question is purely political, does not require a hearing, and is not the subject of judicial inquiry."

The plaintiffs rely upon *Stratford v. Greensboro,* 124 N. C., 127, but as to that case it was said by *Hoke, J.,* in *Edwards v. Comrs.,* 170 N. C., 451, cited in *Allen v. Reidsville,* 178 N. C., 532: "In that case there was specific allegation, with evidence tending to show that the action of the city authorities was in pursuance to a contract admittedly

entered into with the individual defendant and making it according to plaintiff's evidence, not at all improbable 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 interest."

In *Lee v. Waynesville,* 184 N. C., 568, *Hoke, J.,* speaking for a unanimous Court, and citing numerous cases expressly in point, says: "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 local administrative boards for the public welfare, unless their action is so grossly unreasonable as to amount to an oppressive and manifest use of their discretion."

The act of the Legislature under which the city was empowered to act, and did act, in the condemnation of this right of way, was clearly within the power of the General Assembly, and there is nothing which indicates any defect, either in the motive or in the manner of the execution of the power conferred.

We cannot see that any injustice has been done to the plaintiffs in taking an easement for public purposes over a strip of land 20 feet in width and 129 feet long, the said lot being 713 feet deep. It appears that there is nothing put on the right of way taken except the rails of the railroad resting on cross-ties buried in the ground, and there is no obstruction whatever, except when trains are passing. No structure of any kind has been disturbed. Railroad facilities have been supplied to portions of plaintiffs' property which did not have such facilities before. No calculable damage has been done to plaintiffs, and to all appearances there has been liberality in the assessment of damages. The claim of plaintiffs for $50,000 damages for an easement over 20 feet of land across the back end of a lot 129 feet long seems unreasonable. The plaintiffs charge that the city paid an exorbitant price in giving $22,500 for the release of several acres of land, for a lease extending 160 years to come, which land was more advantageously located and which is at the junction of two streets and bounded by the channels of two rivers, with the improvements thereon.

Upon the most careful survey and consideration of the claims made by the plaintiffs, we do not see that the right of eminent domain has been injuriously exercised to the detriment of the plaintiffs. It seems, upon the evidence, to have been called for by the geographical situation of the property in question and by the public and commercial needs of the city of New Bern and its citizens. All who had rights involved by the proposed extension of the railway to this point at the union of the two rivers have willingly, in the public interest, conceded the right of way without compensation, except these plaintiffs. They had a right to call for compensation, and that is a matter properly adjusted in con-

demnation proceedings, but there is no appearance or indication of any unconstitutionality in the act, or of oppression on the part of the city.

The enterprise thus undertaken was justified, and seems to have been imperatively demanded, by public necessity.

The judgment dissolving the injunction is

Affirmed.

THE T. C. MAY COMPANY v. THE MENZIES SHOE COMPANY.

(Filed 3 October, 1923.)

1. Evidence—Written Contracts—Parol Evidence.

Exception that the written contract is the best evidence of its contents is without merit when the parties to the action have admitted its terms and no dispute has arisen on the trial in respect to them.

2. Evidence—Trade—Custom.

Those whose knowledge of a custom in trade, from their own personal dealings and otherwise, are competent to give testimony on the trial as to the established custom therein.

3. Same—Vendor and Purchaser—Contracts—Reasonable Time for Acceptance—Presumptions.

Where a traveling salesman receives orders from a customer of his house, subject to its acceptance, without stating the time in which such right shall be exercised, the law presumes that a reasonable time therefor is given; and upon competent evidence as to what duration is reasonable, a question is presented for the determination of the jury.

4. New Trials—Appeal and Error—Harmless Error.

A new trial will not be awarded on appeal for harmless error upon the former trial that was not prejudicial to the appellant.

5. Attachment—Levy—Process—Amendments—Courts—Statutes—Public Officers.

A warrant in attachment, in substantial conformity with our statute, C. S., sec. 805, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of C. S., sec. 549.

APPEAL by defendant from *Kerr, J.*, and a jury, at April Term, 1923, of NASH.

Manning & Manning, Finch & Vaughan, and J. T. Valentine for plaintiff.

Upham, Black, Russell & Richardson and Austin & Davenport for defendant.

CLARKSON, J. The facts essential are set forth in the opinion.

This case was before this Court at Fall Term, 1922. (See 184 N. C., 150.)

The court below, in that case, nonsuited the plaintiff, and a new trial was granted by this Court. *Adams, J.,* for the Court, clearly and concisely states the law applicable, and then the facts on which a new trial was granted, as follows: "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."

The following issues were submitted to the jury:

"1. Did the plaintiff, T. C. May Company, order from the defendant, The Menzies Shoe Company, through the defendant salesman, C. W. Daniel, the bill of shoes dated 6 February, 1919, subject to the defendant's acceptance in due course of business? Answer: 'Yes.'

"2. Did the defendant accept the said order and thereby contract to ship the said bill of shoes at price quoted on said date? Answer: 'Yes.'

"3. What, if any, damage has plaintiff sustained by reason of any breach of said contract? Answer: '$948.70 and interest from date of attachment.' "

The counsel and the parties to the action agreed that the court answer the first issue "Yes."

There are twenty-six exceptions. We have given each of them careful and thorough consideration, and will not consider them *seriatim,* but will consider the main questions involved, which are covered by the exceptions.

The real contest before the jury was the acceptance by the defendant of plaintiff's order and damages. The validity of the attachment we will consider later.

The witness F. L. Bell, for plaintiff, was asked the following question: "Will you state to the jury the exact contract between the T. C. May Company and The Menzies Shoe Company, as made by you and Mr. Daniel?" The defendant excepted. This exception cannot be sustained.

The court below is given large discretionary power as to the conduct of a trial. *Bowman v. Howard,* 182 N. C., 662; *Banking Co. v. Walker,* 121 N. C., 115; *Shober v. Wheeler,* 113 N. C., 370; *S. v. Anderson,* 101 N. C., 758; *Cheek v. Watson,* 90 N. C., 302, and *Brooks v. Brooks, ib.,* 142. This discretion frequently has the effect of shortening trials and arriving at the main gist of the case.

The witness F. L. Bell was permitted to answer the question, and the record states: "Thereupon introduced the duplicate order which was left with plaintiff by C. W. Daniel, salesman for The Menzies Shoe Company, and also the slip and rider attached thereto."

Curtis W. Boyce, the credit manager of defendant company, in his deposition, admits that this order and rider was received at the home office at Milwaukee, Wisconsin, on 10 February, and witness (Boyce) identified plaintiff's Exhibits 1 and 2, which were correct copies of Exhibits 1 and 2 attached to the deposition, and which carried the rider. Boyce further testified that the traveling salesman had full authority to attach the rider to the order.

The first issue, answered by consent, admits the contract, and the only question was the acceptance. A liberal construction of the answer, and further answer, is to like effect. The sixteenth section of the further answer says: *"It is true* (italics ours) that the plaintiff company gave to C. W. Daniel, traveling salesman for The Menzies Shoe Company, an order, dated 6 February, 1919, which order was mailed to the factory and was subject to acceptance by the company and satisfactory credit showing on the part of the plaintiff."

The evidence of A. F. May for plaintiff, and Curtis W. Boyce for defendant, shows that to the order (the first shipment, $93, was sent in April and paid for in June, there was no controversy about) 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."

It is a well-settled rule of evidence, subject to certain exceptions, that parol testimony is not admissible to contradict, explain, vary, or add to

the terms of a written contract. Many authorities, with interesting quotations on this subject, are cited by *Walker, J.*, in *Patton v. Lumber Co.*, 179 N. C., 103.

This principle does not apply from the facts here. The written evidence was introduced, and the admissions all show that there was no controversy about the terms of the contract.

The next main exceptions are to the testimony of the witness F. L. Bell, and other witnesses for plaintiff, on the question of acceptance of the order on the second issue.

F. L. Bell was asked: "I will ask you, from your knowledge as a shoe man, how long is a reasonable time for the acceptance or rejectment of an order given under the circumstances under which you gave this order?" (Defendant objected; overruled; defendant excepted.) Answer: "About ten days."

F. L. Bell had previously stated that he was in the employ of the plaintiff, and, among other things, it was his duty to buy shoes.

W. J. Batchelor testified that he had been in the general mercantile business in Nashville for several years past. He was asked: "You know the custom of the trade with respect to accepting or rejecting orders?" Answer: "I know our experience." (Defendant objected; overruled; exception.) Answer: "From ten to thirty days."

G. N. Bissette testified that he had been working in Nashville for about twenty-eight years, and that he knew the general custom of the trade with respect to accepting or rejecting orders; that a reasonable time for a Milwaukee concern to accept or reject an order from a Spring Hope merchant would be twenty days. (This evidence was not objected to.)

A. M. Baines testified that he had been in the mercantile business for about eighteen years, and that he knew the general custom of trade in regard to time required for accepting or rejecting orders, and that it was fifteen to thirty days. (This evidence was not objected to.)

On cross-examination, all these witnesses testified that their experience had been as retail merchants and not as wholesalers and manufacturers of shoes.

There is no exception to the testimony of G. N. Bissette and A. M. Baines on this evidence as to general custom and trade, with respect to accepting or rejecting orders.

"Appellant is required to set out his assignments of error in the record, and discuss them in his brief, or they will not be considered by the Supreme Court on appeal, under the rules regulating appeals." *Bunn v. Dunn*, 185 N. C., 108.

It will be noted that Curtis W. Boyce, in his evidence, stated, without objection: "That in his office he endeavored to pass on at once orders

immediately, and in the event credit could not be extended, customers were notified; however, in connection with future orders, it was not the practice to pass on such orders at once; that there was no special limited time in which the orders should be accepted or rejected; that he had been with The Menzies Shoe Company approximately two years, which was his only experience in the shoe manufacturing business; that he knew of no custom of trade which limited the time for accepting or rejecting orders."

Albert W. Minton, chief clerk for R. G. Dun & Co., Milwaukee branch, witness for defendant, without objection, testified: "The length of time to get a report to Milwaukee on a resident of Spring Hope, North Carolina, a small town near the county-seat of Nash County, would depend upon the condition under which the information would have to be obtained, and to see whether the company had a satisfactory report on file—whether the information on file was not sufficiently late to base a report and require a new report. If the case of a customer should show a weak financial condition or representation, his company made an effort to substantiate by a new investigation the report which it had on file, and that necessitates time running all the way from a week to a month or more."

C. B. Curtis, Milwaukee manager for the Credit Clearing House, a witness for defendant, without objection, testified: "They obtain verified financial statements and trade information from various concerns of whom the party being investigated makes his purchases. These investigations in these services extend all over the United States. It would take, possibly, a month or six weeks to get a report on a Spring Hope merchant to be furnished to a Milwaukee manufacturer."

Adolph A. Rinker, Bradstreet Company branch agent at Milwaukee, Wisconsin, testified that "It might take a week; it might take a month, and probably longer."

Elizabeth Stetter, assistant to The Credit Men of The Munn, Buch & Weldon Shoe Company, of Milwaukee, Wisconsin, testified: "To get a report from Spring Hope to Milwaukee it would take from ten to seventy days, depending upon the length of time customers had been in business and their willingness to give information to commercial agencies."

D. L. Sawyer, a credit manager of a Milwaukee concern, said: "Reports from that section of the country have been delayed from ten to seventy-seven days."

Further facts, which are undisputed in the record, are: Usually in the spring, orders were given for shoes to be shipped later for fall trade. The bill of shoes was ordered on 6 February, 1919, to be shipped 25 July, 1919. The defendant received the order on 10 February at Mil-

waukee, Wisconsin, and did not write the plaintiff until 27 June in regard to the order, and in that letter asked for further credit information. They had four months and seventeen days in which to investigate, to accept or reject the order. The order was cancelled on 25 August, 1919, by defendant, who notified plaintiff in the following letter:

25 AUGUST, 1919.

THE T. C. MAY CO., *Spring Hope, N. C.*

GENTLEMEN: We are in receipt of your letter of 18 August, in regard to the order given our salesman, Mr. Daniel, under date of 6 February.

We enclose a copy of our letter of 30 July, which was a reply to yours of 24 July. Inasmuch as we did not hear from you in reply to this letter, we canceled the order. We could not hold the order longer, with the prices in effect last February.

Yours very truly,

THE MENZIES SHOE COMPANY.

From the evidence unobjected to, and the undisputed facts, the jury could have answered as they did the second issue "Yes." "Did the defendant accept the said order and thereby contract to ship the said bill of shoes at price quoted on said date?" The errors complained of, if any, were harmless and not reversible error. *Wilson v. Suncrest Lumber Co., ante,* 56, and cases cited.

We prefer, however, to consider the law applicable to these exceptions. We have set forth the evidence fully, as this is an important matter. Merchants, in trading with each other, should know their rights and responsibilities. Settled law often has the effect of making people certain and careful in their dealings. Honesty in dealing with each other at home, with those of other States, and with the nations of the earth, is the golden cord to bind us together. Good faith—keeping of contracts.

When no time is fixed in the contract, as in this case, to accept or reject an order given a salesman, or drummer, the question arises, what is the custom of the trade, or what is reasonable time? The exceptions that appear in the record will determine what class or kind of evidence is permissible.

We think the evidence admissible. It shows that the men who gave their opinion were merchants of long standing, well acquainted with the custom and usage of the mercantile business. If they could not give their opinion, the hardship would almost be a denial of justice.

"On a question of usage in a particular trade or business, the opinion of persons experienced therein will be received in evidence. . . . It is held that a witness is competent to testify as to usage whose only

knowledge of it is derived from his own business, if that has been sufficiently extensive and long continued." Rogers on Expert Testimony (2d Ed.), sec. 117. The probative weight to be accorded to the estimate of witnesses of this kind is entirely a matter for the jury.

The exceptions in regard to the witnesses testifying to the difference in prices 6 February, the date of contract, the date of the receipt of the shipments, on the third issue as to damages, cannot be sustained. This was a question of fact for the jury. If the difference in the price on 6 February and the price of the shoes actually charged to the plaintiff was incorrectly stated by plaintiff's witnesses, the defendant could have introduced evidence to deny the same. The judge's charge on the third issue as to damages was clear and explicit, and no exception was taken to it. The record shows no evidence to the contrary, and the jury had the whole matter before them.

The question of a new contract was left to the jury. The judge charged fairly and clearly on this aspect of the case, and the exception cannot be sustained. It was a question of fact for the jury.

The exception to the validity of the attachment presents the most serious question in the cause.

We do not think that the case of *Carson v. Woodrow,* 160 N. C., 143, cited by defendant, is applicable to this case. In that case the warrant of attachment was sued out in the Superior Court of Nash County and purported to issue to the counties of Nash and Edgecombe, and addressed to a constable or other lawful officer of Edgecombe, and executed by a constable in Edgecombe County. The warrant of attachment was in blank, save the clerk's signature attached thereto, affidavits, etc., all in blank, and delivered to plaintiff's attorney, who filled them in. The act (C. S., sec. 805) says: "The warrant shall be directed to the sheriff," etc. The act was not complied with, in form or substance. *Hoke, J.,* in that case, very properly said: "We are of the opinion that the attachment, writ and seizure of property under it were invalid." But in *Temple v. Hay Co.,* 184 N. C., 241, *Hoke, J.,* says: "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."

The facts are different here. The record shows that the affidavit had all the formal and substantial facts set forth necessary to obtain a war-

rant of attachment, and duly verified by F. D. Bissette, who signed his name at the end of the affidavit. At the beginning was the following: "A. F. May, for the T. C. May Company, of the county of Nash, being duly sworn, says." This was not sworn to by May, but by Bissette, showing that Bissette, and not May, made the affidavit. This seems to be a patent clerical error. Bissette, later in the cause, as shown by the record, made an affidavit, covering all material allegations necessary to base an order for service of summons on defendant by publication, which was a reiteration and more contained than in affidavit he made as the basis of the warrant of attachment.

In *Sheldon v. Kivett,* 110 N. C., 410, *Clark, J.,* said: "In the affidavit by the agent it is not required that the reasons why it was not made by the principal should be set out, as in the verification of pleadings."

The warrant of attachment was issued to the "Sheriff of Nash County." The warrant of attachment says: *"It appearing by affidavit* (italics ours) to the officer granting this warrant," etc.; then comes the usual form and substance in such warrants, signed by the clerk. There are other minor irregularities objected to by the defendants, as appears by the record, but no substantial irregularity as would make the attachment invalid or void.

"The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When the proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto." C. S., sec. 547.

"The court or judge shall, in every stage of action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect." C. S., sec. 549.

"Where, in an attachment, it appears from the whole record that the statute has been substantially complied with, the action will not be dismissed nor the attachment dissolved." *Best v. Mortgage Co.,* 128 N. C., 351; *Currie v. Mining Co.,* 157 N. C., 209. See, also, thorough discussion of this whole matter by *Walker, J.,* in *Page v. McDonald,* 159 N. C., 41, *et seq.; Temple v. La Berge,* 184 N. C., 253.

On the whole record, we can find

No error.

IN RE WILL OF Z. V. WITHERINGTON.

(Filed 3 October, 1923.)

1. Wills—Caveat—Statutes—Limitation of Actions—Married Women.

Since the enactment of later statutes fully emancipating a *feme covert* from her disabilities, the provisions of C. S., sec. 4158, barring the right to caveat a will after seven years, with certain exceptions, apply equally to her. C. S., sec. 454, and chapter 13, Laws of 1913.

2. Wills—Caveat—Outstanding Life Estates—Limitation of Actions—Statutes.

One who is authorized by law to caveat a will is not required to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a caveat to a will may be filed. C. S., sec. 4158.

APPEAL by caveators from *Grady, J.*, at May Term, 1923, of PITT.

The court found the following facts: On 27 June, 1893, Z. V. Witherington died, domiciled in Pitt County, N. C., and on 13 July, 1893, there was admitted to probate by the clerk of the Superior Court of Pitt a paper-writing purporting to be his last will and testament.

Zebbie Adams, the caveator, is the only child of said Witherington. She was born 2 July, 1893, six days after the death of her father, and intermarried with her co-caveator, J. Q. Adams, on 14 January, 1914.

Said Zebbie Adams and her husband, on 19 January, 1920, filed a caveat to the paper-writing in controversy in the office of the clerk of the Superior Court of Pitt, and the propounders answered and pleaded the statute of limitations. Upon the foregoing facts the court was of the opinion that the caveators were barred by the statute of limitations, and granted the motion to dismiss the same, and the caveators appealed.

F. G. James & Son and Julius Brown for caveators.

F. C. Harding and Skinner & Whedbee for propounders.

CLARK, C. J. C. S., 4158, provides: "At the time of application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will or interested in the estate may appear in person or by attorney before the clerk of the Superior Court, and enter a caveat to the probate of such will: *Provided*, that if any person entitled to file a caveat be within the age of 21 years, or a married woman, or insane, or in prison, then such person may file a caveat within three years after the removal of such disability."

Prior to the Constitution of 1868, owing to the fact that a wife could not bring any action, she was under disability all the time during which

she was under coverture. In 1899 the futility of the disability of a married woman, notwithstanding she was entitled to sue in her own name, by the suspension of the statute of limitations in her favor, became apparent, and by chapter 78, Laws 1899, all disabilities of married women, under the statute of limitations, were stricken out.

In re Beauchamp, 146 N. C., 254, the testator died in August, 1863, and his will was probated in September of that year. On 17 September, 1903, one of the heirs of Beauchamp joined by her husband filed her caveat. In that case the caveator was a married woman at the time the will was probated in 1863, and was also married when the case was tried. This Court held: "While the next of kin and heirs at law have the right to require probate in solemn form, this right may be forfeited, either by acquiescence or unreasonable delay, after notice of probate." *Armstrong v. Baker,* 31 N. C., 114; *Etheridge v. Corprew,* 48 N. C., 18. In that case it was held that while the petitioner at all times had been a *feme covert* and could have brought her suit without joining her husband, still until chapter 862, Laws 1907 (C. S., 4158, *supra*) there was no statute of limitations as to the time in which a caveat must be filed, but it was settled law that the right to caveat was forfeited by unreasonable delay.

In re Bateman's Will, 168 N. C., 235, the Court said that prior to Rev. (1907), sec. 3135 (now C. S., 4158), at which time the seven-years limitation upon caveat was enacted, there had been no fixed period of statute of limitations, but that it had been for a long time recognized in this State that the right to caveat a will proven in common form might be lost by lapse of time. To same purport, *In re Dupree,* 163 N. C., 259.

C. S., 4158, which fixes the statute of limitations at seven years in which a will could be caveated, had a proviso that if any person entitled to file a caveat be within the age of 21 years or a married woman, such person may file a caveat within three years after the removal of disability. If this was meant as a restoration of married women to disability in this particular, it was possibly and, indeed, probably, an inadvertence; but if so, it was soon again corrected by the Martin Act in 1911, now C. S., 454, and chapter 13, Laws 1913, which gave her the fullest and most untrammeled power to bring actions even against her husband and in all cases whatever. This was upheld by this Court in *Crowell v. Crowell,* 180 N. C., 516, and in other cases since.

In no view of the matter is a married woman the defendant in this case. She is the actor, the plaintiff, and the statute of 1911, now C. S., 454 (1), provides that she may sue, and sue alone, when the action concerns her separate property. This proceeding concerns her separate property, and it is unnecessary even that her husband should have been joined.

In this case there was a disability only from 14 January to 14 July. The Martin Act having removed all disability of coverture since 1911, therefore allowing the caveator three years after attaining her majority, she should have caveated the will in July, 1917. She did not institute this proceeding until 19 January, 1920, and, as *Judge Hoke* said, *In re Johnson,* 182 N. C., 527, "C. S., 4158, operates as a complete and conclusive bar to the maintenance of this caveat, it appearing by the admitted facts that the probate in common form was had before the clerk in 1907, and since that time, the caveator being under no disability and has done nothing to challenge or in any way question the validity of the will or probate thereof until 1919."

"Coverture is not now a defense in bar of the running of the statute of limitations, since 13 February, 1899." *Carter v. Reaves,* 167 N. C., 132. As a disability it has been entirely destroyed by statute and no longer exists as a bar to any statute of limitations.

"The coverture of the plaintiff will not avail her. C. S., 408." *Butler v. Bell,* 181 N. C., 91; *Graves v. Howard,* 159 N. C., 594.

The case cited by the appellants, of *Campbell v. Crater,* 95 N. C., 156, is not applicable. That was an action in ejectment and tried in 1905, before either the act of 1907 or 1911 and 1913 completed the emancipation of married women by destroying all disability in the bringing of actions of any kind.

The other contentions of the caveator cannot be considered on a caveat. The caveator did not have to wait until the life estate fell in to file the caveat. If the caveator was bringing an action of ejectment, it might be said that the cause of action did not accrue until the death of the life tenant, but that consideration does not avail as to the right to caveat the will.

Affirmed.

T. T. BARRETT AND WIFE, EURELIA BARRETT, v. D. C. BARNES, TRUSTEE; W. R. BARRETT, AND SCARBOROUGH BARRETT.

(Filed 3 October, 1923.)

Actions — Mortgages — Trusts — Parties — Sales — Surplus— Judgment Creditors—Statutes—Appeal and Error.

A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of C. S., sec. 614, may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error.

BARRETT *v.* BARNES.

APPEAL by defendant Barnes, trustee, from *Daniels, J.*, at April Term, 1923, of HERTFORD.

This is a civil action. The following facts are set forth in statement of case on appeal:

"A deed from W. R. Barrett and wife to T. T. Barrett, dated 1 January, 1919.

"A deed of trust from T. T. Barrett and wife, Eurelia Barrett, to D. C. Barnes, trustee, on the lands described in the complaint, securing the indebtedness of $5,000 of T. T. Barrett to Louisa W. and H. O. Brown, dated 1 January, 1919.

"A contract for the sale of the land described in the complaint between T. T. Barrett and his wife, Eurelia, and W. R. Barrett, dated 5 January, 1921 (marked 'Exhibit C').

"It was admitted that under the aforesaid deed of trust securing the indebtedness due to Louise W. Brown and H. O. Brown, D. C. Barnes, the trustee therein, duly and lawfully sold the lands described in the complaint 25 March, 1922, and made a conveyance thereof to Scarboro Barrett, the purchaser at such sale, and from the proceeds of said sale the trustee, after paying the costs and expenses thereof, paid the indebtedness secured by the deed of trust aforesaid in favor of Louise W. and H. O. Brown, the said deed of trust being the first deed of trust on said land, and also paid from the proceeds of said sale the indebtedness secured by a second deed of trust on said land, which second deed of trust is the one set out in the complaint and referred to in the contract of said 5 January, 1921, and after paying the said deeds of trust and expenses, costs and expenses of sale, the said trustee has a residue in his hands of $1,122.09, or thereabouts, arising from said sale.

"It was further admitted that the said trustee has and had actual notice and knowledge of the following judgments, duly docketed and indexed according to law in the Superior Court of Hertford County, in the office of the clerk thereof, against T. T. Barrett, none of which judgments have been paid, and demand for payment of which had been made on said trustee by the judgment creditors, but no action had been instituted against said trustee by any of said creditors.

"E. W. Whitley v. T. T. Barrett for $626.12, principal, duly docketed and indexed on 11 April, 1921;

"Hertford Mercantile Company v. T. T. Barrett, for $366.72, principal sum, duly docketed and indexed on 11 April, 1921;

"F. S. Royster Guano Company v. T. T. Barrett, for $738.25, principal sum, duly docketed and indexed on 11 April, 1921; and

"G. C. Picot v. T. T. Barrett, for $76.94, principal sum, duly docketed and indexed on 26 April, 1921."

The deed and deeds of trust are not fully set out, as it is not essential.

Other facts necessary for decision of the case are:

On 1 January, 1919, the defendant W. R. Barrett and his wife, Lala J. Barrett, conveyed to the plaintiff T. T. Barrett a tract of about 300 acres of land in Hertford County; the consideration was $10,000.

On 1 January, 1919, the same day the deed was made, T. T. Barrett and his wife, Eurelia Barrett, gave (1) a deed in trust on the identical land to D. C. Barnes, trustee for Louise W. Brown and H. O. Brown, for $5,000, to secure two notes, $4,000, to Louise W. Brown, and $1,000 to H. O. Brown, to be due 20 January, 1920, interest from date; (2) a deed in trust on the identical land to D. C. Barnes, trustee for W. R. Barrett, for $5,000, balance due on the purchase money to secure five notes for $1,000 each, first $1,000, payable 1 January, 1920, and $1,000 on 1 January each year for four years. The deed and deeds in trust were duly recorded in the register of deeds' office for Hertford County about the time that they were made. The deed in trust to secure the Brown notes ($5,000) being a first deed in trust on the land, and the deed in trust to secure the $5,000 notes to W. R. Barrett being a second deed in trust.

It appears from the complaint and in the answer that T. T. Barrett paid W. R. Barrett the first of the five $1,000 notes at its maturity on 1 January, 1920.

"Exhibit C," set out in the case agreed, is as follows:

NORTH CAROLINA—Hertford County.

Consideration, $8,500.

Place is to be free of incumbrance, except the D. C. Barnes paper; W. R. Barrett is to return all T. T. Barrett notes.

Agreement: T. T. Barrett and W. R. Barrett.

W. R. Barrett is to assume D. C. Barnes paper, with no back interest; $5,000 note; $3,500 is to be paid as follows: $1,000 down in cash on delivery of deed, and an interest claim to the amount of $240 now due, making a total of $1,240, balance in one and two years; notes of equal parts ($1,130 each).

It is further agreed that T. T. Barrett is to have all the tenable land free of charge for the year 1921, between the main ditch running across the farm and the county road.

It is further agreed that a certain deed or contract made by W. R. Barrett on or about 1 January, 1919, in which it is stipulated that the said T. T. Barrett releases his right and title as an heir to the said W. R. Barrett, shall be null and void and noneffective; that the said T. T. Barrett is to share equal with all other heirs of the estate of the said W. R. Barrett.

Five rolls fence wire and two rolls barbed wire is excepted in the above deal.

(Marginal notes on paper as follows: Register of deeds—"Paper to be dated 5 January, 1921. The $240 is the cash consideration, receipt of which is acknowledged.")

"T. T. Barrett is to pay interest on D. C. Barnes paper to date."

(Acknowledged, probated and recorded.)

THEO T. BARRETT. [Seal]
EURELIA BARRETT. [Seal]
W. R. BARRETT. [Seal]

Witness: J. C. TAYLOR.

This agreement was, about the time it was made, 5 January, 1921, duly recorded in the register of deeds' office for Hertford County.

T. T. Barrett alleges that on 18 January, 1921, also on 12 February, 1921, in compliance with his agreement, he had prepared a deed to the land and tendered it to W. R. Barrett, who refused to accept it and to carry out his part of the agreement. He further alleges, "I do now hereby tender to said W. R. Barrett and deposit the said deed in this court as a continued tender."

D. C. Barnes, trustee for Louise W. Brown and H. O. Brown, duly and lawfully sold the land set forth in the deed in trust on 25 March, 1922, and it was purchased by Scarborough Barrett. The before-mentioned deed, deeds in trust, and the agreement to repurchase made between W. R. Barrett and T. T. Barrett, were duly recorded in the register of deeds' office of Hertford County about the time they were made and before judgments against T. T. Barrett hereinbefore mentioned.

R. C. Bridger and Lloyd J. Lawrence for plaintiffs.
Winston & Matthews and Stanley Winborne for defendants Barretts.
C. E. Midyette for D. C. Barnes, trustee.

CLARKSON, J. The only exception and assignment of error is made by D. C. Barnes, trustee, and that is to the judgment set out in the record. The judgment of the court below was consented to by all the parties to the suit, except D. C. Barnes, trustee. The objection by him is to the order of the court in regard to the fund in his hands as trustee, $1,122.09, or thereabouts, arising from the sale of the land: "It is adjudged that W. R. Barrett is the owner of, and entitled to, the entire sum of money, and every part thereof, in the hands of the said trustee, arising from the sale of the land described in the complaint," etc.

From the evidence it will be seen that this fund was a surplus arising from the sale of about 300 acres of land of T. T. Barrett, sold by D. C. Barnes as trustee. There was sufficient funds to settle the notes secured

by two deeds in trust. D. C. Barnes, trustee, sold the land on 25 March, 1922. The judgments were obtained against T. T. Barrett, as will appear in the case agreed, in April, 1921, and the trustee had actual notice of the judgments, and demand has been made on him by the judgment creditors to pay these judgments.

"Upon filing a judgment roll upon a judgment affecting the title of real property, or directing, in whole or in part, the payment of money, it shall be docketed on the judgment docket of the Superior Court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the Superior Court of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property, in the county where the same is docketed, of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith." C. S., sec. 614.

"A mortgagee who sells under the mortgage is not liable to a subsequent mortgagee or judgment creditor for the surplus unless he has *actual notice thereof.*" (Italics ours.) *Norman v. Hallsey,* 132 N. C., 6.

"A sale of land under an execution on a junior judgment passes the title to the purchaser encumbered with the lien of prior docketed judgments; but where the sale is made upon execution on the senior judgment the title passes to the purchaser unencumbered; and the lien of any junior docketed judgments is transferred to the fund arising from the sale; and it is the duty of the officer making the sale to apply it to the satisfaction of the several judgments in the order of their priority, whether he has executions in his hands or not." *Gambrill v. Wilcox,* 111 N. C., 42.

Clark, C. J., in *Gammon v. Johnson,* 126 N. C., 64, says: "In general, all encumbrances, whether prior or subsequent encumbrances, as well as the mortgagor, should be parties to a proceeding for foreclosure, *and judgment creditors as well as mortgagees.*" (Italics ours.) *Jones v. Williams,* 155 N. C., 179, is not in conflict under the facts in this case.

As the case goes back to the Superior Court to make the judgment creditors parties, the numerous cases cited in plaintiffs' brief will not now be considered.

For a complete determination of the rights of the litigants in this cause, the judgment creditors should be made parties to this suit, or voluntarily come in and make themselves parties. This must be done, to the end that their rights, if they have any, under the facts in this case, may be safeguarded and asserted and a proper application of the surplus be adjudged. *Outlaw v. Outlaw,* 184 N. C., at p. 259. The consent judgment is modified to this extent.

Modified and affirmed.

AUTOMOTIVE TRADE ASSOCIATION ET AL. v. SHERIFF ET AL.

(Filed 3 October, 1923.)

Taxation—Automobiles—License Tax—Statutes—Interpretation.

A manufacturer of both automobiles and auto trucks is required by the revenue laws of 1923 to pay a separate license tax for the manufacture and sale of each in this State, the intent of the Legislature appearing by this later act to amend the laws of 1921 in this respect, which required one tax of $500 only from such manufacturer of both, the later statute requiring the Commissioner of Revenue to collect $500 for the privilege of engaging in the business, either of selling automobiles or auto trucks, a separate tax on each, though both be manufactured by the same concern.

APPEAL by defendants from *Harding, J.,* at chambers, in Charlotte, on 19 July, 1923.

The plaintiffs, representing many of the agents, dealers and salesmen of automobiles in this State, seek by this action to obtain the construction of section 78, chapter 4 (the revenue law), Laws 1923, in regard to the license tax for dealers in automobiles and auto trucks.

From the construction placed by the court below upon the section in question, which was presented upon a case agreed, the defendants appealed.

C. A. Cochran and John M. Robinson for plaintiffs.
Attorney-General and Assistant Attorney-General for defendants.

CLARK, C. J. Practically the sole question presented to the Court on this appeal is whether section 78, chapter 4 of Revenue Act of 1923, as recast by the General Assembly of 1923, requires the State Commissioner of Revenue to collect from the manufacturer or dealer engaged in the business of selling automobiles or auto trucks in this State a license tax of $500 for the business of selling automobiles and also a

license tax of $500 for the business of selling auto trucks, when both automobile and truck are made by the same manufacturer. The court found as a fact that prior to 1 July, 1923, the State Treasurer, the official then having charge of this automobile sales tax, had collected only a single license tax of $500 when the automobile and auto truck were manufactured and sold by the same factory.

The Commissioner of Revenue and other defendants in this case contend that the amendment made to section 78 by the General Assembly of 1923, properly interpreted, not only authorized, but required, the Commissioner of Revenue to collect $500 for the privilege of engaging in the business of selling the automobile of any factory, and also $500 for engaging in selling automobile trucks in the State, though also manufactured by the same concern.

Section 78, Laws 1923, provides that every manufacturer of "each and every make or brand of automobile or auto truck engaged in the business of selling the same in this State," etc., "shall pay to the State Commissioner of Revenue the tax of $500 and obtain a license for conducting the same"; and adds, "the $500 license tax herein imposed shall be for each class or style of machine offered for sale."

The act of 1921 provided simply that "every manufacturer of automobiles engaged in the business of selling the same in this State," etc., "shall pay to the State Treasurer a tax of $500."

By a comparison of section 72 of the act of 1921 with section 78 of the act of 1923 it will be seen that the amendment consists of this: the latter act (1923) provides that the manufacturer of "each and every make or brand of automobile *or auto truck* engaged in the business of selling the same in this State," etc., "shall pay a tax of $500"; and adds, "the $500 license tax herein imposed shall be for every *"class"* or *"style"* of machine offered for sale"; whereas section 72 of the act of 1921 merely provided: "Every manufacturer of automobiles engaged in the business of selling the same in this State," etc., "shall pay a tax of $500."

The first line of section 72, Laws 1921, imposing a tax of this kind, reads: "Every manufacturer of automobiles," whereas section 78 of the act of 1923 requires the Commissioner of Revenue to collect the license tax of $500 on each make or brand of automobiles and every make or brand of automobile trucks. To construe the act of 1923 to mean no more than the act of 1921, before the amendment, would eliminate from the act of 1923 the additional words put therein—each and every make or brand "of automobile trucks." It would seem, therefore, clear that the Legislature had a definite and fixed purpose in using the additional words, and makes taxable the dealer in automobile trucks, independent of the fact whether or not he is also dealing in automobiles.

Under the act of 1921 the dealer in auto trucks, if he was also dealing in automobiles, paid but one tax of $500 for carrying on the business in both. Under the act of 1923, as we understand it, there is now required a separate tax on each of these businesses. The tax of $500 is placed on the "business of selling auto trucks," irrespective whether or not the same manufacturer is selling automobiles.

The records of the Department of Revenue show that under the act of 1921 there were 112 brands of passenger automobiles sold in the State, and there were 82 factories selling automobile trucks. Of these 82, there were 19 selling both passenger automobiles and auto trucks of the same name. These, under the act of 1921, paid only one tax each of $500 for the business of selling both automobiles and auto trucks.

The act of 1923, by the additional words used, have taxed these 19 manufacturers with $500 each for dealing in automobiles, and an addition of $500 each for dealing in auto trucks, though produced by the same manufacturer. By the addition of the words above cited, the State will now receive $9,500 derived by the State from requiring all manufacturers dealing in auto trucks to pay the $500, because these are not now exempted, as under the former construction put upon the act, if manufacturer dealt also in automobiles.

The General Assembly evidently did not see why, of the 82 dealers in auto trucks, 19 of them should be exempted from taxation on such business when their 67 competitors were paying a tax of $500 each on the same business of selling trucks. The statute of 1923 provides that the dealers in trucks should all pay a tax of $500 each on the business. Why should the 19 be exempted from taxation on selling trucks because they also sell automobiles?

The question was entirely one for the legislative discretion, and the use of the additional words placing a tax upon all manufacturers dealing in automobiles "or auto trucks" was clearly intended to attain some purpose, and there could be none but that of requiring all dealers in auto trucks to pay a tax upon the business of dealing in auto trucks without exempting their 19 competitors who were formerly exempted (under the construction then formerly placed on the act) from paying such tax because they also dealt in automobiles.

As we understand the amendment made by the General Assembly of 1923, the Commissioner of Revenue is required to collect $500 for the privilege of engaging in the business of selling automobiles in the State, and also $500 upon the business of selling auto trucks in the State. Each must pay $500 for selling, without any exemption.

It is interesting to note the enormous increase in the business of dealing in automobiles in North Carolina in the past three years. In 1919-20, 112,159 automobiles were licensed in this State, and 10,860

trucks; in 1920-21, 133,864 automobiles and 14,063 trucks; in 1921-22, 147,490 automobiles and 15,464 trucks; in 1922-23, 187,200 automobiles and 21,100 trucks; and over 200,000 have already been licensed for 1923-24.

On the above, under the former acts before the amendment of 1923, there was no tax levied for dealing in trucks as a separate and independent business from dealing in automobiles, though there were 67 dealers in trucks alone, 93 dealers in automobiles alone, each of which 160 paid $500 tax, and only 19 who dealt in trucks and automobiles manufactured by the same concerns. The Legislature, evidently thinking that this was an unjust discrimination in favor of the 19, as against their competitors selling automobiles or trucks alone, made the above amendment, under which all dealers in auto trucks are required to pay the same tax on that business without any exemption should they also deal in automobiles.

The statute clearly intends that only the person paying the $500 license tax is entitled to have a certified duplicate issued to his agent upon the payment of $500. The payment of this $500 for the whole State covers all automobiles, or all auto trucks, but not both, manufactured by the same factory under the same name, irrespective of the peculiar style of the automobiles or of the truck. The only difference made by the amendment is that the manufacturers of all trucks by any concern pay a license tax, and all brands or all makes of automobiles, of whatever style, from the same factory, pay the $500 license tax, without any exemption because the factory happens to be engaged in the business of selling both trucks and automobiles.

When the manufacturer fixes a price at which he sells an automobile to the dealer in this State, requiring him to pay the price, and fixes the price at which the State dealer may charge for the machine, his control over the matter ceases. The manufacturer, unless he pays the $500 license himself, has nothing to do with the selection of the agents to whom are issued certified duplicates.

Section 95 of the statute provides: "No officer required to issue license under this act shall have authority to issue a duplicate of any license unless expressly authorized to do so by this chapter, but each person, firm, or corporation shall be required to take out a separate license for each agent." According to the express terms of section 78, these agents who have duplicate licenses are authorized to sell only the car or truck of the factory in the duplicate license, and the Commissioner of Revenue is not authorized to issue duplicate license for the sale of more than one brand or make or trade name of a car—*i. e.*, it must be from the same manufacturer or factory.

Reversed.

GEORGE R. McNEILL v. TOWN OF WHITEVILLE.

(*Filed 3 October, 1923.*)

Taxation — Municipal Corporations — Cities and Towns — Sewerage — Necessary Expense.

A sewerage system, being necessarily used by a municipal corporation in connection with its water system, required for the health of its citizens, is a necessary expense within the intent and meaning of the Constitution, and does not require for the validity of bonds issued for that purpose an approval by the vote of the electors; and the statute of 1923, authorizing an alternate method of financing an installation of sewerage, does not take away the power conferred by the general municipal statute; and the amount of a bonded indebtedness for this purpose may be deducted from the gross debt of the municipality in computing its net indebtedness.

APPEAL by plaintiff from *Cranmer, J.*, at chambers, 14 September, 1923.

This is a case agreed, in a controversy submitted without action. The plaintiff is a resident and taxpayer of the town of Whiteville, this State, and the defendant is a municipal corporation. The State Board of Health has made a survey of the town of Whiteville and on the manner of disposing of the sewage in said town. It has condemned the same, and suggests and advises that an up-to-date sewerage system be installed in said town, and that it is necessary for the preservation of the health of the public.

The defendant is now engaged in installing a water system, which will be ready for use at an early day, and has been advised by the State Board of Health that it will be a menace to the public health if the said system is put in general operation before the sewerage system has been installed. The defendant proposes to begin the construction of a sewerage system at an early day, and, for the purpose of paying for the same, intends to issue bonds in the sum of $75,000 under and by virtue of authority conferred by the Municipal Finance Act, chapter 106, Laws Extra Session 1921.

It is agreed that the net indebtedness of the defendant is $105,500, and that the assessed valuation for the property in said town for the year 1922 was $1,489,232, and that if the defendant is not allowed to deduct the bonds hereinbefore referred to, the net indebtedness of the town will exceed 8 per cent of the assessed valuation of the property of said town.

The Court, *Cranmer, J.*, held that the defendant, in computing its net indebtedness, is entitled to include in the deduction from its gross indebtedness the aforesaid proposed new issue of $75,000 for bonds to be issued for sewerage purposes. Appeal by plaintiff.

H. L. Lyon for plaintiff.
M. H. Schulken for defendant.

CLARK, C. J. It has been held in this Court on numerous occasions that water and sewerage bonds are for a necessary expense, and as such can be issued without the approval of the voters. *Swindell v. Belhaven,* 173 N. C., 1. This principle has not been changed by chapter 106, Extra Session 1921. It is true that section 2943 of said chapter does not specifically mention sewerage bonds in naming the deductions to be considered in arriving at the net indebtedness of a municipality; but it does include in said section 2943 (b) in "the deductions to be made from gross debt in computing net debt," among the items (subsection 5), on 142: "The amount of bonded debt included in the gross debt incurred or to be incurred for water, gas, electric light or power purposes or two or more of the said purposes." We are of opinion that a water system for a city or town is incomplete without the means of taking care of the waste and to carry away the water after the same has been used. When it is said that a town has a water system, we understand, of course, that it is coupled with a sewerage system as an integral part thereof. The General Assembly, when it enacted the Municipal Finance Act, could not have intended to leave out so important a part of a town water system as the sewerage, which takes care of the waste.

We think his Honor was correct in holding that in estimating the percentage of indebtedness which a town is entitled to incur, which is reached by deducting from its gross debt the indebtedness incurred or to be incurred for a water system, properly included therein a reasonable and just amount of bonded indebtedness for the sewerage system as a part thereof.

We do not think that the fact that the General Assembly has by chapter 166, Laws 1923, authorized an alternative method of financing an installation of sewerage in any wise militates against the plan the town has adopted. The act of 1923, while giving towns the privilege of adopting a different system, does not deprive them of the power to proceed in the manner which its authorities in this case have seen fit to adopt. Indeed, the act is careful to provide that it shall not repeal any other method or proceedings that has been authorized or adopted for providing sewerage.

It is not claimed before us that $75,000 is not a reasonable and just allotment for that purpose. The judgment of the court below is

Affirmed.

REEL BROTHERS v. N. B. LEE AND N. W. HARDISON.

(Filed 3 October, 1923.)

Bills and Notes — Negotiable Instruments — Endorser — Principal and Surety—Evidence—Questions for Jury.

Where the plaintiff has paid a note he had discounted at the bank, which was made by the defendant, with his codefendant as endorser, and sues thereon: *Held*, upon the evidence in this case, it was for the jury to determine whether the one defendant was a cosurety of the other, and it was error in the Superior Court judge to sustain a motion as of nonsuit.

APPEAL by plaintiffs from *Grady, J.*, at Spring Term, 1923, of PAMLICO.

This is an action for the recovery of $454.09 and interest from the defendant Hardison and his codefendant, Lee, the latter being insolvent.

On 19 June, 1920, the defendant Hardison and the plaintiff firm endorsed the note for $1,500, due at the Bank of Pamlico 1 November, 1920. On 3 May, 1920, for the accommodation of the defendant, Lee, plaintiff Reel Brothers endorsed another note for $500, payable to the said Bank of Pamlico on 3 November, 1920. As surety for the endorsement of said note, the defendant Lee executed and endorsed to plaintiff an agricultural lien on 19 June, 1920, on 130 acres of cotton, to be raised on defendant Lee's land that year. The said lien was properly probated and recorded in Pamlico, 20 June, 1920.

Upon failure of the defendant Hardison or his codefendant Lee to pay any part of the said $1,500 note at maturity, and upon refusal of the defendant Hardison to do so, plaintiff was compelled to pay said note. Payment of the $500 note was also refused by the defendant Lee, and, upon demand of the payee, plaintiff was forced to pay said note. Lee raised during said year 75 bales of cotton, and up to 1 November had refused to turn over any of said cotton to the plaintiff upon said agricultural lien.

Upon information, plaintiff alleges that there was a conspiracy between Hardison and Lee to run off and dispose of said cotton, including the entire crop of 75 bales, and defeat plaintiff from collecting any part of the $2,000 paid to the bank by plaintiff, and also the large store account advances made by them to the defendant Lee. Upon a demand by plaintiff to the defendant Lee that he turn over to him sufficient cotton to pay the $2,000 banking debt, Lee requested to be allowed to retain a part of the cotton until he could have more cotton marked, and plaintiff accepted 16 bales, which were sold for $1,407.50, and later secured two other bales, which sold for $196; these items being credited on Lee's account. Lee thereafter refused to make any further delivery

of cotton, but turned over the same to his codefendant, Hardison. On 21 June, 1921, plaintiff procured a warrant of attachment against the cotton broker who was holding six bales of defendant's cotton, and later, by agreement of the parties, said six bales were sold and the proceeds, $565.82, was paid into court.

At Spring Term, 1923, it appearing to the court that the $1,500 note sued on was endorsed by the defendant Hardison, as well as by the plaintiff, and that the plaintiff had accepted 16 bales of cotton from the defendant Lee, the court, at the conclusion of the evidence, sustained a motion of nonsuit as to Hardison, and further directed that the proceeds of the six bales, $565.82, which had been paid into court, should also be paid over to said Hardison. Appeal by plaintiff.

Z. V. Rawls for plaintiffs.
F. C. Brinson and Moore & Dunn for defendants.

CLARK, C. J. Upon the evidence that the defendant Hardison was endorser of the $1,500 note which had later been endorsed by the plaintiffs to the bank, and the evidence that the account in the agricultural lien, and the store account held by the plaintiff against said Lee, and the $500 note of Lee, which was also in evidence, the issue should have been submitted to the jury whether the defendant Hardison was a cosurety with Lee to the plaintiff, and the judgment of nonsuit should be

Reversed.

A. T. CASTELLOE v. JAMES JENKINS, W. S. MONTGOMERY, W. J. BURDEN, C. T. WHITE, AULANDER BUILDING AND HARDWARE COMPANY, AND J. E. COOKE, TRUSTEE.

(Filed 3 October, 1923.)

1. Corporations—Shares of Stock—Transfer of Shares—Liens.

While the constitution or by-laws of a corporation may make its shares of stock transferable on the books of the company, the written assignment thereto on the certificate by the owner of his shares, accompanied by delivery, is sufficient as between the parties to pass the full title thereof to the transferee, and the mere delivery, without such written assignment, at least an equitable title thereto.

2. Same—Transfer in Blank—Principal and Agent.

Where the owner of shares of stock in a corporation signs a blank space thereon left for the transfer thereof, with written power of attorney left also in blank, accompanied by delivery, the transferee is *prima facie* presumed to be the owner of the shares, with right to have them transferred on the books of the corporation.

3. Same—Title.

The *prima facie* title to shares of stock in a corporation of one to whom the owner has transferred them, accompanied with delivery, is superior to that of a pledgee thereof, under the terms of a written agreement executed before any shares had been issued by the corporation, when the transferee has acquired them without notice of the pledgee's claim. As to whether the pledgee's agreement was technically a mortgage, or an executory contract for delivering the shares when issued, or that the pledgor should hold for the pledgee's benefit, was not necessary to be decided.

4. Same—Delivery of Shares.

The principle relating to constructive or symbolic delivery of the possession of personal property has no application to a pledge of shares of stock in a corporation under a written agreement made before the corporation had issued its shares, as against a transferee to whom they had been made, without notice of the pledgee's claim.

5. Same—Burden of Proof.

The burden of proof is on the plaintiff, claiming as pledgee of shares of stock in a corporation, under a written agreement with the owner, executed before the corporation had issued any, to show priority over the title of one who had acquired as a transferee.

6. Verdict—Interpretation.

The verdict of the jury should be considered on appeal, in the light of the evidence and the charge of the court.

APPEAL from *Daniels, J.*, at April Term, 1923, of BERTIE.

Civil action. In 1919 the defendants Jenkins, Montgomery, Burden, and White, desiring to engage in business, organized the Aulander Building and Hardware Company as a corporation, and subscribed each to twenty-five shares of the capital stock. The stock was paid, and on 2 January, 1920, the corporation issued this receipt to the defendant Jenkins: "Received of James Jenkins twenty-five hundred dollars in full for his twenty-five shares in Aulander Building and Hardware Company. This 2 January, 1920. Aulander Building and Hardware Company, by James Jenkins, President. By W. J. Burden, Secretary-Treasurer."

Certificates of stock were not issued until 15 May, 1920.

The plaintiff alleged that on or about 19 February, 1920, the defendant Jenkins applied to him for a loan of $1,800, and that he executed and delivered to Jenkins two notes—one for $1,000 and the other for $800—payable ten months after date, and that Jenkins thereafter assigned these notes, on which the plaintiff was liable, to the Peoples Bank of Murfreesboro. The plaintiff afterwards paid the notes, principal and interest.

When the plaintiff executed these notes, Jenkins signed and delivered to the plaintiff, as security for the loan, the following instrument, marked "Exhibit A":

This is to certify that, whereas A. T. Castelloe has this day (19 February, 1920) given me his promissory notes—one for the sum of one thousand dollars and the other for eight hundred dollars—each made payable to my order, and due ten months from date of this paper:

Now, therefore, I do hereby promise to pay the said notes at maturity, without costs or detriment to said A. T. Castelloe, for the said notes are given to me without value, being only accommodation paper lent to me. And to secure the payment of said notes at maturity, I do hereby assign to said A. T. Castelloe the twenty-five shares of stock I now own in Aulander Building and Hardware Company, and I will transfer the stock to said Castelloe as soon as the same is issued.

Witness my hand and seal, this day and year above written.

JAMES JENKINS. [Seal]

It was alleged also that Jenkins was the president of the Aulander Building and Hardware Company, and that immediately after the foregoing paper was executed, the plaintiff notified the company that he held said stock to secure his debt; that Jenkins, with knowledge of the plaintiff's rights, fraudulently transferred his shares to Montgomery, who took them with full notice of the plaintiff's equities; that Jenkins and Montgomery fraudulently procured the issuance of a certificate of stock by the company to Jenkins, and later a transfer of the certificate to Montgomery; and that Burden and White purchased from Montgomery, with notice of plaintiff's equities, and placed the certificate in the possession of the defendant J. E. Cooke, trustee (with power of sale), to secure a part of the purchase price, and that Cooke and Montgomery are preparing to sell the stock and apply the proceeds to the amount claimed to be due Montgomery.

Answers were filed, denying the material allegations of the complaint, and the following issues were submitted and answered:

"1. Is the defendant James Jenkins indebted to the plaintiff in the sum of $1,800, with interest from 19 February, 1920? Answer: 'Yes.'

"2. Was the twenty-five shares of stock described in the complaint pledged with the plaintiff by the said defendant to secure the payment of the said indebtedness of $1,800 and interest from 19 February, 1920, as alleged in the complaint? Answer: 'Yes.'

"3. Was the plaintiff the owner as pledgee of the said certificate of the twenty-five shares of stock in the said Aulander Building and Hardware Company? Answer: 'Yes.'

"4. Did the defendant W. S. Montgomery purchase and receive the said shares of stock from the defendant James Jenkins with notice of the prior claim of the plaintiff? Answer: 'No.'

"5. Did the defendant W. S. Montgomery, with notice of the prior lien and claim of the plaintiff on the said twenty-five shares of stock, wrongfully and fraudulently convert and cause the defendant James Jenkins and the said Aulander Building and Hardware Company to wrongfully convert the same, and issue the said stock and deliver the same to him, with the intent and purpose of depriving the plaintiff of his rights and pledge therein? Answer: 'No.'

"6. What was the value of the said twenty-five shares of stock at the time it was transferred by the defendant James Jenkins to the defendant W. S. Montgomery? Answer: '$1,800.'

"7. Did the defendants C. T. White and W. J. Burden afterwards purchase the said shares of stock from the said W. S. Montgomery with notice of plaintiff's lien and pledge thereon? Answer: 'Yes.'

"8. Did the defendant Aulander Building and Hardware Company wrongfully issue and deliver the certificate for the said shares of stock to the defendant Jenkins, with knowledge of the plaintiff's lien and pledge thereon? Answer: 'Yes.'

"9. Did the defendants James Jenkins, W. S. Montgomery, C. T. White, W. J. Burden, and Aulander Building and Hardware Company, with the wrongful and fraudulent intent and purpose of depriving the plaintiff of his rights as pledgee of said stock, cause the said certificate of stock to be issued to the said James Jenkins, and afterwards transferred to W. S. Montgomery and afterwards transferred to C. T. White and W. J. Burden, as alleged in the complaint? Answer: 'No.'

"10. Has the plaintiff released his claim to own said stock? Answer: 'No.'"

Judgment was rendered in favor of the plaintiff against Jenkins and the Aulander Building and Hardware Company for $1,800, with interest from 15 May, 1920, and in favor of the other defendants. The judgment recites these admissions for the purpose of the trial: the assignment of the stock to Castelloe by the paper-writing in evidence was made 19 February, 1920, and on the same day notice thereof was given to the corporation; the assignment to Montgomery was made 7 April, 1920; the stock (certificate) was issued to Jenkins 15 May, 1920; the plaintiff took no further steps to get possession of the stock, and Montgomery received the certificate of stock on 15 May, 1920, and had the transfer entered on the books of the corporation. The plaintiff appealed.

Gillam & Davenport and Murray Allen for plaintiff.

Winston & Matthews for W. S. Montgomery.

ADAMS, J., after stating the facts: The verdict and the admissions of the defendants appearing in the judgment and the evidence establish these facts: The Aulander Building and Hardware Company was organized as a corporation in December, 1919, and the first meeting of the stockholders was held on 1 January, 1920, in which Jenkins was elected president; Burden, secretary and treasurer; White, vice president and assistant secretary and treasurer; and Montgomery, general manager. These four owned all the stock. When they paid their subscription they took a receipt from the company, showing the number of shares to be issued to each subscriber. Certificates of stock were not issued, however, until 15 May. On 19 February, 1920, the defendant Jenkins became indebted to the plaintiff in the sum of $1,800, and on that day pledged with the plaintiff twenty-five shares of stock in the corporation to secure this indebtedness, and the plaintiff thereby became the owner of such stock as pledgee. On 7 April, 1920, Jenkins assigned the same stock to Montgomery. On 15 May, 1920, the company, with knowledge of the plaintiff's lien, wrongfully issued the certificate of stock to Jenkins, who immediately endorsed and transferred it to Montgomery and caused the transfer to be entered on the company's books.

The appeal presents for decision the question of priority of claims to the stock formerly held by the defendant Jenkins, the plaintiff contending that, as pledgee, he has the preferred ownership, the defendant Montgomery contending that, as holder of the certificate of stock, he has the entire legal and equitable title. These contentions may be resolved by determining the legal relation existing with respect to the stock between the parties principally concerned, namely, the plaintiff, Montgomery, Jenkins, and the corporation. For this purpose we will first examine Montgomery's alleged title to the stock, and then ascertain in what way and to what extent, if any, it is affected by the plaintiff's pledge.

What, then, are the nature and status of Montgomery's interest in the stock represented by the certificate which he holds? While certificates of stock are the symbol of the stockholders' incorporeal right and are not the stock itself, they constitute *prima facie* evidence of ownership as to the number of shares they represent, and, in fact, are regarded such peculiar evidence that a written assignment of such certificates will ordinarily transfer the whole title, and a mere delivery thereof at least an equitable title. 4 Thompson on Corporations (2d Ed.), sec. 4203; *Meisenheimer v. Alexander,* 162 N. C., 235. Strictly speaking, such certificates are not negotiable in the sense of the law merchant, but as they are framed in a way to invite the confidence of business men, they are dealt with as transferable by delivery, when properly endorsed, and

are often used as collateral security in commercial transactions. "It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued; that in all commercial centers they are commonly transferred from hand to hand, like negotiable paper, and that they are hypothecated for temporary loans by a simple endorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and, in the judgment of laymen, the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to modern transactions." 4 Thompson Corp., sec. 3481; *Knox v. Eden Musee Co.*, 148 N. Y., 441; *Bank v. Lanier*, 11 Wall (U. S.), 369; *Weniger v. Success M. Co.*, 227 Fed., 548; *Bank v. Dew*, 175 N. C., 89.

For this reason, as suggested by *Justice Walker* in the case last cited, there is a growing disposition of the courts to allow certificates of stock the advantages of commercial paper, and to this end the methods of transfer have been somewhat relaxed. Hence, Thompson says: "The usual and perhaps the more generally employed method of transfering shares of stock is by the delivery of the certificate, with the assignment endorsed thereon, duly signed by the person named in such certificate. This is sufficient ordinarily to transfer the title of the original holder to the assignee. In other words, corporate stock is transferred as to the parties thereto by endorsement and delivery of the certificates. It is a good assignment of shares of stock to deliver the stock thereof, with a blank transfer on the back, to which the holder has affixed his name; and the party to whom it is delivered is authorized to fill such blank endorsement. It has been said that the possession of certificates, with a power to transfer them, was *prima facie* evidence of title; and where the possessor is given value, his title cannot be impeached, either by subsequent purchasers who did not receive the certificate, or by creditors of the transferrer. A transfer of stock by the delivery of the certificate, endorsed in blank, or with power of attorney, is sufficient to pass title without registry on the corporate books; and the purchaser is authorized to fill up the blank by inserting his own name, or it may be filled with the name of any remote transferee. A certificate of stock, with power of attorney to transfer, duly executed in blank as to the date and the name of the transferee, authorizes the holder to complete a sale by delivery of the certificate and transfer of the stock. The holder of a certificate of stock on which is a printed assignment and power of attorney to make the transfer, signed by the owner, is presumed to be

rightfully in possession thereof, and is *prima facie* authorized to fill in the blank assignment and cause a transfer to be made to himself on the books of the corporation." Corporations, Vol. 4, sec. 4317. And in section 4320: "The passing of the title to stock by a mere delivery of the certificate is governed by the same principle that has been frequently applied to notes, bonds, certificates of deposit, life insurance policies, and ordinary written contracts generally. And on this theory it has been held that a stockholder may transfer to another a complete equitable title to his stock by mere delivery of the certificate, without complying with the forms required by the corporation. To this principle the Supreme Court of Pennsylvania said: 'Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms by the corporation.' An assignment of a certificate of stock upon a valid consideration may be made by mere delivery; an endorsement or instrument in writing is not necessary to pass the title." In *Havens v. Bank*, 132 N. C., 223, *Walker, J.*, cites with approval *McNeill v. Bank*, 46 N. Y., 325, in which it is said: "It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificate with assignment and power endorsed passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them, except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections." *Cox v. Dowd*, 133 N. C., 537; *Bleakley v. Candler*, 169 N. C., 21; *Bank v. Dew*, *supra*.

Under these conditions it was not necessary to transfer the stock on the company's books. Although shares of stock are personal property and are transferable on the books of the corporation as provided by the by-laws (C. S., sec. 1164), such provision, it is held, can be of no practical benefit to those not connected with the corporation, because they have "no means of knowing whether the transfer has been made or not." *Bleakley v. Candler, supra*.

From these authorities, especially when considered in connection with the verdict, we deduce the conclusion that Montgomery's certificate is

at least *prima facie* evidence of his title to the stock formerly held and afterwards endorsed and transferred by the defendant Jenkins.

We are next to decide whether such title is subordinate to or in any way affected by the written agreement made by the plaintiff and Jenkins on 19 February, 1920. It will be observed in this connection that, although the answers to the second and third issues show the stock in question had been pledged to the plaintiff and he was the owner thereof as pledgee, the plaintiff testified that Jenkins executed "the written assignment" referred to as "Exhibit A" for the purpose of securing the loan; that it had never been registered or transferred on the books of the company, and that no certificate of stock had then been issued. This written assignment embodies the entire contract entered into by the plaintiff and Jenkins at the time the loan was made, and in these circumstances the verdict should be construed in the light of the evidence and the charge of the court. *S. v. Snipes*, 185 N. C., 747, and cases cited; *Moore v. Trust Company*, 178 N. C., 126. When so construed, the verdict presents the specific question whether the holder's written assignment as security for debt of shares of stock in a corporation for which no certificate has been issued has priority as a pledge over the *prima facie* title acquired by a subsequent purchaser for value without notice, who receives from the holder the certificate for such shares subsequently issued, when the written assignment has not been registered or entered on the books of the corporation.

As we understand the controversy, it is not necessary to decide whether "Exhibit A" is technically a mortgage of the stock or an executory contract to deliver the certificate when issued, or an agreement that Jenkins should hold the stock for the plaintiff's benefit, and whether it is valid *inter partes*, for by neither of these contingencies would the plaintiff acquire priority. So the ultimate question is whether the contract gave the plaintiff priority as pledgee of the stock.

Under both the civil and the common law the characteristic feature of a pledge is the possession by the pledgee of the pledged property. The transfer or delivery of such possession constitutes the very essence of the contract. It is true that the delivery of possession may be actual, constructive, or symbolic, as, for example, the contents of a warehouse by the delivery of a key or a warehouse receipt, or stock by the delivery of a certificate, but a bare agreement to deliver is never equivalent to a fictitious, constructive, or symbolic delivery. Schouler on Personal Property, 513; Cool on Stock and Stockholders, sec. 465; 4 Thompson on Corporations, sec. 4200, *et seq.; Propst v. Roseman*, 49 N. C., 130; *Thompson v. Andrews*, 53 N. C., 453; *McCoy v. Lassiter*, 95 N. C., 88; *Bank v. Johnston*, 161 N. C., 509. In section 4200, *supra*, Thompson says: "A pledge of stock by an instrument in writing not accompanied

by a delivery of the certificate is not a pledge against third parties, nor is it good as against a judgment creditor of the pledger. Delivery is always essential to the creation of a pledge." Among other authorities sustaining this position he cites *Casey v. Cavaroc,* 96 U. S., 467, in which *Mr. Justice Bradley,* holding that without possession there can be no privilege as against third persons in property claimed as a pledge, further observed: "Bad faith, it is true, would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge, so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

We have not overlooked certain decisions in which it is suggested that since shares of stock are not capable of manual delivery, a transfer of possession may be made without delivery of the certificate, especially when no certificate has been issued; but even if the contract between the plaintiff and Jenkins is enforceable *inter partes,* it cannot in any event prevail as against the title of an innocent purchaser for value who has acquired ownership by the actual possession and proper endorsement of the certificate of stock. Exceptions 1, 2, 3, 4, 6, 21, 22 are, therefore, overruled.

The other exceptions relating to the instruction that as to the fourth issue the burden of proof was on the plaintiff, likewise are untenable. The burden of proof here is not determined by the priority of claims; nor is the plaintiff's position similar to that of an innocent purchaser of a negotiable instrument, the execution of which was procured by fraud. His situation more nearly approximates that of a maker or other person who seeks to impeach the validity of the instrument on the ground of fraud, and thereby assumes the burden of establishing his allegation. *Board of Education v. Makely,* 139 N. C., 31; *Walker v. Carpenter,* 144 N. C., 674; *Bowser v. Wescott,* 145 N. C., 57; *Winslow v. Hardwood Co.,* 147 N. C., 276; *Sanford v. Eubanks,* 152 N. C., 697.

We find no sufficient cause for disturbing the judgment as rendered by the court.

No error.

RAYMOND CAIN, ON BEHALF OF HIMSELF AND THE OTHER CITIZENS OF GRAINGER SPECIAL-TAX SCHOOL DISTRICT, v. N. J. ROUSE, PAUL HODGES, AND W. B. BECTON, MEMBERS OF THE BOARD OF EDUCATION FOR LENOIR COUNTY, AND E. E. SAMS, COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION OF LENOIR COUNTY.

(Filed 3 October, 1923.)

Injunction—Schools—Taxation.

Where, in an action of the citizens, it appears from the findings of the judge, upon the evidence, that the county board of education and superintendent of public instruction had temporarily arranged to divide the attendance of children of this and another such district between the schoolhouses of each, and that a substantial issue has been raised as to legality of this arrangement, an order continuing the preliminary restraining order to the hearing is a proper one, to be vacated only when the defendants may have complied with the requirements of the law.

APPEAL by defendants from judgment continuing restraining order, heard by *Allen, J.*, at chambers, 8 August, 1923.

Civil action. This controversy arose from the unfortunate burning of the Grainger School building at Grainger Station, in Lenoir County, on or about 20 March, 1923.

Judge O. H. Allen issued the following restraining order:

"This cause coming on to be heard before his Honor, O. H. Allen, one of the judges of the Superior Court, and being heard upon the complaint in the above-entitled action, treated as an affidavit, for the purposes of this order, and it appearing to the court from the said affidavit, and for the purposes of this order, that the board of education, through the members herein named as defendants and who constitute the said Board of Education of Lenoir County, have attempted to divide the children of the Grainger Special-Tax District in Lenoir County, and require some of the said school children of the said district to attend school at Sharon District School and the remainder at Kinston; and it further appearing that the said board has attempted to pass a resolution putting into force their proposed plan of dividing the children of the said district; and it further appearing that the said board has declined to furnish a suitable building in the said Grainger District for the school purposes; and it further appearing that the said board has announced that they would not furnish or permit the patrons of said Grainger District to furnish a building or to perform their part of the contract which has been executed and which provides for adequate teachers for said district; and it further appearing that the teachers have been employed for said Grainger School for the school year of 1923-24:

"It is now, therefore, ordered, adjudged and decreed that the said defendants be and they are hereby ordered to furnish a building suitable for school purposes in the Grainger District at Grainger Station, as near the old building as practicable; that they perform their part of the contract in hiring the necessary teachers for the said Grainger School for the year 1923-24, for a period of at least six months, as the law provides; that the said defendants pay the said teachers so employed, and sign the vouchers for said teachers as is provided by statute in such cases—that is to say, that they are to be paid in such manner as the other teachers of the county are paid; that said defendants are hereby required to provide the necessary funds for the expense of said school as is provided by statute for the ensuing school term; and the said defendants are hereby restrained from in any wise using or permitting any of the funds belonging to the said Grainger District for any other purpose other than to pay the expenses for a school at Grainger Station; and the said defendants are hereby restrained, their agents, successors or any person or persons, firm or corporation or whatever name designated, from in any wise putting into effect the resolution requiring the children of the grammar grade to be sent to Sharon School and the High School, and the High-School children to be sent to Kinston High School or to any other place out of the said Grainger District.

"That said defendants are required to appear before his Honor, O. H. Allen, one of the judges of the Superior Court of the Sixth Judicial District of North Carolina, in Kinston, North Carolina, on 8 August, 1923, at 10 o'clock a. m., and show cause, if any they have, why the said restraining order herein issued should not be continued pending the final adjudication of this matter, or made permanent."

The defendants appeared at the time and place designated in the restraining order, and, after hearing the evidence submitted by the plaintiffs and defendants, *Judge Allen* gave judgment continuing the restraining order. The judgment is as follows:

"This cause coming on to be heard before the undersigned, and being heard on the return date of the order to show cause why the restraining order heretofore entered in this cause should not be continued, the court finds the following facts, to wit:

"1. That there was a joint election of the two school districts of Grainger and Sharon held 4 June, 1911, at Sharon, and that at such an election a separate account was kept, showing the vote of each district, and the Sharon District was assessed a separate rate of special school tax on the $100 worth from that assessed in the Grainger School District for the year 1923, but that the authorized rate at the election was the same, and thereafter each has assumed to act as a separate district

and had its own school, and the schools in the two territories were carried on and conducted in the same manner as they had theretofore been maintained and conducted—that is, there are, and have at all times been, maintained each in the territory claiming to be a district separate committeemen appointed and recognized by the board of education in the same manner and to the same extent that committeemen in other districts have been appointed and recognized, and there are now two separate and distinct boards of committeemen, one for each school claiming to be a district.

"2. That the board has at all times kept a separate account of the funds of each district, and for 1923 recommended the assessments of different rates of taxes in this district; that the funds have been computed separately in the office of the register of deeds, and the sheriff has collected the taxes and the treasurer has kept separate accounts for each district.

"3. That on 7 May there was a meeting of the committeemen of Sharon and Grainger districts at the office of the county board of education, and action was taken, which is shown from a copy of the minutes of said meeting, together with a copy of the minutes of other meetings on the subject, which is attached to the affidavit of E. E. Sams and is here referred to. The plaintiffs deny that they agreed to any such plan as is stated in the minutes, and offer affidavits to that effect, together with a petition, marked 'Exhibit A,' which they say was on file with the board on 24 May.

"4. The action above mentioned taken by the county board was not, and was not intended to be, a final disposition of the matters involved, but was a temporary arrangement, treated as growing out of an emergency, and likewise the proposition of the school committee of Grainger School, claiming to be the school committee of Grainger District, to use a vacant building at Grainger Station, is only meant to be temporary.

"5. That the county board of education and county superintendent in all the action taken in the matters involved in this case has acted honestly and in good faith and according to their views as to what is to the best interests of the children of both districts, and likewise the committee and those claiming to be the committee of the Grainger District, of the citizens who are coöperating with them, acted according to what they think is to the best interest of the children.

"From the foregoing facts the court holds that there has not been a consolidation of the two districts, and that the course proposed by the board of education cannot be taken unless there has been an agreement between the school committeemen of the two districts, approved by the county board, and upon this question as to an agreement there is a conflict and an issue raised which the court is of the opinion will have to be submitted to a jury.

"It is, therefore, ordered that so much of the restraining order heretofore granted as restrains the county board of education from providing for the Sharon School District to take care of the grammar grades from the Grainger School District and for the Kinston High School to take care of the High-School students of the Grainger School District, and providing a truck for the transportation of the said students to the respective places, is continued to the final hearing before the jury. In the meantime this restraining order does not interfere with any plan that may be agreed on hereafter, or with any action that may be taken by the board of education hereafter within its legal rights or as to the provisions for a temporary school building at Grainger.

"By the concluding above, I mean to hold that the board of education can now order a consolidation if they see fit, or a modified form, so as to adopt the conditions to the present situation."

Later, his Honor added the following to his judgment:

"This affidavit (that of E. E. Sams, superintendent public instruction of Lenoir County) was not before me at the time of my decision, but is allowed to be filed after the announcement of my decision or judgment, and the plaintiffs may, if they desire, file answer and make it plain, the court holds that the board has the power to order a consolidation now, or to provide separate schools or consolidation as to the high schools, and maintain temporarily separate schools as to elementary and primary grades in each of the districts."

Shaw & Jones for plaintiffs.
Cowper, Whitaker & Allen for defendants.

CLARKSON, J. From the evidence as set forth in the record in this cause, the court below was fully warranted in rendering the judgment continuing the restraining order to the hearing.

In *Tise v. Whitaker-Harvey Co.*, 144 N. C., 510, it is said: "It is a rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for plaintiff's right, and are sufficient to establish it, a preliminary restraining order will be continued to the hearing." *Cab Co. v. Creasman,* 185 N. C., 556. It is to be noted that the court below found that all the parties to the action have acted honestly and in good faith, according to their respective views as to what was the best interest of the children of the district.

This litigation may seriously hamper the education of the youth. There should be a speedy trial or disposition of this cause.

Judgment affirmed.

CAROLINA-TENNESSEE POWER COMPANY v. HIAWASSEE RIVER POWER COMPANY, W. H. REESE ET AL.

(Filed 3 October, 1923.)

1. Appeal and Error—Evidence—Findings.

Where, by agreement of the parties, the judge finds the facts in the case appealed from, his findings, supported by competent evidence, are conclusive.

2. Same—Corporations—Condemnation.

Where the statute chartering a public-service corporation gives it power of condemnation, and it appears on appeal, the judge finding the facts by consent, that the corporation was duly created, organized and existing thereunder, exceptions by the owner of lands that it had no such power, or corporate existence, for failing in certain respects to have been properly organized, are untenable. Nor is the defendant's position available that the plaintiff's laches had deprived it of this right, when the findings, supported by evidence, are to the contrary.

3. Corporations—Condemnation—Constitutional Law.

Under the facts of this appeal: *Held*, the defendant's position is untenable that the powers conferred upon the plaintiff, petitioner in condemnation of their lands, were special privileges, contrary to the Fourteenth Amendment to the Federal Constitution, under the authority of *Power Co. v. Power Co.*, 175 N. C., 668, and other like cases cited.

4. Corporations—Condemnation—Measure of Damages.

The measure of damages in proceedings of a public-service corporation to condemn lands for a public or *quasi*-public use is the fair market value of the lands, taking into consideration any and all uses or purposes to which the property is reasonably adapted, and might with reasonable probability, be applied.

CLARKSON, J., concurring.

ADAMS, J., not sitting, and taking no part in decision in this case.

APPEALS by defendants in twelve suits from *McElroy, J.*, at January Special Term, 1923, of CHEROKEE.

All of these causes, except No. 589, were condemnation proceedings, brought by the Carolina-Tennessee Power Company against the several defendants for the purpose of condemning and acquiring certain lands situate on the banks of the Hiawassee River in Cherokee County, to be used by petitioner in connection with a water-power development or hydro-electric system. No commissioners were appointed, as provided by C. S., 1720; but, by consent of all the parties, at the January Special Term, 1923, Cherokee Superior Court, said causes were transferred to the civil-issue docket, consolidated and tried together before his Honor, P. A. McElroy, sitting as judge and jury, it being agreed that he should hear the evidence, find the facts and render judgments accordingly.

It was admitted on the hearing that the Hiawassee River Power Company now owns all the lands sought to be condemned in these pro-

ceedings, except those involved in No. 596, known as the *Reese case,* said proceeding being against W. H. Reese and wife. The several causes, therefore, for all practical purposes, may be considered as one proceeding on behalf of the Carolina-Tennessee Power Company against the Hiawassee River Power Company to condemn lands claimed by it, and another proceeding against W. H. Reese and wife to condemn lands claimed by them.

No. 589 was a motion to dissolve the injunction issued in the case of *Carolina-Tennessee Power Company v. Hiawassee River Power Company,* decided by this Court in 1918 and reported in 175 N. C., 668. By consent, this motion was heard with the other causes above mentioned, and the motion was denied by the trial court.

In No. 595, the defendant, in addition to setting up the usual defenses, asked for affirmative relief against the petitioner in the shape of an injunction to restrain the petitioner from further interfering with the defendant in the development of its water-power or hydro-electric system. This application by the defendant, Hiawassee River Power Company, for injunctive relief was denied.

From a judgment in favor of the petitioner in each of the above-entitled causes the defendants appealed, assigning errors in each cause.

Martin, Rollins & Wright for petitioner.

C. M. Seymour, Moody & Moody, J. Crawford Biggs, C. W. Tillett, Jr., and Tillett & Guthrie for defendants.

STACY, J., after stating the facts as above: It required two weeks in the Superior Court to hear and to determine the matters herein litigated. The record on appeal to this Court is voluminous; it contains more than three hundred exceptions and assignments of error. After a careful and painstaking investigation of the whole matter, we have found no ruling or action on the part of the trial judge which we apprehend should be held for reversible error. In each cause, therefore, the judgment entered below must be affirmed.

The main contentions of the defendants are as follows:

1. That all these condemnation proceedings should be dismissed, the injunction in the original suit (No. 589) dissolved, and an injunction issued against the petitioner and in favor of the Hiawassee River Power Company in No. 595.

2. That the trial court erred in its findings with respect to the issue of damages in each cause which entitles the defendants, at least, to a new trial on this issue.

The defendants assign three principal reasons for their first position: (1) That the petitioner's right of condemnation has been lost by laches and its failure to prosecute these suits; (2) that the petitioner has never

acquired the right to condemn these lands because it has failed to show compliance with the conditions set forth in the fifteenth section of its charter, and because it has never had a legal board of directors; and (3) that the petitioner is not proceeding in good faith.

With respect to the defendants' first and third reasons, just stated, relating to the question of laches, or the statute of limitations, and good faith, it is sufficient to say that, upon competent and ample evidence, the trial court has resolved these matters in favor of the petitioner, as witness the following findings, made and incorporated in the judgment entered in each condemnation proceeding:

"8. That the petitioner's cause of action is not barred by the statute of limitations, and petitioner has not abandoned its right to make said developments, or its purpose and intention to make said developments, or any of them, and that none of the defenses set up in the pleadings of the defendants can be availed of by the defendants or either of them in this cause.

"9. That the petitioner has not been guilty of any laches in failing to develop said water-power described in the petition; that the prior rights of the Carolina-Tennessee Power Company to develop said water-powers still subsist and have not been forfeited or lost by the said petitioner, and the defendant, Hiawassee River Power Company, is not entitled to use said lands, or any part thereof, for water-power purposes."

These findings, made by his Honor below, clearly distinguish the present causes from the cases relied upon and interestingly discussed by the defendants in their elaborate brief. To point out the many differences between the authorities cited and the instant causes would only be a work of supererogation. The alpha and omega of every case must be determined by the facts of record. However, for the benefit of the student or the investigator, an examination of the following authorities, chiefly relied upon by the defendants, may be of interest: *Stith v. Jones,* 119 N. C., 428; *Manning v. R. R.,* 122 N. C., 824; *R. R. v. R. R.,* 148 N. C., 59; *Bensley v. Mountain Lake Water Co.,* 13 Cal., 306; 73 Am. Dec., 579; *Rehmke v. Fogarty,* 107 Pac., 184; *Hagerman v. Bates,* 38 Pac. (Colo.), 1100; *Streicher v. Murray,* 92 Pac. (Mont.), 36; *Sanitary District of Chicago v. Chapin,* 80 N. E. (Ill.), 1017; *N. Y. Cable Co. v. N. Y.,* 10 N. E., 332; *Johnston v. Standard Milling Co.,* 148 U. S., 360; 37 L. Ed., 480.

As between the Carolina-Tennessee Power Company and the Hiawassee River Power Company, the right, as well as the prior right, of the petitioner to condemn the lands in dispute and to acquire them for use in its hydro-electric or water-power development must be considered as settled by our former decisions, at least so far as the present records are

concerned. *Carolina-Tenn. Power Co. v. Hiawassee R. P. Co.,* 175 N. C., 668; *S. c.,* 171 N. C., 248. Defendants contend, however, as to the suit against W. H. Reese and wife, No. 596, that this would not be so, as they were not parties to the original proceeding. But in the *Reese case* it is specifically admitted by the defendants "that the petitioner is a North Carolina corporation and under the supervision of the Corporation Commission of North Carolina"; and his Honor finds as a fact from the evidence in this cause: "That the petitioner, Carolina-Tennessee Power Company is a corporation, duly created, organized and existing under and by virtue of the laws of the State of North Carolina, having the powers, privileges and duties set out in its charter, to wit, chapter 76 of the Private Laws of 1909, and having its principal place of business in the town of Murphy, N. C."

It is further contended by the defendants in the *Reese case,* as well as in the others, that the Legislature has granted special privileges and special charter rights to the petitioner in its act of incorporation, which are in violation of the Fourteenth Amendment to the Constitution of the United States. For this reason the defendants insist upon their motion to dismiss, or for judgments as of nonsuit. The motions based upon this ground must be overruled on authority of *Power Co. v. Power Co.,* 175 N. C., 668; *Land Co. v. Traction Co.,* 162 N. C., 314; *Street R. R. v. R. R.,* 142 N. C., 423.

But the defendants' most vigorous attack is made upon the second ground above mentioned, to wit, that the petitioner has never acquired the power of eminent domain because it has failed to show compliance with the following conditions as set forth in the fifteenth section of its charter:

"Whenever one hundred shares shall have been subscribed, the subscribers, under the direction of the majority of the incorporators herein named, who themselves shall be subscribers, may organize the said company by electing a board of directors, and provide for the election of such other officers and the adoption of such by-laws as may be necessary for the management of the business and affairs of the said company, and thereupon they shall have and exercise all powers and functions of a corporation under this charter and the laws of this State."

The defendants, in their brief, admit the *bona fide, de jure* existence of the petitioner as a corporation, but they contend that, under the above provision, three specific requirements must be met before it can exercise the right of condemnation: (1) That each incorporator must be a subscriber for stock; (2) that a minimum of 100 shares of stock shall have been subscribed; (3) that a board of directors shall have been elected. For this position the defendants rely upon the following authorities: *R. R. v. Stroud,* 132 N. C., 413; *R. R. v. R. R.,* 148 N. C.,

59; *Merges v. Altenbrand,* 123 Pac. (Mont.), 21; *N. Y. Cable Co. v. New York,* 10 N. E., 332; *Warden v. Madisonville etc. R. R. Co.,* 101 S. W. (Ky.), 914; *Parkside Cemetery Assn. v. Cleveland etc. Traction Co.,* 112 N. E. (Ohio), 596, and others.

Passing the question of the right of the defendants to make this attack in the present proceedings, we think it is sufficient to say that in each cause the following specific finding is made by the trial court:

"That the petitioner, Carolina-Tennessee Power Company, is a corporation, duly created, organized and existing under and by virtue of the laws of the State of North Carolina, having its principal place of business in the town of Murphy in said State, and having the authority, power and duties set out in its charter, to wit, chapter 76, Private Laws of 1909."

Petitioner, however, in order to repel this attack as a matter of law, cites and relies upon the following authorities: *R. R. v. Lumber Co.,* 114 N. C., 690; *Street Ry. Co. v. R. R.,* 142 N. C., 423; *Kansas City etc. Ry. Co. v. Coal & Min. Co.,* 61 S. W. (Mo.), 684; Lewis on Eminent Domain, sec. 592; Nichols on Eminent Domain, sec. 411; 2 Cook on Corporations (7th Ed.), sec. 637; 20 C. J., 913.

The defendants' last position is that, in any event, they are entitled to a new trial in each cause for errors committed on the issue of damages. We have carefully examined the numerous exceptions taken and entered on this branch in the different proceedings, but nothing has been discovered by us which we think should be held for reversible error. No benefit would be derived from a discussion of these exceptions *seriatim,* as they deal largely with questions of fact, and apparently no new or novel point of law is presented for decision by any of them.

It is the accepted position here and elsewhere that in condemnation proceedings, where property is taken for a public use, or a *quasi*-public use, under the power of eminent domain, the measure of compensation to be awarded the owner is the fair market value, taking into consideration any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied. The test is the fair market value of the property. 10 R. C. L., 128; Nichols on Eminent Domain (2d Ed.), sec. 445; *Brown v. Power Co.,* 140 N. C., 333; *R. R. v. McLean,* 158 N. C., 498; *Land Co. v. Traction Co.,* 162 N. C., 503.

In *Boom Co. v. Patterson,* 98 U. S., 403, the rule is very clearly stated by *Mr. Justice Field,* as follows: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the mar-

ket, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

To like effect are the decisions of this Court in *R. R. v. Mfg. Co.*, 169 N. C., 156; *R. R. v. Armfield*, 167 N. C., 464; *Teeter v. Telegraph Co.*, 172 N. C., 784.

The above standard of award, as we understand the record, was adopted by his Honor in arriving at the different values placed upon the several properties. In this there was no error.

The judgment in favor of the petitioner in each of the above causes will be upheld.

Affirmed.

CLARKSON, J., concurring: In the present case I have read the voluminous record, heard the able arguments of the defendants' counsel, and read their carefully prepared brief, but am unable to see any reversible error. The case was first in this Court at Spring Term, 1916 (*Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C., 248), on an appeal from *Cline, J.*, at March-April Term, 1915, of Cherokee Superior Court. At that term the following issues were submitted to the jury:

"1. Did the plaintiff, prior to 21 August, 1914, survey, stake out, and adopt the locations for its dams, reservoirs, and public works on the Hiawassee River, as alleged in the complaint and as indicated on the map offered in evidence? Answer: 'Yes.'

"2. If so, were the plaintiffs' said locations lying, on 21 August, 1914, in a state of abandonment? Answer: 'No; they did not.'"

The court below *ex mero motu* found additional facts, and granted an injunction substantially as requested in the prayer of the complaint. From this judgment the defendant appealed to this Court and was granted a new trial. A learned opinion was written by *Walker, J.*, deciding all the main contentions for the plaintiff, but gave a new trial for certain important issues of fact to be decided by a jury for a proper determination of the case. The cause again came on for hearing at March Term, 1917, of Cherokee County, before *W. J. Adams, J.*, now a member of this Court. The issues submitted to the jury, and their answers, are as follows:

"1. Were the locations for the dams, reservoirs, and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint and as indicated on the maps offered in evidence by plaintiff, marked 'Exhibit 7 and 7-A'? Answer: 'Yes' (by consent).

"2. If so, did the plaintiff, in the year 1909 and thereafter, but before the organization of the defendant company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiff, prior to the commencement of this action on 21 August, 1914, abandon its said locations and proposed plans, as alleged in the answer? Answer: 'No.'

"4. Did the plaintiff file the maps or plats of its said locations in the office of the clerk of the Superior Court of Cherokee County on or about 21 June, 1911, as alleged in the complaint? Answer: 'Yes.'

"5. Did the plaintiff, on or about 17 August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs, and public works which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint? Answer: 'Yes' (by consent).

"6. Were the locations for the dams, reservoirs, and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer: 'Yes' (by consent).

"7. If so, did the defendant thereafter, by authoritative corporate action, adopt said location; and if so, when? Answer: 'No.'"

Upon the findings of the jury there was a judgment in favor of the plaintiff, and defendant appealed to this Court.

The judgment of the court below was affirmed in an opinion, comprising fifteen pages, covering every phase of the case, with numerous citations, not only from this Court, the United States Court, and legal text-books, but decisions from numerous States of the Union. The decision was exhaustive and learned, covering all the main contentions—remarkable for its clearness and logic, and is the leading case in this State on "water-powers." The decision of these cases gave the plaintiff priority of right in *locus in quo* as the first company that defined, marked its route and adopted the same by authoritative corporate action. *Power Co. v. Power Co.*, 175 N. C., 668.

Writ of error to Supreme Court of United States was allowed 17 August, 1918. On 22 March, 1920, the Supreme Court of the United States dismissed writ of error, "dismissed for want of jurisdiction."

From the opinion of *Walker, J.*, it would seem that the only question unsettled was the plaintiff's condemning the land of defendant and others to complete its hydro-electric enterprise. The present suits arise

out of the condemnation proceedings. These suits were carefully heard before *McElroy, J.*, a painstaking and conscientious judge, who, both sides agreed, could find the facts and make his conclusion of law. He has found them against the defendant and in favor of the plaintiff, on evidence submitted, and from these findings and conclusions of law the defendant has again appealed to this Court. The defendants' counsel, in the oral argument, so earnestly insisted that there was reversible error that the Court carried the case over during the vacation months under *advisari*. Knowing the great importance of the case, I have gone thoroughly into every phase of the exceptions, and can find no material or prejudicial error.

"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 complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Wilson v. Suncrest Lumber Co., ante,* 56, and cases there cited.

CLARKSON, J., concurring.

ADAMS, J., not sitting, and taking no part in decision in this case.

The decision in this case is determinative of the following cases on appeal, to wit:

589. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*
591. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
592. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
593. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
594. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
595. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*
596. *Carolina-Tennessee Power Co. v. W. H. Reese et ux.*
597. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
598. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
599. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*
600. *Carolina-Tennessee Power Co. v. Hiawassee River Power Co. et al.*

INA V. SMITH, GUARDIAN, v. W. H. CREECH.

(Filed 3 October, 1923.)

1. Wills—Interpretation—Intent—Presumptions—Statutes.

In its interpretation, a will will be given effect in accordance with its intent as gathered from the entire instrument, unless in violation of law; and where the will is sufficiently ambiguous to permit of construction, there is (1) a presumption against intestacy; (2) the first taker is to be considered as the primary object of the testator's bounty; and, by statute in this State, a devise of real property is to be construed in fee, unless in plain and express words it is shown or plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. C. S., sec. 4162.

2. Same—Deeds and Conveyances—Mortgages.

Several sisters, tenants in common of land, devised their interest to each other without residuary clause, all to the effect that should the testatrix's sisters, or any one of them, marry, to those remaining unmarried, and so on to the last single sister; and should all of them marry, then the estate to be equally divided between the surviving sisters or their lawfully begotten heirs. All of them died without leaving issue, and the will of the last surviving sister devised the lands to her brother, with direction to pay certain specific bequests, who paid the same and mortgaged the land to the plaintiff in this action: *Held*, the intent of the wills was to convey the fee simple in the lands to the sisters, defeasible as to each upon her marriage, and so on to the last survivor, and her devise to her brother was of a fee-simple title and subject to his mortgage.

3. Wills—Interpretation—Extraneous Acts—Evidence.

Acts of the parties in disposing of property as owner may, in proper instances, be received as evidence of their own concept of the meaning of his devise.

APPEAL by plaintiff from *Horton, J.*, at May Term, 1923, of WAYNE.

Controversy without action. On the hearing it appeared that John R. Smith, now deceased, having mortgaged a piece of land (that now in controversy) to plaintiff to secure a debt of $1,500, and default having been made, plaintiff, mortgagee, under powers contained in the instrument, on 19 February, 1923, after due advertisement, sold said land at public auction, when defendant became the purchaser at the price of $6,100; that it having been rumored that the title of John R. Smith conveyed in the mortgage was in part defective, the land was sold and bid in by defendant, with the understanding that the title in question should be investigated, and if the same proved defective, as suggested, the purchase price agreed upon would be proportionately reduced; that John R. Smith had died, and his wife, Ophelia, was devisee of the land under his will. The court, being of opinion that the

title to the land was defective to the 42/175 interest, entered judgment for the amount of bid, less the proportion indicated, and plaintiff excepted and appealed.

D. H. Bland for plaintiff.
Teague & Dees for defendant.

HOKE, J. From the pertinent facts as set forth in the case agreed, it appears that "The title to said property on 23 September, 1876, was in Mary A. Smith, C. A. V. Smith, M. T. A. L. Smith, Louvenia Smith, and Susan E. Smith as tenants in common, in fee simple. The said tenants in common were all sisters and no one of them was ever married, and all died prior to the year 1910, leaving no issue; that such title as John R. Smith owned in said lands and premises was acquired by him under the following instruments:

"A. The will of C. A. V. Smith, dated 11 August, 1877, probated 17 May, 1879, and recorded in will book No. 1, at page 152, in the office of the clerk of the Superior Court for Wayne County, the part of the will pertaining to the lands in controversy being as follows: 'I give and devise to my sisters, Mary A. Smith, M. Tabitha Smith, Louvenia E. Smith, and Susan E. Smith, all of my real and personal estate (together with my accounts), during their single lives, to share and share alike; but in case any one of them should marry, I give to the unmarried living sisters my entire estate, both real and personal, during their unmarried life, and so on to the last single sister; and should all of my sisters marry, then it is my will that my estate be equally divided between the surviving sisters or their lawfully begotten heirs.'

"B. The will of M. Tabitha A. Smith, dated 14 August, 1877, admitted to probate 31 October, 1881, and recorded in the office of the clerk of the Superior Court for Wayne County, in will book No. 1, page 215, the part of the said will pertaining to this controversy being as follows: 'I give and devise to my sisters, Mary A. Smith, C. A. V. Smith, Louvenia E. Smith, and Susan E. Smith, all of my real and personal estate during their single life, to share and share alike; but in case any one of them should marry, then I give to the unmarried living sisters my entire estate, both real and personal, during their unmarried life, and so on to the last single sister; and should all my sisters marry, then it is my will that my estate should be equally divided between my surviving sisters or their lawfully begotten heirs.' It will be noted that this will is dated practically at the same time as the will referred to in the preceding paragraph, and that substantially the same provisions are set forth therein. C. A. V. Smith died before M. Tabitha A. Smith.

"C. The will of Mary A. Smith, dated 17 November, 1881, admitted to probate 24 May, 1892, in the office of the clerk of the Superior Court for Wayne County in will book No. 1, page 566; that portion of said will bearing upon this controversy being as follows: 'I give, devise and bequeath to my sisters, Louvenia E. Smith and Susan E. Smith, all of my estate and property, real, personal and mixed, during their single life, to share and share alike; but in case any one of them should marry, then I give, devise and bequeath to the unmarried living sister my entire estate and property; but in case both of them should marry, then such estate and property is to be equally divided between them; and should either of my said sisters die before I do, my will and desire is that such share of such estate and property as would have belonged to such deceased shall be the property of such survivor.'

"D. Will of Susan E. Smith, dated 18 May, 1892, admitted to probate 26 September, 1903, in the office of the clerk of the Superior Court of Wayne County, in will book No. 2, at page 457, the part of said will relating to this controversy being as follows: 'I give, devise and bequeath to my sister, Louvenia E. Smith, all of my estate and property, real, personal and mixed, forever.'

"E. The will of Louvenia E. Smith, dated 3 November, 1910, admitted to probate 10 November, 1910, in record of wills No. 3, at page 322, that portion of said will bearing upon this controversy being as follows: 'Item 3. I give to my brother, John R. Smith, the house and lot on which I now live, in the city of Goldsboro, lying on South William Street; and my brother, John R. Smith, is to pay to each one of the children of my brother B. T. Smith, above named, $100, and to pay Fannie Smith, widow of my brother B. T. Smith, $400; and I give to said Fannie Smith all of my household and kitchen furniture.'

"The five sisters originally owning this property in fee had four brothers, to wit, John R. Smith, Josiah Smith, B. T. Smith, and W. H. Smith. Josiah Smith died intestate and without issue before any of the wills herein referred to were executed or admitted to probate, and need not, therefore, be considered in determining the controversy. B. T. Smith and W. H. Smith both died prior to John R. Smith, both leaving children."

It is contended for defendant that, under the first three of these wills, and insistently so under the first and second, those of C. A. V. Smith and Tabitha Smith, only a life estate in the devisor's interest is given, and that on their respective deaths the remainders in such interest would pass by descent to their heirs at law, which would include the children of the deceased brothers, B. T. and W. H. Smith.

The plaintiff contends that, under all of these wills, a fee simple in the lands was devised, and that under them the entire title was in John R. Smith, the mortgagor.

It was stipulated that in case a life estate only was passed by the wills, there should be a reduction of the purchase price to the amount of 42/175. The court being of opinion that the wills only devised a life estate, judgment was entered allowing the reductions, and plaintiffs excepted and appealed.

It is the accepted position in the interpretation of wills that the intent of the testator, as expressed in the entire will, must be given effect, unless in violation of law; and in arriving at this intent, and in wills sufficiently ambiguous to permit of construction, it is one of the recognized rules that there is a presumption against intestacy; second, that the first taker is ordinarily to be considered as the primary object of the testator's bounty. And another, sanctioned with us by positive statute, "That when real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple unless such devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity." C. S., sec. 4162; *Whitfield v. Douglas,* 175 N. C., 46; *Fellowes v. Durfey,* 163 N. C., 313; *Austin v. Austin,* 160 N. C., 368; *Steadman v. Steadman,* 143 N. C., 351; *Blue v. Ritter,* 118 N. C., 582.

Considering the wills in question here in view of these established principles, we are of opinion that each testatrix passed, and intended to pass, her entire interest and estate in this property to her unmarried sisters, with the stipulation that should any one of them marry, leaving the other sisters single, or any one of them, the interest of the one so marrying should terminate in favor of the others. And so on, "to the last living sister." And that the expression appearing in the will, "during their unmarried lives," or "during their single life," did not and was not intended to lessen the quantity of the estate devised, but was only in aid of the expressed purpose that the estate given should terminate on marriage, thus emphasizing the time when the defeasance should operate.

That this is the true construction appears from the fact that it is the clear and controlling purpose in the mind of each testatrix to make provision for her surviving unmarried sisters, and this provision is continued to the last sister remaining unmarried, and with no limitation over, except on the marriage of all; that the descriptive terms of the property are such as to indicate that absolute ownership was intended, "all of my real and personal estate," and again, "my entire estate"; that there is no residuary clause, and that on the happening of the contingency in the last clause, to wit, "the marriage of all the sisters," the fee simple is to be equally divided between "the surviving sisters or their lawfully begotten heirs," showing that in any event, married or

single, the sisters should have the property in absolute ownership, and that no intestacy was contemplated. While not allowed as controlling, the acts of the parties in disposing of the property as owners shows their own concept of the meaning of these wills, and, in case of ambiguity, may be considered in aid of arriving at proper interpretation.

This, in our opinion, being the correct construction, the wills of the sisters undoubtedly conveyed a fee simple in the property to the last surviving sister, and her will in turn conveyed the same interest to John R. Smith, thus constituting him the absolute owner. It may be noted further in confirmation of this view that in the will of the last surviving sister conveying the property to John R. Smith, devisee, John R. Smith is charged with the duty of paying to the children and widow of his deceased brother certain legacies, and that the same were paid to them, these being some of the persons whose interest caused the alleged defect in the title.

In the case of *McCallum v. McCallum,* 167 N. C., 310, cited and principally relied upon by appellees, there was a life estate in apt and definite terms given to the first taker without more, and with nothing in the will or condition of the parties tending to create ambiguity or permitting construction, and to our minds the case is not an apposite authority on the facts presented in this record.

There is error, and this will be certified, that judgment be entered for the full purchase price.

Error.

A. F. STEVENS v. RENA TURLINGTON.

(Filed 3 October, 1923.)

1. Mortgages—Statute of Frauds—Release—Parol Evidence.

A contract made between a mortgagor and mortgagee after the making of the mortgage on lands, which are intended to terminate that relationship as between themselves, does not fall within the intent and meaning of the statute of frauds (C. S., sec. 988), requiring contracts concerning land, etc., to be put in writing, etc.: and where the mortgagee has agreed by parol to release certain lands embraced in the description of the mortgage to a purchaser thereof from the mortgagor and take a mortgage in lieu thereof on other lands, it is enforceable.

2. Same—Title.

While the legal title to lands vests in the mortgagee, it is only for the purpose of securing to him the mortgage debt, and certainly until foreclosure, or perhaps his rightful possession taken upon condition broken by the mortgagor, the mortgage is regarded only as a pledge, with all the other incidents of title remaining in the mortgagor, subject to the conditions of title upon which he had given it, as expressed in the written instrument.

3. Same—Equity—Estoppel.

Where there is an existing mortgage upon lands, and a purchaser of a part of the lands from the mortgagor, a parol agreement taken with the mortgagee, later made, that the latter would release the lands from the terms of the mortgage upon receiving in lieu of his lien a mortgage upon other lands, creates an equitable estoppel against the mortgagee's position that the parol agreement was ineffectual under the statute of frauds (C. S., sec. 988).

4. Same—Purchase Money.

The principle upon which the giving of a deed taking back a mortgage for the balance of the purchase price is regarded as one transaction, giving the purchase-price mortgage a superior equity, and that the mortgagor acquires title subject to the mortgage lien, etc., has no effect upon the principle that the mortgagee is estopped in equity by his parol agreement, later made, to take a mortgage on other lands in lieu of a part thereof embraced in a description of the mortgage, as against a purchaser in good faith, in reliance upon the parol agreement.

5. Mortgages—Discharge—Parol Evidence.

Evidence of a parol discharge of a written contract within the statute of frauds, or of an equitable estoppel by matter *in pais*, must be positive, unequivocal and inconsistent with the contract; and where the evidence is conflicting, it raises an issue to be determined by the jury.

APPEAL by defendant from *Horton, J.*, at chambers in Lillington, 25 May, 1923. From JOHNSTON.

Civil action to remove cloud from title and to restrain the defendant, as mortgagee, from executing a deed to the purchaser at a certain mortgage sale, it being alleged that the defendant orally agreed with plaintiff to release the land in question from her mortgage. The temporary restraining order was continued to the hearing, and the defendant appealed.

No counsel for plaintiff.
Young, Best & Young for defendant.

STACY, J. The essential facts and allegations of this case are as follows:

On 14 February, 1920, W. A. Stevens purchased a tract of land from his sister, Rena Turlington, executing and delivering to her his note and a mortgage on said land to secure the payment of the entire purchase price of the property. This mortgage was duly registered. Thereafter, on 23 March, 1920, the plaintiff, being desirous of purchasing a part of said land from his brother, W. A. Stevens, went to the defendant, his sister, and secured from her a verbal agreement to release that portion of the land which he wished to buy, from the operation of her

mortgage, and it is alleged that she promised to accept in lieu thereof a mortgage on another tract of land owned by their minor brother, J. Almon Stevens. Relying upon this understanding and agreement, plaintiff has taken a deed from his brother and paid to him $400 of the purchase price. J. Almon Stevens has prepared and tendered to the defendant a mortgage on his land as per agreement, but defendant has refused to accept same.

Defendant denies the making of any such verbal agreement, and, by way of answer, she pleads that, even if such promise were made, it is not in writing, and, therefore, it is not enforceable. Defendant contends that she is entitled to proceed with the foreclosure of her mortgage and to execute to the purchaser a valid deed therefor, default having been made in the payment of the debt, and the property having been sold on 14 February, 1923, after due advertisement under the mortgage.

The appeal presents a single question of law: Does an unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real-estate mortgage, come within the statute of frauds? If this be answered in the affirmative, the injunction should be dissolved; otherwise not. The question must be answered in the negative under authority of *Hemmings v. Doss,* 125 N. C., 400, and cases there cited. In *Faw v. Whittington,* 72 N. C., 321 (opinion by *Bynum, J.*), it is said: "While the general rule is that the same formalities are required by the 'Act to create and transfer an interest in land,' distinction is made between contracts to 'sell and convey,' which are the words used in the act (Battle's Revisal, ch. 50, sec. 10), and contracts or agreements made between vendor and vendee, mortgagor and mortgagee, after that relation between them is established, and which are intended to terminate that relation."

There seems to be a sharp conflict in the decisions of the different States on this subject, depending on whether, in the given jurisdiction, a real-estate mortgage is regarded strictly as a conveyance of the land or as a mere incident to the debt. Browne on the Statute of Frauds (5th Ed.), sec. 267. In some of the States, notably Massachusetts and Maine, it is held that an oral promise made by a mortgagee to relinquish his claim to the mortgaged premises, comes within the statute of frauds and is void. *Parker v. Baker,* 2 Met. (Mass.), 423; *Leavitt v. Pratt,* 53 Me., 147.

On the other hand, this question has been decided differently in a number of jurisdictions, including North Carolina. *Hemmings v. Doss, supra,* and cases there cited; *Wallis v. Long,* 16 Ala., 738; *Howard v. Gresham,* 27 Ga., 347; *Southerin v. Mendum,* 5 N. H., 420.

The principal considerations urged in support of this latter view, according to the general holdings, may be summarized as follows:

1. In respect to the rights of all persons except the mortgagee, who holds the legal title to the mortgaged premises, it is well settled that the mortgagor is to be considered as the owner of the land, with an estate therein which "may be devised, granted or entailed with remainders" (Lord Hardwicke), and which is subject to dower and to sale under execution. *Weathersbee v. Goodwin,* 175 N. C., 234; *Willington v. Gale,* 7 Mass., 138; Bispham's Equity, sec. 151; 27 Cyc., 1234.

2. It is further held that a mortgagee has no interest in the mortgaged premises which can be taken at law under attachment or general execution until the right to redeem is foreclosed. C. S., 677 and 807; *Bowen v. King,* 146 N. C., 385; *Johnson v. Whilden,* 166 N. C., 104; *S. c.,* 171 N. C., 153; Jones on Mortgages (6th Ed.), sec. 701; Freeman on Executions (3d Ed.), Vol. 2, sec. 184.

3. According to the rule now generally prevailing, if a mortgagee attempt to convey the land to any person other than the mortgagor, unless he at the same time transfer the debt secured by the mortgage, no estate will pass by his deed, though in some cases it may operate as an assignment of the mortgage. *Aymar v. Bill,* 5 Johnson's Ch. Rep. (N. Y.), 570; *Greve v. Coffin,* 14 Minn., 345; *Johnson v. Cornett,* 29 Ind., 59; *Hubbard v. Harrison,* 38 Ind., 341; *Hill v. West,* 80 Ohio, 222; Kent's Com., 194; 19 R. C. L., 345.

4. Where a testator, who holds lands in mortgage, by will devises all his real estate, the lands held in mortgage do not pass under such devise. *Martin v. Smith,* 124 Mass., 111. Nor would a surviving widow be entitled to dower in such lands. *Nash v. Preston,* 79 Eng. Rep., 767; Powell on Mortgages, sec. 733.

5. When a mortgagee transfers to another person the debt which is secured by the mortgage, this ordinarily carries with it the mortgage security, unless the parties agree otherwise. *Jones v. Ashford,* 79 N. C., 172; *Hyman v. Devereux,* 63 N. C., 624; *Williams v. Teachey,* 85 N. C., 402; *Baber v. Hanie,* 163 N. C., 588; *Weil v. Davis,* 168 N. C., 298.

6. Where a mortgagee dies, his interest in the mortgaged premises goes, not to his heirs, but to his personal representatives. C. S., 2578. They may discharge and release the same as provided by C. S., 2596.

7. And, finally, when the debt is paid, the title of the mortgagee is thereby extinguished, and all his interests in the land revert immediately to the mortgagor by operation of law. *Porter v. Millet,* 9 Mass., 101.

The decisions in this State are to the effect that, as between the mortgagor and the mortgagee, the legal title to the mortgaged premises is vested in the mortgagee, while the mortgagor is looked upon as the equitable owner of the land. This relative position continues until the

land is redeemed or until the mortgage is foreclosed. Prior to the day of redemption, or condition broken, the mortgagor may pay the money according to the terms of his contract, and thus avoid the conveyance at law. This is termed his legal right of redemption. After the special day of payment has passed, or default suffered, the mortgagor still has the right to redeem at any time prior to foreclosure. This is called his equity of redemption; and such right is regarded as a continuance, and not a change, of his old estate. *Hemphill v. Ross,* 66 N. C., 477; *Parker v. Beasley,* 116 N. C., 1; Adams Equity, sec. 114. Where there is no agreement to the contrary, certainly after default, the mortgagee is entitled to enter and to hold the land until redeemed; and he may maintain an action in ejectment therefor, even against the mortgagor himself. *Weathersbee v. Goodwin, supra; Coor v. Smith,* 101 N. C., 261; *Kiser v. Combs,* 114 N. C., 640; *Capehart v. Dettrick,* 91 N. C., 344; *Wittkowski v. Watkins,* 84 N. C., 457; *Bruner v. Threadgill,* 88 N. C., 361; *Cunningham v. Davis,* 42 N. C., 5.

Such rights are given to the mortgagee to enable him to protect his security, prevent waste, and keep the land from being lessened in value in any unlawful manner. In so far as it is necessary to accomplish these purposes, the mortgagee is considered and treated in law as the holder of the legal title; but otherwise his interests are viewed from a different standpoint. *Lackey v. Martin,* 120 N. C., 391.

In order to give a mortgagee the full benefit of the security and appropriate remedies for any violation of his rights, it may be said that he is treated as the owner of the land; but for other purposes the law looks beyond the mere form of the conveyance to the real nature of his interest, and treats his estate in the land quite differently from that of an estate in fee simple. For purposes other than those mentioned above, the mortgage is to be considered as an incident to the debt, which is the principal consideration; while for the purposes of security, in this jurisdiction, it is treated as a direct appropriation of the property. *Capehart v. Dettrick, supra; Hyman v. Devereux, supra; Joyner v. Stancill,* 108 N. C., 154; *Miller v. Pierce,* 104 N. C., 389; *Faw v. Whittington, supra.* But until foreclosure, or at least until possession taken, the mortgage, as a general rule, is regarded in the light of a *chose in action,* to be dealt with according to the principles of equity. See opinion of *Kent, C. J.,* in *Jackson v. Willard,* 4 Johnson's Rep. (N. Y.), 41; *Sheldon v. Sill,* 8 Howard, 441.

"At common law, a mortgage was a conveyance of land, sometimes in fee and sometimes of a lesser estate, with a stipulation called a clause of defeasance, by which it was provided that in case a certain sum of money were paid by the feoffor to the feoffee on a day named, the conveyance should be void, and either the estate should, by virtue of the

defeasance, revest in the feoffor or he should be entitled to call upon the feoffee for a reconveyance of the same." Bispham's Equity (9th Ed.), sec. 150.

In this State, mortgages are practically the same as at common law, with the exception of the mortgagor's equity of redemption and its incidents. We adhere to the doctrine that the legal title passes to the mortgagee, subject to the equitable principle that this passage of the legal title is primarily by way of security for the debt, and that for all other purposes the mortgagor is regarded as the owner of the land. *Gorrell v. Alspaugh,* 120 N. C., 362; *Weil v. Davis,* 168 N. C., 298.

But it is the contention of the defendant in the instant case that her mortgage is a purchase-money mortgage, executed simultaneously with her deed to W. A. Stevens, and, therefore, it is of a higher dignity than an ordinary mortgage given to secure the payment of a debt created in some other manner. It is generally held that when a vendor conveys property and simultaneously takes back a mortgage to secure the payment of all or a part of the purchase price, and such mortgage is at once registered, the title to the property conveyed does not *rest* in the purchaser for any appreciable length of time, but merely passes through his hands, without stopping, and *vests* in the mortgagee. During such instantaneous passage, no lien of any character held against the purchaser, dower or homestead right, can attach to the *title,* superior to the right of the holder of the purchase-money mortgage. *Humphrey v. Lumber Co.,* 174 N. C., 520; *Hinton v. Hicks,* 156 N. C., 24; *Bunting v. Jones,* 78 N. C., 242.

This does not change the relative position of mortgagor and mortgagee as between the vendor and purchaser of the land, but it simply gives to the holder of the purchase-money mortgage priority or precedence over other claims and liens held against the vendee, not upon the ground of any superior equity in the vendor or mortgagee *as such,* but simply upon the ground that the two instruments, having been executed simultaneously, are regarded in law as concurrent acts or as component parts of a single act. *Moring v. Dickerson,* 85 N. C., 466; *Weil v. Casey,* 125 N. C., 356.

It will be observed that this suit is not between the mortgagor and the mortgagee; but A. F. Stevens, plaintiff herein, is a purchaser of the land for value, and he alleges that in buying the property he relied upon the defendant's promise to release the same from the operation of her mortgage. This, under authority of *Gorrell v. Alspaugh,* 120 N. C., 362, if found to be a fact, would constitute an equitable estoppel against the defendant. *Miller v. Pierce, supra.*

It may be well to note that evidence of a parol discharge of a written contract within the statute of frauds, or of an equitable estoppel by

matter *in pais,* must be "positive, unequivocal, and inconsistent with the contract." *Faw v. Whittington, supra; Miller v. Pierce, supra.* Here the allegations of the verified complaint, and other evidence offered, are of such character; but the credibility of such evidence, of course, on the hearing, will be a matter for the jury. *Shell v. Roseman,* 155 N. C., 90.

From the foregoing it follows that his Honor properly continued the restraining order to the hearing.

Affirmed.

NOVELTY ADVERTISING COMPANY v. THE FARMERS MUTUAL TOBACCO WAREHOUSE COMPANY.

(Filed 3 October, 1923.)

1. Contracts—Vendor and Purchaser—Especial Goods—Breach—Measure of Damages.

Where an executory contract for the sale of goods peculiar to the seller's business and not available for sale by the vendor to its general trade, in this case art calendars with the purchaser's name printed thereon, with a stipulation in the contract against countermand, and the goods are not presently in existence, but thereafter to be especially manufactured, the seller, upon being notified by the purchaser, in breach of his contract, that he would not accept the goods, may not continue their manufacture and thus increase the purchaser's damages: and the measure thereof is the cost incurred by the seller up to the time he received the notification, together with the profits he would have made had the contract not been breached.

2. Same—Evidence—Instructions—Question for Jury—Appeal and Error.

Where a purchaser has breached his executory contract for the manufacture of goods made especially for him, before their completion, the question of damages is for the jury upon the evidence thereof, and a peremptory instruction from the court that they award the plaintiff the full contract price is reversible error.

APPEAL by defendant from *Kerr, J.,* at June Term, 1923, of EDGECOMBE.

Civil action to recover damages for an alleged breach of contract.

On 8 January, 1920, plaintiff contracted with the defendant to print certain calendars, containing advertising matter serviceable only to the defendant, and to ship the same from plaintiff's establishment in Coshocton, Ohio, to the defendant in Rocky Mount, N. C., on or about 1 December, 1920. The amount to be paid for said work was $408.75. The contract contained the following stipulation: "Advertising specialties are made to order and countermands cannot be recognized."

On 7 December, 1920, defendant wired and wrote plaintiff not to proceed with calendar order, as they were undecided as to their plans for the coming year. In reply to this, plaintiff wrote that upon receipt of $110 to cover expenses already incurred, the order would be canceled, but that unless satisfactory adjustment was effected by 15 December, shipment would be made as quickly as possible thereafter. Receiving no answer, plaintiff wired the defendant on 14 December: "We must have assurance that you will mail check promptly for expenses already incurred, or will print like copy submitted, Thursday, 16 December, and express as soon as finished. It is up to you." On 16 December, 1920, defendant wrote the plaintiff as follows: "In reply to your telegram regarding expenses already incurred by you in the printing of our job. Kindly advise by return mail what the expenses are. Up to the present time, we were under the impression that our present manager would continue in force, but now find that this will not be the case; thus there is no need of the completion of the job. We have already written you, advising you to discontinue order. However, if you will send us the bill of expense up to now, we will give it consideration."

On 20 December, 1920, plaintiff informed the defendant that the calendars had been finished and were being shipped.

Defendant refused to accept shipment when it reached Rocky Mount.

His Honor instructed the jury that plaintiff was entitled to recover the full contract price. Verdict and judgment accordingly. Defendant appealed.

J. P. Bunn and F. S. Spruill, Jr., for plaintiff.
Battle & Winslow for defendant.

STACY, J., after stating the case: The decisions in this jurisdiction are to the effect that when an executory contract for the sale of goods, not presently in existence and ready for delivery, but to be thereafter manufactured, is rescinded before the work is completed, the vendor will not be allowed to increase his damages by continuing to manufacture the goods after notice of rescission, but his damages in such cases are to be measured as of the time of the breach of the contract by the vendee. *Clothing Co. v. Stadiem,* 149 N. C., 6; *Heiser v. Mears,* 120 N. C., 443. The theory upon which this conclusion is reached is not that the buyer or the party in default has a right to pay damages as an alternative performance of his contractual obligation, but rather upon the theory that it is the duty of the seller to do nothing, after notice of rescission, to increase his damages. *Advertising Co. v. Wilson,* 186 Mo. App., 492; 172 S. W., 394; *Catalogue Co. v. Foundry Co.,* 97 S. W., 231; *International Text-Book v. Jones,* 166 Mich., 86.

In *Mfg. Co. v. Cutlery Co.,* 127 S. W., 666, the power as distinguished from the right of a party to repudiate an executory contract, in the face of a stipulation against cancellation, is stated as follows: "One party to an executory contract has the power to repudiate it, and the remedy of the other party is an action for damages caused by the breach of the contract. He cannot thereafter himself perform and recover on the contract. And a contracting party who has certain things to do under his contract has no right to proceed to execute it after he has been notified that the other party will not stand by the contract, and when he receives notice from the other party repudiating the contract, he is not justified in allowing anything further to be done." See, also, Bishop on Contracts, secs. 837 and 841.

The different methods employed and used by the courts in working out the rights of the parties under such circumstances have not been uniform; and this has resulted in a sharp conflict of authorities elsewhere on the subject. *Hart-Parr Co. v. Finley,* 31 N. Dak., 130; Ann. Cas. 1917 E, 706, and note; Page on Contracts (6th Ed.), sec. 3224. For example, in several jurisdictions it is held that where the contract is for the sale of a commodity not in existence at the time and which the seller is thereafter to manufacture, or put in a condition to be delivered (especially if it be of a kind different from that ordinarily made by the seller), upon repudiation by the purchaser, the contract is to be considered as one for work and labor, and not one of sale. *Flynn v. Dougherty,* 91 Cal., 669; *Atwater v. Hough,* 29 Conn., 508; *Goddard v. Binney,* 115 Mass., 450; *Turner v. Mason,* 65 Mich., 662; *Bennett v. Nye,* 4 Greene (Ia.), 410; *Bagby v. Walker,* 78 Md., 239; *Deal v. Maxwell,* 51 N. Y., 652; *Mattison v. Wescott,* 13 Vt., 258.

When a party breaches his contract, without any valid excuse, the courts are not inclined to permit him to prescribe the rights of the innocent party, but their chief concern is in making the plaintiff whole and securing to him his rights under the contract. *Register Co. v. Hill,* 136 N. C., 277; *Smith v. Lumber Co.,* 142 N. C., 26. Nevertheless, we think it is more in keeping with a just regard for the rights of both parties to hold that when a buyer countermands an order for goods before they have been manufactured and at a time when the seller can stop the work and thus mitigate his damages, the vendor should not be allowed to proceed with the work so as to aggravate the damages and recover the contract price upon the theory of full performance. *Butler v. Butler,* 77 N. Y., 472; *Danforth v. Walker,* 37 Vt., 239; *Fireworks Co. v. Polites,* 130 Pa. St., 536; *Collins v. Dalaporte,* 115 Mass., 159; Elliot on Contracts, Vol. 3, sec. 2035; 13 C. J., 655; *Scale Co. v. Beed,* 52 Iowa, 307.

In 6 R. C. L., 1029, this rule is stated as follows: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages from the other party. The legal right of either party to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows—subject to the jurisdiction of equity to decree specific performance in proper cases—is universally recognized and acted upon."

Applying these principles to the facts of the instant case, we think the plaintiff's recovery should be limited to such damages as were sustained prior to the receipt of the defendant's letter of 16 December, 1920. This letter contained, for the first time in the correspondence between the parties, what amounted to a definite repudiation of the contract. If the work had not been completed at that time, the plaintiff would only be entitled to recover an amount sufficient to compensate it for the labor expended and expense incurred in the part performance of the contract, prior to its repudiation, plus the profit that would have accrued had full performance not been prevented by the defendant. *Catalogue Co. v. Foundry Co., supra.* While the difference between the contract price and the amount of damages sustained up to the receipt of the defendant's letter of renunciation may have been slight, yet this was a question for the jury, and we think his Honor erred in his peremptory instruction.

New trial.

T. W. EDWARDS v. JAMES R. BUTLER.

(Filed 3 October, 1923.)

Judgments—Attorney and Client—Laches — Motion to Set Aside Judgment.

The laches of an attorney will not be imputed to his client when the latter is free from blame; and where the client upon being served with summons as a defendant in an action immediately employs counsel having the reputation of diligence in his practice, who promises to notify him when necessary to give further attention to his case, and soon thereafter a judgment by default final for the want of an answer is rendered against him, ignorant of the course and practice of the court, it will be

set aside upon motion aptly made upon a showing of merits, with permission to make new parties if necessary to the full determination of the controversy. As to whether such judgment was the proper one in this case, *quere?*

MOTION to set aside a judgment by default final against defendant for $1,005.60, heard before his Honor, *Grady, J.*, at August Term, 1923, of SAMPSON.

The motion was denied, and in the judgment of his Honor thereon it is stated that defendant, on an equitable adjustment of matters between him and plaintiff, is entitled to certain credits in the judgment, and it is further provided that the cause be retained for an adjustment of the matters referred to and execution in the meantime be stayed. Defendant excepted and appealed.

No counsel for plaintiff.
Clifford & Townsend for defendant.

HOKE, J. It appears by the findings of fact of his Honor, and supported by affidavits presented at the hearing, that summons was served on defendant on 27 October, 1922, returnable 13 November, 1922. That immediately defendant employed a reputable and diligent attorney regularly practicing in the court to look after the matter for defendant, and said attorney undertook to do so. That on conference with the attorneys of plaintiff, they promised him that they would serve him with copy of complaint when same was filed, and defendant's attorney thereupon assured him that he need give himself no concern about the matter until "he, the said attorney, advised him further." That in violation of this agreement, complaint was filed and the judgment complained of entered without knowledge of defendant or his attorney and without any notice having been given as agreed upon.

The affidavit of defendant in support of the motion is accompanied by an answer setting forth a meritorious defense and tending to show that a judgment by default final is not a proper determination of the matters involved in the controversy.

Upon these facts it is held with us in well-considered cases that the negligence of an attorney, even if established, will not be imputed to a client when the latter is himself free from blame. *Seawell v. Lumber Co.*, 172 N. C., 320; *Schiele & Krigshaker v. Ins. Co.*, 171 N. C., 426.

In the case presented it appears that defendant, as soon as served, employed an attorney having just reputation for character, capacity and diligence, and who was a regular practitioner in the court, to look after his interests. That plaintiff himself was unacquainted with the

course and requirements of court procedure and, relying on the assurance of his attorney, he thereby failed to file his answer, etc., within the time required.

It would seem on the only evidence submitted that defendant's attorney was justified in the instant case by the assurances received, but whether this be accepted or otherwise, we can perceive no blame attributable to defendant himself, and under the authorities cited, defendant moving in apt time and on a show of merits, is entitled to have the judgment set aside.

There is also an averment in defendant's affidavit filed as a basis for the motion that a judgment by default final is not in accordance with law and the course and practice of the court, and there is doubt in any event if such a judgment should be allowed to stand. In plaintiff's verified complaint he alleges in effect that he bought or bargained for one-half of a tract of land from defendant and paid him thereon $1,000 and certain additional expenditures for a deed, $5.61, and that he entered into possession of said land and stayed there one year, receiving the rents and profits of same, and so far as appears still has possession of the property. That he bought the one-half on condition that one J. O. Tew would buy the other, and that if said J. O. Tew did not buy the other half and make the payments thereon that the trade should be rescinded and defendant would save plaintiff harmless and return him his money, etc., and thereupon demanded and obtained a judgment by default final for the entire amount without accounting in any way for the occupation of the property for at least a year. His Honor recognized that there should be a further adjustment and so provides in his judgment, but under the contract as alleged, to "save plaintiff harmless in case the trade is off," it would seem that the accounting should precede a final judgment in the matter. Without decision on this question, however, we are of opinion and so hold that the judgment be set aside as for excusable neglect, and the defenses presented by the answer should be considered and passed upon and new parties made if necessary to a full determination of the controversy.

Error.

ROAD COMMISSIONERS v. COUNTY COMMISSIONERS.

(Filed 3 October, 1923.)

1. Statutes—Interpretation—Intent—Repugnances—Repeal.

The provisions of a later statute that are repugnant to those of a former one will be construed to repeal so much thereof as is repugnant without any specific repealing clause, and in construing the later act,

the intent of the Legislature will be given effect primarily as interpreted from the language therein used, and where this is free from ambiguity and expresses plainly, clearly and distinctly the sense of its framers, a resort to other means of interpretation is not permitted.

2. Same—Taxation—Roads and Highways.

A statute entitled to limit the amount of tax authorized for road district purposes, authorized by a prior law, and in the body of the act requiring that the amount of the levy should not exceed a certain rate on the $100 valuation of the taxable property, repeals so much of the former law as is repugnant thereto, without expressly repealing it; and the increased valuation of the taxable property may be considered as an aid to this interpretation.

MANDAMUS PROCEEDINGS, heard before his Honor, *Shaw, J.*, at August Term, 1923, of DAVIDSON.

The road commissioners of the county having duly certified to defendants and board of assessors that a road tax of 45 cents on the hundred dollars was necessary for carrying out the road program of the county for the years 1923-24, as provided by law, demanded of defendants that such levy be made by defendant board. Defendants contending that under the statutes applicable they could not exceed a rate of 35 cents, declined to levy the 45-cent rate, whereupon present proceedings were instituted to compel compliance. The court entered judgment denying the writ and plaintiff board excepted and appealed.

Walser & Walser, Phillips & Bower and J. R. McCrary for plaintiff.
W. O. Burgin and P. V. Critcher for defendant.

HOKE, J. On the hearing it was made to appear that chapter 334, Public-Local Laws of 1915, provided for a bond issue of Davidson County of $300,000, and authorizing a tax levy not to exceed 30 cents for the creation of a sinking fund and for maintenance of roads, etc. Chapter 129, Public-Local Laws of 1917, provides that the board of road commissioners in their discretion shall determine the amount of tax to be levied for road purposes, and that the county commissioners shall levy such tax as the road commissioners shall find to be necessary, "not to exceed the amount as provided by law." Chapter 233, Public-Local Laws of 1919, provides that the board of county commissioners, at the time other road taxes are levied and in addition to the taxes now authorized to be collected under existing law, shall levy annually a special tax of 30 cents on the $100, etc., valuation for the purpose of maintaining the present public roads and extending the same and paying the outstanding indebtedness of the board of road commissioners.

The General Assembly of 1923 enacted a statute as follows:

H. B. 308; S. B. 407.

AN ACT TO AMEND CHAPTER 129, PUBLIC-LOCAL LAWS 1917, AND TO LIMIT AMOUNT OF TAX TO BE LEVIED FOR ROADS IN DAVIDSON COUNTY.

The General Assembly of North Carolina do enact:

SECTION 1. That chapter 129, Public-Local Laws, Session of 1917, be amended as follows: That there be added to section 2 of said act the following: "*Provided,* that the amount of taxes to be levied shall not exceed 35 cents on each $100 of valuation of taxable property."

SEC. 2. That the board of county commissioners of Davidson County shall levy each year at the time of levying taxes for road purposes, as provided by law, such an amount as the board of road commissioners of said county shall in writing request for such year, however, not to exceed 35 cents on each $100 of taxable property in said county.

SEC. 3. That this act shall be in force and effect from and after its ratification.

From a proper perusal of this the legislation applicable we concur in the view that the force and effect of the act of 1923 is to restrict the amount of taxation for any and all road purposes to the 35 cents as specified. It is true, as contended by appellant, that implied repeals are not favored, and that where there are two statutes relating to the same subject passed at the same or different sessions, and there is no express repealing clause, that both must be given effect in so far as their different provisions are not inconsistent with each other, but it is also true that, to the extent that they are necessarily repugnant, the later statute shall prevail. *Bramham v. Durham,* 171 N. C., 196-198.

This decision quotes with approval from the opinion of *Associate Justice Fields* in *U. S. v. Tyner,* 78 U. S., 96, to the effect "That where there are two acts on the same subject the rule is to give effect to both if possible, but if the two are repugnant the latter act and without any repealing clause operates to the extent of the repugnancy as a repeal of the former."

And in determining whether there is a repugnancy, it is the approved rule here and elsewhere that the intent of the Legislature must be sought primarily in the language used, and "where this is free from ambiguity and expresses plainly, clearly and distinctly the sense of the framers, a resort to other means of interpretation is not permitted." *Kearney v. Vann,* 154 N. C., 311; *In re Applicants for License,* 143 N. C., 1.

In this last decision citation is made from Black on Interpretation of Laws, sec. 26, as follows: "The meaning of a statute must first be sought in the language of the statute itself," and further, "If the language is plain and free from ambiguity and expresses a simple, definite and sensible meaning, that meaning is conclusively presumed to be the meaning the Legislature intended to convey." And from Lewis' Sutherland on Statutory Construction (2d Ed.), sec. 267, "Where the intention of the Legislature is so apparent on the face of the statute that there can be no question of its meaning, there is no room for construction."

Considering the statute of 1923 in the light of these recognized principles, it is clear that the meaning and purpose of the Legislature is to restrict the amount of taxation for road purposes in Davidson County to the 35 cents on the $100. It so provides in express terms. An interpretation that is in full accord with the title: "An act to amend chapter 129, Public-Local Laws of 1917, and to limit the amount of tax to be levied for roads in Davidson County."

This view is confirmed by the fact that the tax valuation of Davidson County in 1923 is more than double that which prevailed in the years when the former acts were passed, and this no doubt affords a reason for the action of the Legislature in the premises.

We are of opinion that his Honor has made correct disposition of the matter before him, and his judgment denying the writ is

Affirmed.

STATE v. CLEVELAND LOFTIN.

(Filed 3 October, 1923.)

1. Arrest—Police—Sheriffs—Officers—Warrants for Arrest.

A policeman of a city is given the same authority as is vested by law in sheriffs (C. S., sec. 2642), and may arrest, without a warrant, a person in his presence violating the statute forbidding the operation of an automobile upon the streets by a person under the influence of intoxicating liquor. C. S., sec. 4506.

2. Instructions—Jury—Belief of Evidence—Findings of Fact—Criminal Law.

The verdict of a jury must not be solely based upon their belief of the evidence on the trial, but upon their findings of fact therefrom, and in criminal cases, beyond a reasonable doubt.

3. Same—Appeal and Error—New Trials.

The Court disapproves again an instruction for the jury to render their verdict upon their belief of the evidence, and where the evidence is conflicting, this instruction will be held for reversible error.

CRIMINAL ACTION, tried before *Grady, J.*, and a jury, at August Term, 1923, of LENOIR, on appeal from the recorder's court.

There were two warrants, one charging the defendant with operating an automobile while intoxicated or under the influence of intoxicating liquor, in violation of C. S., sec. 4506, and the other with unlawfully resisting an officer. In the Superior Court the cases were consolidated, and a verdict of not guilty was returned as to the operation of the automobile. In the other case, Richard Stroud testified in substance that he was a police officer; that the defendant spoke to him, went across Bright Street, entered a car and drove away; that Saunders, a constable, said the defendant was "too drunk to drive a car"; that the two officers followed the car around two blocks and into the defendant's back yard; that he approached the defendant and undertook to make the arrest and was assaulted by the defendant; that he had no warrant and thought the defendant was under the influence of liquor when he was driving the car.

There was evidence for the defendant tending to show that he was sober and was driving at a rate not exceeding six to ten miles an hour. Several witnesses were examined on each side.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Moore & Croom for the defendant.

ADAMS, J. In section 2642 of the Consolidated Statutes it is provided that a policeman shall have the same authority to make arrests within the town limits as is vested by law in sheriffs; and a sheriff is authorized to arrest without a warrant any person who commits a misdemeanor in his presence. *S. v. Freeman,* 86 N. C., 683; *S. v. Hunter,* 106 N. C., 796; *S. v. McAfee,* 107 N. C., 812; *Sossamon v. Cruse,* 133 N. C., 470; *S. v. Rogers,* 166 N. C., 389. Therefore Richard Stroud, who was known to the defendant as a policeman of the city of Kinston, was authorized, although he had no warrant, to arrest the defendant within the corporate limits of the city for a breach of the statute forbidding the operation of an automobile upon the streets by a person under the influence of intoxicating liquor, if the breach was committed in the officer's presence. C. S., sec. 4506.

As to this proposition there seems to have been no controversy, but the defendant excepted to the instruction "that if the jury believe all the evidence they will find the defendant guilty of resisting an officer."

The phraseology of this instruction has frequently been disapproved. In *Sossamon v. Cruse, supra, Justice Walker* pointed out the objection

of the second passage taken from the charge of the court. The jury is there told that if they 'believe from the evidence' the facts therein recited, the acts of the defendant did not constitute an assault. This Court has referred to this form of expression as being open to the objection that the jury might believe that certain facts existed when they would not be willing to find that they did exist, and that the law as given by the court to the jury should be based not upon their belief merely, but upon the facts as found by them under the rule of law as to the burden of proof and such proper instructions from the court as will enable the jury to intelligently weigh and apply the evidence. *S. v. Barrett,* 123 N. C., 753; *Wilkie v. R. R.,* 127 N. C., 203." In *Merrell v. Dudley,* 139 N. C., 59, *Justice Brown* was equally explicit: "The plaintiff also excepts to certain expressions used by the judge below in charging the jury: 'If you believe from the evidence . . .' is an expression urged upon our attention by the plaintiff as erroneous and prejudicial. It is true that the language is inexact, and this form of expression should be eschewed by the judges in charging juries. This Court has heretofore called attention to it in a number of cases: *S. v. Barrett,* 123 N. C., 753; *S. v. Green,* 134 N. C., 661; *Wilkie v. R. R.,* 127 N. C., 203; *Sossamon v. Cruse,* 133 N. C., 470." And in *S. v. Singleton,* 183 N. C., 739, *Justice Stacy* remarked: "We are again constrained to call attention to the fact that the form of expression, 'If you believe the evidence,' should be eschewed in charging the juries in both criminal and civil actions," citing *Merrell v. Dudley, supra.*

In *Merrell's case, supra, Justice Brown* made the further observation, "We do not regard the use of such language as reversible error unless it clearly appears that the appellant was probably prejudiced thereby"; and this ruling has been applied by the Court to cases in which only one inference was reasonably to be deduced from the evidence, as, for example, where only one witness testified to the transaction. It finds illustration in *S. v. Murphrey, ante,* 113, and the cases cited. There we said that because more than one inference could not reasonably be drawn from the evidence the expression, "If you believe the evidence," would not be held for reversible error, but we again noted disapproval and suggested that in criminal actions the accepted formula as to "reasonable doubt" should be followed—not "if the jury believe the evidence beyond a reasonable doubt," but "if upon all the evidence they are satisfied beyond a reasonable doubt of every element necessary to constitute the offense," etc.; for it is the duty of the trial judge in charging the jury to explain the constituent elements of the offense for which the defendant is indicted.

The defendant did not testify, but he introduced fourteen witnesses and the State eight. The evidence being conflicting and reasonably susceptible of more than one inference, certainly as to the defendant's

condition, his Honor's instruction—"if the jury believe all the evidence," etc.—was clearly prejudicial to the defendant.

In justice to the learned judge who tried the case, we note the fact that when the instruction complained of was given, the defendant had not been acquitted on the charge of operating his car while under the influence of intoxicating liquor. There is

Error.

JOBBERS OVERALL COMPANY v. C. S. HOLLISTER COMPANY.

(Filed 3 October, 1923.)

1. Evidence—Written Contracts—Parol Evidence.

Matters resting in parol leading up to the execution of a written contract are considered as merged in the written instrument, and may not contradict or vary its terms.

2. Same—Condition Precedent.

The rule excluding parol evidence that contradicts or varies a written contract into which it has merged, does not apply when it tends to show a condition precedent to the effectiveness or the operation or binding effect of the written instrument.

3. Same—Appeal and Error—Prejudice—New Trials.

The purchaser of goods gave the salesman of the vendor a written order therefor, and offered evidence tending to show that it was agreed that the written instrument should be effective only if he could countermand in time an order for like goods he had theretofore given another concern, which he had been unable to do: *Held*, sufficient as tending to show a condition precedent to the effectiveness of the written instrument, and its exclusion by the trial court was reversible error.

APPEAL by defendant from *Grady, J.*, at May Term, 1923, of CRAVEN.

Civil action to recover the value of certain overalls, alleged to have been sold and delivered to defendant by plaintiff.

From a directed verdict in favor of plaintiff the defendant appealed, assigning errors.

H. P. Whitehurst and Guion & Guion for plaintiff.
Moore & Dunn and R. A. Nunn for defendant.

STACY, J. Plaintiff's agent secured from the defendant a paperwriting purporting to be an unconditional order for certain overalls to be shipped by plaintiff to defendant. The writing contained the following stipulation: "This contract is not subject to cancellation unless delivery is delayed beyond a reasonable length of time." There is no contention of any delay in delivery.

Defendant denied liability and, upon the trial, offered to show that the order in question was given with the distinct understanding and upon the express condition that the same should not become effective or operative if certain overalls previously ordered from another dealer were received by defendant; and further, that before plaintiff had acknowledged and accepted said order, defendant advised the plaintiff by letter that defendant would receive the overalls previously ordered as aforesaid, and that defendant would and did thereby cancel the order given to plaintiff's agent. Notwithstanding this letter, plaintiff thereafter shipped the overalls and now brings this suit to recover their value as per stipulated price.

All of the defendant's proposed evidence was excluded on objection. Therefore the single question presented by the appeal is the competency or incompetency of the evidence offered by the defendant.

If the evidence in question were offered for the purpose of establishing a condition subsequent, resting in parol, and in direct conflict with the express terms of the written instrument, it was properly excluded. The general rule is, that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. All such agreements are considered as varied by and merged in the written contract. "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Smith, C. J.,* in *Ray v. Blackwell,* 94 N. C., 10.

On the other hand, if defendant's purpose was to show a condition precedent, prior to the happening of which it was agreed the contract should not become effective or operative, the proposed evidence was competent, and it was error to exclude it. *Building Co. v. Sanders,* 185 N. C., 328, and cases there cited. "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced." *Devens, J.,* in *Wilson v. Powers,* 131 Mass., 539.

We think the evidence offered by the defendant brings the instant case within the latter rule and that a new trial must be awarded and another jury impaneled to pass upon the evidence.

New trial.

A. C. BECK v. WILKINS-RICKS COMPANY.

(Filed 10 October, 1923.)

1. Evidence—Examination Before Trial—Statutes.

It is competent for a party who has been examined under the provisions of the statutes before the trial of the cause, at the instance of the adverse party, to introduce the testimony so taken as evidence in his own behalf at the trial. C. S., secs. 900, 901, 902.

2. Same—Definition of Promise.

A promise is a declaration by any person of his intention to do, or to forbear from doing, anything, at the request or for the use of another; and a proposal when accepted becomes a promise.

3. Contracts—Compromise—Promise.

A promise made and accepted by the proprietor of an automobile garage or its authorized agent, to pay the plaintiff for his automobile, which was claimed to have been negligently delayed under dangerous conditions, in repairing, through the defendant's fault, and consequently burned in the destruction of the garage by fire, is a valid and binding one, upon a sufficient consideration, and enforceable in our courts.

4. Same—Principal and Agent—Corporations.

The secretary of an incorporated garage and auto repair company has the implied authority to settle claims made for damages upon the corporation, C. S., sec. 1145, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented.

5. Same—Judgments.

Held, the affirmative verdict establishing the defendant's negligence in this case, as the cause of plaintiff's damage, and fixing the amount thereof, was sufficient to support a verdict in plaintiff's favor, there being no further defense claimed.

APPEAL by defendant from *Horton, J.*, at March Term, 1923, of LEE.

This was a civil action, brought by plaintiff against the defendant for the value of an automobile burned in the garage of the defendant. The complaint alleges that the defendant was a corporation, engaged, among other things, in the conduct of a public garage for the repair of automobiles, in the town of Sanford; that on the morning of 20 January, 1919, about 9:30 o'clock, plaintiff carried an Overland, No. 90, to the garage to have minor repairs made, which would take only about one and a half hours, and the defendant promised to make the repairs that day; that during the afternoon, and after the time the defendant had promised to have the repairs completed, the plaintiff went to the garage for the purpose of taking the car away, and found the same dismantled and the defendant's employees making repairs not directed or

authorized, and which defendant had been expressly directed by plaintiff not to make. On account of the wrongful dismantling of the car, plaintiff could not get the same; that during the night the car was burned, through the negligence of the defendant.

There was allegation that defendant was negligent in not keeping a watchman at the garage, and also other allegations of negligence in the manner in which automobiles, etc., were kept in the garage, having on them wires and equipment for conveying electric current, etc., which made it a menace and source of danger from fire.

There was allegation that after the burning of the car the plaintiff and defendant entered into negotiations for settlement of damages, and the defendant promised and agreed to pay plaintiff the value of the car.

The defendant denied the material allegations of plaintiff, and denied that it was to make minor repairs which could be completed in an hour and a half, or that the repairs authorized by plaintiff could be completed the day the car was left with them. It admitted that it kept cars in storage, but denied that it was negligent in not keeping a watchman or in the manner automobiles were kept, and denied that it made any promise to plaintiff to settle for the car which was burned.

The following issues were submitted to the jury:

"1. Was the automobile of plaintiff destroyed by the negligence of defendant, as alleged? Answer: 'No.'

"2. What damage did plaintiff suffer by reason thereof? Answer: '.....'

"3. Was delivery of plaintiff's car to him before the fire prevented by unauthorized work by defendant, as alleged? Answer: 'Yes.'

"4. Did the defendant promise and agree to pay the plaintiff the value of the automobile? Answer: 'Yes.'

"5. What was the value of the automobile? Answer: '$350.'"

The court below gave judgment for plaintiff and against defendant for $350. The defendant appealed to this Court, and assigned as errors:

"1. His Honor erred in admitting in evidence the written examination of the plaintiff, taken during the pendency of the action.

"2. His Honor erred in denying defendant's motion to nonsuit the plaintiff.

"3. His Honor erred in denying defendant's motion to nonsuit at conclusion of all the evidence.

"4. Error was committed in submitting the third issue, as follows: 'Was delivery of plaintiff's car to him before the fire prevented by unauthorized work by defendant, as alleged?'

"5. His Honor erred in submitting the fourth issue, as follows: 'Did the defendant promise and agree to pay the plaintiff the value of the automobile?'

"6. His Honor erred in refusing to set aside the verdict on the third and fourth issues.

"7. His Honor erred in signing the judgment."

Gavin & Jackson and Hoyle & Hoyle for plaintiff.
Seawell & Pittman for defendant.

CLARKSON, J. The first assignment of error was to the court below admitting in evidence the written examination of plaintiff, taken during the pendency of the action. In this State the "Bill of Discovery" has been abolished and the following has been substituted:

"A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents.

"The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge or court orders otherwise.

"The party to be examined, as provided in the preceding section, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk, or commissioner, as in the case of witnesses examined conditionally, and may be read by either party on the trial." C. S., secs. 900, 901, 902.

A. C. Beck, the plaintiff, was examined as a witness on the trial, and gave his evidence, and then offered the evidence given by him on an examination under the before mentioned statute, had at the instance of defendant. The court below allowed this written examination to be introduced, and in this there was no error. The statute says, in plain language, *"and may be read by either party on the trial."* (Italics ours.) C. S., sec. 902. *Phillips v. Land Co.*, 174 N. C., 542; *Walker v. Cooper*, 159 N. C., 536.

The other exceptions will not be considered separately, but as a whole.

The first main contention is to the promise to pay for the automobile by L. P. Wilkins, secretary and treasurer of defendant company, and

his authority to make the promise so as to bind the defendant company.

As to this promise, the plaintiff testified as follows: "I told Mr. Wilkins that I had come over to see him in regard to my car that was burned in the fire in his garage. He said to me, 'All right; what is it about it?' I told him I wanted to know what disposition he was going to make about the car. He kind of paused for a second, and said, 'I do not know that we are responsible for the cars stored in our garage.' I said, 'Well, Mr. Wilkins, I am mighty glad to say that my car was not a stored car.' The next thing, as well as I remember, he said was, 'What is your name?' I said, 'This is Mr. Beck, of the Sanford Cash Store. I thought you knew before who I was, or I would have introduced myself. I called up twice before I came, and told the young lady to tell you I was coming over.' He said, 'What kind of a car was yours?' and I said, 'An Overland 90; it was there for repairs, and was to have been delivered that afternoon, and when I went for it I could not move it. I think you are responsible.' He said, 'Yes, we will have to pay you for your car.' I said, 'Well, when will you pay?' He said, 'What is your car worth?' I said, 'I do not know, Mr. Wilkins. Mr. Monger has just gotten a new car-load, and I have not heard him say. It is worth just what a brand-new one is worth. My car has been used some, but I had an extra set of new tires, new inner tubes and everything, and I think the extras would offset the fact that it had been used.' He said, 'You go by and find out what new cars are worth, and let me know, and I will pay you this evening or tomorrow.' "

The language is plain—"You go by and find out what new cars are worth, and let me know, and *I will pay you this evening* or tomorrow." (Italics ours.) Evidence taken from written examination.

A promise is the declaration by any person of his intention to do, or to forbear from doing anything, at the request or for the use of another. A proposal, when accepted, becomes a promise. 13 C. J., 239.

A declaration which binds the person who makes it, *either in honor, conscience, or law* (italics ours), to do or forbear a certain act specified; a declaration which gives to the person to whom it is made a right to expect or claims the performance or nonperformance of some particular thing. C. L. P., Vol. 32, 633; *Taylor v. Miller,* 113 N. C., 340.

"Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise." *Ramsey v. Browder,* 136 N. C., 251.

In *Burriss v. Starr,* 165 N. C., 662, *Walker, J.,* says: "Besides, it appears that the parties in good faith came to a settlement of their

dispute as to their rights. Plaintiff thought he had a 'bond for title,' but could not find it. The death of the widow had made the 'dower tract,' as it was called, more valuable, and defendant wished to settle the matter, and made the first offer to do so. The settlement was a distinct advantage to defendant, as it removed an apparent cloud from his title. In *Mayo v. Gardner,* 49 N. C., 359, this Court said, by *Chief Justice Nash: 'In re Lucy,* 21 Eng. Law and Eq., 199, it was decided that, to sustain a compromise, it was sufficient if the parties thought, at the time of entering into it, that there was a *bona fide* (or real) question between them, though in fact there was no such question.' The law favors the settlement of disputes, as was said in that case. It is stated in 9 Cyc., 345, that 'the compromise of a disputed claim may uphold a promise, although the demand was unfounded,' citing numerous cases in the notes to sustain the text."

We are of the opinion that the language used by L. P. Wilkins was a promise to do a certain thing, definite and certain enough to give a legal right to require performance, and under the facts in this case the promise was founded on a sufficient consideration to support the promise and was not a *nudum pactum.*

Did L. P. Wilkins have authority to make the promise? It was in evidence that he was secretary and treasurer of the defendant corporation, and his evidence is as follows:

"Q. What officers of Wilkins-Ricks Company had authority to settle and compromise claims and to pay people for cars they were responsible for, if any, collect and disburse money? Answer: 'I had authority to pay all the bills.'

"Q. You would have been the man? Answer: 'I would have been.'"

C. S., sec. 1145, says: "Every corporation organized under this chapter shall have a president, secretary and treasurer," etc.

Under the facts in this case, we are of opinion that L. P. Wilkins, secretary and treasurer of defendant corporation, had a right to make the promise, and it was in the implied scope of his employment. The business of the corporation could not be successfully carried on if he was so limited that in transactions of this kind he had no authority. *Strickland v. Kress,* 183 N. C., 537; *Powell v. Lumber Co.,* 168 N. C., 632.

In regard to the exception taken to the submission of the third issue: "Was delivery of plaintiff's car to him before the fire prevented by unauthorized work by defendant as alleged?" we do not deem it necessary to consider this issue.

The verdict on the fourth issue, "Did the defendant promise and agree to pay the plaintiff the value of the automobile?" was answered in the affirmative.

In the view taken of this case, the affirmative answer of the issue, and the answer in favor of plaintiff as to the value of the automobile, was sufficient to support the judgment.

The numerous authorities cited by the able attorneys in their briefs in regard to unauthorized repairs and bailment, it will be unnecessary to consider and pass on. The subject of bailment was fully discussed when this case was before us in *Beck v. Wilkins,* 179 N. C., 231.

On the entire record we can find

No error.

C. L. TRIPP v. T. L. LITTLE.

(Filed 10 October, 1923.)

1. Trespass—Possession—Landlord and Tenant—Actions.

The plaintiff in rightful possession of land may maintain an action against a trespasser thereon, though claiming the right to such possession under the title of another.

2. Same—Title—Parties.

The owner of the title to lands is proper and at times a necessary party to an action of trespass brought by his tenant, or one who is in possession under him, when the wrongful invasion of the property involves an injury both to the possession and the inheritance.

3. Same—Courts—Statutes.

Under the provisions of our statute, the court has the power to order the owner of the title to be made a party in his tenant's action of trespass involving an injury both to the possession and to the inheritance. C. S., secs. 446, 456, 460.

4. Same—Abatement.

The owner of the legal title conveyed the lands to his son, and thereafter, while continuing in peaceful possession, instituted an action for trespass involving injury both to the possession and the inheritance; and after his death, pending this action, the court substituted the son as party plaintiff, under defendant's objection, who moved in abatement of the action on the ground that the original plaintiff did not own the legal title at the time of action commenced: *Held,* the motion was properly denied.

5. Evidence—Declarations—Requisites—Ante Litem Motam—Boundaries.

In order that unsworn declarations may be received upon the trial as evidence of the true location of a contested private boundary involving title, it is required that they must have been made *ante litem motam,* by a declarant who was disinterested when they were made, and who was dead at the time of trial: and to be competent as *ante litem motam,* they must have antedated the time when the dispute had arisen, as well as that of action commenced.

6. Evidence—Declarations—Interest.

Evidence that a declarant on question of boundary is a relative of one of the owners will not affect the competency of his declarations—the disqualifying interest being of a pecuniary or proprietary nature.

APPEAL by defendant from *Grady, J.*, at May Term, 1923, of PITT.

Civil action. The action is for trespass to realty and to restrain repetition of same, and was instituted by Redding Tripp, father of present plaintiff, and who remained in actual possession of the land until his death pending the action, and who had conveyed the land to his son, the present plaintiff, prior to action commenced. At the call of the cause there was motion that the action abate for that the original plaintiff, Redding Tripp, had no title at the time of action commenced. It was claimed by plaintiff that an order of court had been made several terms ago, but no such order being found, a juror was withdrawn and an order was signed presently substituting C. L. Tripp as party plaintiff, and the trial proceeded as between said C. L. Tripp as plaintiff, and defendant. The court offered parties the privilege of a continuance if taken by surprise, but both agreed to proceed with the trial, defendant noting his exception for a refusal to abate the action pursuant to his motion.

Defendant in his answer admitted that he had cut timber trees on the land specified and raised the issue of title as against plaintiffs or either of them, asserting title in himself to the land in dispute. On issues submitted the jury rendered verdict as follows:

"1. Is the plaintiff the owner of the tract of land referred to on the map and included within the lines B, C, 7, 6, 5, Z, B? Answer: 'Yes.'

"2. If not, what damages is the defendant entitled to recover of the plaintiff by reason of the issuance of the injunction in this action? Answer: '.....'"

Judgment on verdict for plaintiff, and defendant excepted and appealed, assigning for errors the refusal to allow his motion that the action abate, to certain ruling of the court on questions of evidence.

F. G. James & Son and Skinner & Whedbee for plaintiff.
Louis W. Gaylord and Albion Dunn for defendant.

HOKE, J. The action being one for trespass to realty, it is held in this jurisdiction, and is the rule very generally prevailing, that the same can be properly instituted and maintained against a wrongdoer by one in the peaceable possession of the property at the time of the wrong committed. *Lee v. Lee,* 180 N. C., 86; *Wheeler v. Telephone Co.,* 172 N. C., 9, 11; *Frisbee v. Marshall,* 122 N. C., 760; *Hayward v. Sedgely,* 14 Me., 439. And the defendant having raised the issue of title, the

original plaintiff being in under the present plaintiff, his grantee of the legal title, and the trespass involving an injury both to the possessory right and to the inheritance, the present plaintiff as claimant of the title is not only a permissible but a proper party to a determination of the controversy. *Balcum v. Johnson,* 177 N. C., 213; citing *Cherry v. Canal Co.,* 140 N. C., 422; *Gwaltney v. Timber Co.,* 115 N. C., 579; *Jordan v. Barwood,* 42 W. Va., 312; *Shortle v. Terre Haute, etc. Ry.,* 131 Ind., 3218.

In *Haywood v. Sedgely, supra,* it is said: "The case in the year book, 19 Henry VI, 45, decided that a tenant at will may have an action for injury to the soil, and the landlord also, for his injury. The same rule applies to the cutting of trees. If trees are cut on the land of a tenant at will, he may have an action of trespass. Roll's Abridgment, Trespass, note 4; Comyn's Digest, Trespass, B-2. The principle is quite explicitly stated in Note 2, Coke on Littleton, 57-A, 'If a stranger cuts trees, the tenant at will shall have an action, as shall also the lessor, regard being had to their general losses.'" And *Spencer v. Weatherly,* 46 N. C., 327, is in affirmance of the general principle.

And whatever doubt may exist as to the propriety of joining these parties under the strict rules of common law procedure, under the more liberal and comprehensive provisions of our Code there can be none in our opinion that the owner may and should be joined to an action instituted by his tenant for a wrongful invasion of the property, and involving an injury both to the possession and the inheritance. C. S., secs. 446, 456 and 460, providing, among other things, for the making of such parties as are necessary to a complete determination of a controversy. On the record we are of opinion that his Honor properly refused to order an abatement and in directing that the action proceed as between the present plaintiff and defendant.

While we approve his Honor's ruling in the matter referred to, we are of opinion that defendant is entitled to a new trial of the cause for an erroneous ruling on a question of evidence. From an examination of the record it appears that plaintiff asserted and was endeavoring to maintain title under his deeds as covering the land in controversy, and in doing so it was a material question as to the true location of a certain poplar corner at B. And a witness for plaintiff, E. C. Dresbach, over defendant's objection, was allowed to state that the corner in question, at the point claimed by plaintiff, was pointed out to him as plaintiff's corner by a Mr. Cooper, a relative of plaintiff, now dead. Speaking of the time and circumstance when this occurred, the witness Dresbach said: "There is a poplar stump at point B on the map. The first time the corner at B was pointed out to me has been about twelve years ago,

as I remember, by a gentleman by the name of Cooper. I think they called him Roan. He was there when I first went there to make a survey. He was a middle-aged man. He is now dead. When I first went there to make a survey there was a question about where this line was. As I remember it, the dispute was about where the line stood between Tripp and Horton. Cooper was a relative of Mr. Tripp and I suppose he would have an interest in the matter. Of course, I am not certain of that fact. He was there on the ground and pointed out the corner."

It is fully established in this State that under proper circumstances unsworn declarations may be received in questions of private boundary, the requirements for the admissibility of such evidence being that they must have been made *ante litem motam* and by a declarant who was disinterested when made and who was dead at the time of trial. *Hoge v. Lee,* 184 N. C., 44; *Bank v. Whilden,* 175 N. C., 52; citing *Sullivan v. Blount,* 165 N. C., 7; *Lamb v. Copeland,* 158 N. C., 136, and other cases. The interest which disqualifies the declarant is a pecuniary and proprietary interest and therefore there would be no objection to these declarations of Cooper because of his relationship to the Tripps, father and son, but the statements of the witness Dresbach reveal clearly that the oral and unsworn statements of the declarant Cooper were not made *"ante litem motam,"* for this term, *"ante litem motam,"* does not apply merely to the suit then being tried, but refers also to the origin of the controversy between the parties or their predecessors in title, and which has resulted in the suit.

The position and the reason for it is stated with his accustomed learning and accuracy by our brother and former associate, *Judge Walker,* in *Rollins v. Wicker,* 154 N. C., 560-563, as follows: "The plaintiff offered to prove by the same witness what was the testimony of Joseph Buchanan (a deceased kinsman of the plaintiff) in the trial of the other case as to plaintiff's legitimacy, and that it tended to establish the fact. This evidence was properly excluded. It does not appear that the declaration of the deceased relative was made *ante litem motam.* This expression is not restricted to the date of the commencement of the present suit, but to the beginning of the controversy. In order to avoid the mischief which would otherwise result, 'all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy are rejected.' This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to an earlier period of the controversy. But in our law the term *lis* is taken in the classical and larger sense of controversy, and by *lis mota* is understood the commencement of the controversy and not the commencement

of the suit. The commencement of the controversy has been further defined by Mr. Baron Alderson, in a case of pedigree, to be 'the arising of that state of facts on which the claim is founded, without anything more.' 1 Greenleaf on Evidence, sec. 131. The value of this kind of evidence depends upon its being drawn from an unbiased source, and it should emanate from those in a situation favorable to a knowledge of the truth, and, what is a very important consideration, it should refer to a period 'when this fountain of evidence was not rendered turbid by agitation.' Section 132."

From the accompanying statements of the witness Dresbach, it appears that though made twelve years before, a controversy then existed as to the true location of this line between the Tripps, who owned plaintiff's title, and Albert Horton, under whom defendant immediately claimed. For this error there must a new trial of the case, and it is so ordered.

New trial.

OTHO BRANCH v. W. H. AYSCUE.

(Filed 10 October, 1923.)

1. Evidence—Declarations—Trespass—Title.

It is not objectionable, as unsworn declarations of the absent tenant, for the plaintiff in claim and delivery to testify, in his action against the landlord for the possession of the tenant's share of the crop, that the tenant had assigned his share to him for the support of his children, it being competent to show how he had acquired the title thereto.

2. Evidence—Book Entries.

A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of C. S., secs. 1786, 1787, 1788, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction.

3. Same—Appeal and Error—Prejudice—New Trials.

The erroneous admission of book entries in this case is *held* for reversible error, being material to the principal issue in the cause, and prejudicial to appellants.

APPEAL by defendant from *Cranmer, J.*, at February Term, 1923, of FRANKLIN.

Civil action. The action is to recover plaintiff's share of crop of tobacco, or the value thereof, grown on lands of plaintiff for the year 1922 by Ed Alston, tenant of defendant, and sued for by plaintiff as

assignee of the tenant. Defendant denied the indebtedness and claimed the tobacco for advancements made by him to Ed Alston during his said tenancy.

Plaintiff offered evidence tending to show that Ed Alston as tenant for defendant for 1922 grew a crop of corn, cotton, and tobacco on defendant's land. That the tenant, having determined to leave the State or community, put plaintiff in charge of his eight children and assigned plaintiff his crop, telling him to sell same and apply proceeds in aid of the children's support after paying his landlord, the defendant, for a box of meat and a barrel of flour. That plaintiff applied for said share, and defendant, assenting to the assignment, turned over to plaintiff the tenant's share of the corn and cotton, saying that the tenant's account was very little, not more than twenty-five or thirty dollars. That when plaintiff applied for the tenant's share of the tobacco, defendant refused to permit its removal till he was paid for his advancements, alleged by defendant to be $223.76.

Defendant denied any assent to taking the crop as a right, saying he had allowed plaintiff to pick out the cotton in charity to the children. He also denied saying the account of the tenant was only twenty-five or thirty dollars, and testified that the advancements were as stated, $223.76. Defendant also testified in denial of plaintiff's claim that tenant had lent defendant $200, or that the money included in his claim for advancements was to repay the alleged loan. On issues submitted, the jury rendered a verdict as follows:

"1. Is the plaintiff the owner and entitled to the possession of the tobacco described in the complaint? Answer: 'Yes.'

"2. What was the value of said tobacco crop at the time of its seizure in claim and delivery? Answer: '$654.60.'

"3. In what sum, if any, is defendant indebted to the plaintiff? Answer: '$274.07.' "

Judgment for plaintiff, and defendant excepted and appealed, assigning errors.

Wm. H. & Thos. W. Ruffin for plaintiff.
W. M. Person for defendant.

HOKE, J. Defendant excepts to the validity of the trial:

First, because the court allowed plaintiff to testify that Ed Alston, the tenant, assigned plaintiff his share of the crop with directions to sell same and apply the proceeds in aid of his children's support, this on the ground that it admits the unsworn declarations of the tenant, but the objection is without merit and does not properly characterize the evidence. It does not give or purport to give merely the unsworn

declarations of the absent tenant, but is the testimony of the plaintiff as to how he acquired his title, the witness speaking on oath and on matter directly relevant to the issue.

Defendant excepts further for that the court, over his objection, allowed the introduction of the account book of Ed Alston, purporting to contain a statement of his dealings with defendant, in the handwriting of his daughter, Eula, and plaintiff was permitted to read to the jury certain entries in said book as follows:

"Loaned Ayscue (defendant) $200 in 1921.

"Paid in April, 1922."

And in our opinion this objection must be sustained.

There are conditions permitting the introduction of verified account books and copies of the same under specified and restricted conditions, appearing chiefly in C. S., secs. 1786-87-88, but we know of no principle that will uphold the competency of an unverified account as containing entries in the parties' own favor, assuredly not where it has not even been made to appear that such person is dead and cannot be had to give his sworn evidence of the transaction. *Peele v. Powell,* 156 N. C., 553-560; *Bland v. Warren, etc.,* 65 N. C., 372; 17 Cyc., 365-368.

We at first thought that the entry might be regarded as harmless because the same book showed that the amount had been repaid, but on further consideration of the record it appears that defendant claimed and was testifying to advancements to the amount of $223.76, chiefly in money, and these entries were capable of being used and no doubt were used as pregnant evidence on the part of plaintiff tending to show that these amounts paid to the tenant were not advancements as defendant contended, but were only in repayment of the loan as shown by the entries referred to. They were, therefore, undoubtedly material to the principal issue in the case, and their reception constitutes prejudicial error which entitles defendant to a

New trial.

B. R. FIELDS v. R. LEROY ROLLINS.

(Filed 10 October, 1923.)

Estates—Rule in Shelley's Case—Wills—Devise—Heirs—Children.

A devise to the testator's two sons for the term of their natural lives, and, at the death of either of them, to their heirs, if any, and if at their death they leave no heirs of their body, then the lands to go to their nearest relatives, respectively: *Held,* the use of the words "heirs or heirs of the body of the first takers," the two sons, is not to be taken in the sense of words of general inheritance under our canons of descent, but

are construed in the sense of children, to whom the estate was limited in remainder, and the rule in *Shelley's case* does not apply; and *Held*, further, the words "nearest relatives of my two sons" are construed as their next of kin, carrying the estate to a restricted class of heirs of the first taker, taking them without the rule in *Shelley's case*, and the two sons taking only a life estate, cannot make a valid conveyance of the fee-simple.

APPEAL by plaintiff from *Grady, J.*, at June Term, 1923, of GREENE.

Civil action. It appears from the record that plaintiff had contracted to sell and convey to defendant a piece of real estate devised to him under the will of his father, W. R. Fields, and make a good title thereto, for the sum of $5,000, and defendant, admitting the contract, declines to pay on the ground that under said will plaintiff only takes a life estate and that the title offered is not a good one. The court being of opinion that the plaintiff had only a life estate, it was adjudged that defendant go without day, etc. Plaintiff excepted and appealed.

Skinner & Whedbee for plaintiff.
Corey & Worthington for defendant.

HOKE, J. From the facts as stated in the case agreed, it appears that the piece of land in question is that devised to plaintiff under the will of his father, W. R. Fields, and the title offered is dependent on the proper construction of a clause of said will as follows: "To my sons, G. L. Fields and B. R. Fields, I loan for the term of their natural lives, respectively, a certain tract or parcel of land lying and being in Speight's Bridge Township, Greene County, North Carolina, and known as the Bennett Fields' Homestead, containing two hundred and ten (210) acres, more or less, and adjoining the lands of Z. S. Smith, M. L. Walston, Dr. A. West, I. F. Smith, Ida Burch, Etta Mewborn and S. G. Fields, the same to be equally divided in value between my said sons, G. L. Fields and B. R. Fields. I desire that my son, G. L. Fields, shall have the west side of the said tract, beginning at the James Beaman line, and running to the run of the Lightwood Knot Swamp, and that my said son, B. R. Fields, have the east side of the tract, the same being the old homestead. My desire is that the said lands are to be loaned to my said sons, G. L. Fields and B. R. Fields, respectively, for the term of their natural lives, and at the death of either of them, to go to their heirs, if any, and if at their death they leave no heirs of their body, then said land shall go to the nearest relatives of my said sons, respectively."

In 1st Coke Rep., 104, the rule in *Shelley's case* is given as follows: "That 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 words 'heirs' is a word of limitation of the estate and not a word of purchase," and in several of our recent decisions on the subject it is held that in order to a "proper application of the rule, the word 'heirs' or 'heirs of the body' must be taken in their technical sense, carrying the estate to the entire line of heirs, and at this time and in this jurisdiction to hold as inheritors under our canons of descent, and if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or first taker will be held to have acquired a life estate according to the express words of the instrument." *Hampton v. Griggs,* 184 N. C., 13; *Wallace v. Wallace,* 181 N. C., 158-161; *Pugh v. Allen,* 179 N. C., 307; *Puckett v. Morgan,* 158 N. C., 344; *May v. Lewis,* 132 N. C., 115. And in determining this question, the cases hold further that when there is a limitation over to a restricted class of heirs of the first taker, on his death without heirs or heirs of his body, this of itself will show that the words in the first instance were not used or intended as words of general inheritance under our canons of descent, but must be taken and construed to mean issue in the sense of children or grandchildren.

Applying the principles stated and as pertinent to our present inquiry, it was ruled in the case of *Wallace v. Wallace, supra,* as follows:

"In order to an application of the rule in *Shelley's case,* appreciation of the words 'heirs' or 'heirs of the body' must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument.

"The limitation to W. for life, and after his death to his heirs, if any, in fee simple, and on failure thereof to his next of kin, the word 'heirs' is not used in the sense of general inheritors of the estate, but in the sense of issue or children, and in such case W. takes an estate for life, and the rule in *Shelley's case* does not apply.

"In a limitation to one for life, with remainder to his bodily heirs, in any, and on failure thereof to his 'next of kin,' the use of the words 'bodily heirs' is to be taken in the sense of issue or children; and on the death of the life tenant without such issue or children, the takers, under the term 'next of kin,' are the nearest blood kin to the exclusion of relationship by marriage, and also of the principle of representation, unless controlling expressions in the instrument show a contrary intent."

The words "nearest relatives of my said sons respectively" are the equivalent of the words "next of kin" in the *Wallace case,* and carrying the estate as shown in that decision to a restricted class of heirs of the first taker, the rule in *Shelley's case* does not apply.

The sons, therefore, having only a life estate, plaintiff is not in a position to make a good title, as his Honor ruled, and his judgment that defendant go without day is

Affirmed.

B. C. WAY AND B. P. WAY v. CARTERET ICE, TRANSPORTATION AND STORAGE COMPANY AND MOREHEAD CITY SEA FOOD COMPANY.

(Filed 10 October, 1923.)

Evidence—Instructions—Appeal and Error.

This action presents the issue as to whether the plaintiffs were entitled to take cash for their stock in the defendant corporation absorbed by its co-defendant, under offer to sell by the one and acceptance by the other by respective resolutions of each, in evidence and undisputed, giving the plaintiffs this option, with further evidence that the plaintiffs had elected to take cash for their shares of stock so absorbed: *Held,* the plaintiffs' testimony that they had elected to take the cash was material and relevant to the issue, and properly admitted in evidence; and, their being no conflicting evidence as to their right to make this selection, an instruction to that effect was not erroneous.

CIVIL ACTION, tried before *Grady, J.,* and a jury, at January Term, 1923, of CARTERET. Appeal by defendants.

Charles L. Abernathy and C. R. Wheatley for plaintiffs.
Julius F. Duncan, for defendants.

CLARKSON, J. The action against the defendant, Carteret Ice, Transportation and Storage Company (hereafter called Ice Company), was before this Court at Fall Term, 1922. The Ice Company filed a demurrer, which was sustained by the court below, and the plaintiffs appealed to this Court. The Morehead City Sea Food Company (hereafter called Sea Food Company) also filed a demurrer in the court below, which was overruled and leave given it to answer over. The demurrer of the Ice Company in this Court was overruled and both companies given leave to answer over. *Way v. Sea Food Co.,* 184 N. C., 171. The law and facts are fully set forth in that opinion, in which *Walker, J.,* says: "It seems from the allegations of the complaint, admitted in law by the demurrer, that before this action was brought the

plaintiffs notified the defendants that they would elect to take cash for their 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 Co. v. Tobacco Works,* 117 N. C., 544, the facts of the two cases being substantially alike."

The Ice Company and the Sea Food Company both filed answers to the plaintiffs' complaint. The case came on for hearing, and the court below submitted the following issue to the jury:

"Did the plaintiffs or either of them elect to accept stock in the Carteret Ice, Transportation and Storage Company for their interest in the purchase price of the lands and property conveyed to said Carteret Ice, Transportation and Storage Company, under the contract referred to in the pleadings?" The jury answered "No."

The court charged the jury as follows:

"I construe that contract to mean that they were entitled to receive cash for their stock for their interest in this transaction, and that they should have been paid cash under their option unless they had elected to take stock, and I charge you they never notified them that they would take stock."

The defendants filed seven exceptions: The first was to allowing the witness, B. P. Way, to be asked and to answer:

"Q. I will ask you, Mr. Way, did you at any time authorize or consent for anybody to take stock in the Ice Company instead of cash, concerning this transaction, for your part or your brother's? Answer: 'No, sir, I did not accept the stock or authorize them to accept stock.'"

This exception goes to the heart of this action. The decision by *Walker, J., supra,* disposes of this exception and it cannot be sustained.

The complaint set forth fully all the allegations plaintiffs relied on as giving them a cause of action against the defendants. The defendants filed demurrers. In the court below the Sea Food Company's demurrer was overruled with leave to answer over and the Ice Company's demurrer was sustained, and plaintiffs appealed to this Court. This Court overruled the demurrer with leave to both to answer over. Defendants filed answers. The question asked the witness Way was to the material allegation as the basis of the cause of action which this Court said was a good cause of action.

The other exceptions are to the refusal of the court below to nonsuit; the issue submitted; the charge of the court; and refusal to set aside verdict and judgment of court. None of these exceptions can be sustained.

The Sea Food Company regularly, by its proper officials, passed the following resolution:

"Resolved that, whereas, after full and free discussion of the condition of the company, and the outlook for the future business interests of the company, it is deemed wise and for the best interests of the stockholders to dissolve the company, and in order to do so it must dispose of its holdings; therefore be it resolved that we offer to the Carteret Ice, Transportation and Storage Company all this company's holdings of real estate, on which is located the ice factory, cold storage, packing house, sidetracks and water front, with riparian rights of the same, free from all encumbrances and claims of all person or persons whomsoever. Possession to be given 1 December, 1919, for the sum of $40,000 cash. This option to be valid and binding until 1 November, 1919. The stockholders of the company hereby reserve the right to take stock in the consolidated company as their interest may appear from the records of this company."

The Ice Company regularly, by its proper officials, passed the following resolution:

"Resolved, that the proposition of the Morehead City Sea Food Company, to sell its real estate holdings as reported by the directors to this meeting, for the price of $40,000, *payment to be made in cash, or in lieu thereof to such stockholders of the Morehead City Sea Food Company as may elect to take stock of this company, at par,* be and the same is hereby accepted; and the directors of this company are hereby authorized and directed to carry out and complete the purchase and transfer of said properties." (Italics ours.) The sale was duly consummated.

The evidence of both B. C. Way and B. P. Way was to the effect that they elected to take cash instead of stock, and made demand for the cash. The defendants introduced three witnesses, men of high charac-

ter. From a careful perusal of their evidence it was not in conflict with the evidence of the Ways, and to some extent corroborative. The court below took this view. The contracts between the Sea Food Company and the Ice Company, as shown by the resolutions, were admitted by all.

The court below was warranted, from the law and evidence, in making the charge as set out in the record. From a careful review of the whole record, the court can find no error that would entitle defendants to a new trial.

No error.

O. F. DAVIS ET AL. v. COUNTY BOARD OF EDUCATION OF BEAUFORT COUNTY, BOARD OF COMMISSIONERS OF BEAUFORT COUNTY, SCHOOL COMMITTEE OF PUNGO DISTRICT, No. 1, W. A. RESPASS, W. J. HODGES AND N. W. PAUL.

(Filed 10 October, 1923.)

1. Constitutional Law — Municipal Corporations — Cities and Towns — Taxation.

Our Constitution, Art. VII, sec. 7, requiring the approval of the electors to a proposition of pledging its faith or loaning its credit by municipalities, applies to taxing school districts, and the validity of the tax or bonds requiring their sanction is determined by a majority of the registered voters.

2. Taxation—Statutes—Municipal Corporations—Cities and Towns—Absentee Voters—Irregularities—Discretionary Powers.

The absence of the registrar from the designated place of registration is an irregularity over which the electors have no control, and, such provisions being directory, it will not invalidate the result of the election when it appears that no elector was deprived of the right to register and vote, and each had full information of the place where he could register, and had been afforded reasonable opportunity to do so. A deviation in this respect is not encouraged by the court.

3. Same—Conditions Precedent—Mandatory Laws.

The amendment by Public Laws of 1919 of those of 1917, now C. S., sec. 5960, allowing electors within the voting district, without being present at the polls, to vote in the prescribed manner, is upon the condition precedent that with their ballots so to be cast, it shall be shown by a certificate of a physician or by affidavit that such persons were physically unable to attend, as it was intended as a matter of public policy, to prevent fraud in elections; and its compliance being within the power of such electors, the statute in this respect is mandatory; and where a sufficient number of them have so voted as to result in less than a majority of the registered voters for the special tax or bonded debt a school district proposes to issue, the certified result in favor of the proposition will be declared invalid.

4. Same.

C. S., sec. 5968, providing that election laws shall be liberally construed in favor of the elector's right to vote, has no application when he desires to avail himself of a special privilege and does not, of his own volition, comply with the conditions precedent prescribed by the statute, which gives him the right to do so. C. S., sec. 5960.

APPEAL by plaintiff from *Connor, J.*, at May Term, 1923, of BEAUFORT.

Civil action. On petition, duly filed as provided in Public Laws, Extra Session 1920, ch. 87, the board of county commissioners ordered an election to be held on 19 December, 1922, at the Upper Pungo Schoolhouse, in Pungo School District, No. 1, on the two questions, whether a special tax of not more than 30 cents on the $100 valuation of property should be levied annually to supplement the school fund, and whether bonds not exceeding $20,000 should be issued for the purpose of erecting, enlarging, altering and equipping school buildings and acquiring the necessary land and an annual tax levied sufficient to pay the bonds as they matured. W. A. Respass was registrar and W. J. Hodges and N. W. Paul were judges of election. At the close of the polls the election officers counted the votes and made returns to the board of county commissioners. The board judicially passed upon the returns and found as a fact that there were 137 registered voters in the election and that 72 votes were cast for special tax and 71 for the bond issue. Whereupon the board adjudged that the election was duly carried in favor of the tax and the bonds.

The purpose of the action is to have the election declared void and to restrain the bond issue and the levy of the special tax.

The following verdict was returned:

"1. Were the five persons named in the complaint registered on 9 December, 1922, after sunset, as alleged in the complaint? Answer: 'No.'

"2. Were the five persons named in the complaint registered at the store of W. A. Respass and registered after the registration books had been closed? Answer: 'No.'

"3. Were the seven absentee voters' ballots unlawfully cast in favor of the bond issue and the special school tax, as alleged in the complaint? Answer: 'No.'"

Judgment was rendered dismissing the action, from which the plaintiffs appealed.

J. D. Paul and Small, McLean & Rodman for plaintiffs.

Stephen C. Bragaw and Lindsay C. Warren for defendants.

ADAMS, J. "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." Const., Art. VII, sec. 7. Since this section applies to a taxing school district and since "a majority of the qualified voters" means a majority of the registered voters, the judicial declaration of the board of commissioners that the election was carried in favor of levying the special tax and issuing the bonds can be sustained only in case a majority of the registered voters cast their ballots in support of the propositions submitted; and as the plaintiffs have attacked the result of the election as determined by the commissioners, it is made necessary to ascertain from the record whether a majority of the registered voters supported the proposed measures. *Wood v. Oxford,* 97 N. C., 228; *Clark v. Statesville,* 139 N. C., 490; *Smith v. School Trustees,* 141 N. C., 150; *Williams v. Comrs.,* 176 N. C., 554; *Dickson v. Brewer,* 180 N. C., 403.

It is admitted that the number of registered voters was one hundred and thirty-seven. The returns show that seventy-two votes were cast for the special tax and seventy-one for the bond issue. But the plaintiffs contend that twelve votes, or seven at any rate, should be deducted from those counted as favorable to both propositions, and that if the deduction be made the election failed. This contention demands consideration of the questions involved in the second and third issues.

In regard to the matters embraced in the second issue, the plaintiffs' exceptions are without merit. His Honor fairly presented to the jury the question whether the names of the five persons referred to were registered after the books had been closed, and the controversy on this point was resolved against the plaintiffs. The mere fact that their names were registered as a matter of convenience a half mile from the polling place did not vitiate the registration if it was otherwise valid. The registrar was not required to be always at the designated place of registration and there is no pretension that his temporary absence deprived any qualified voter of his right to register. *DeBerry v. Nicholson,* 102 N. C., 465; *Younts v. Comrs.,* 151 N. C., 583. The objection that he left the polling place and permitted these five persons to register at his store is met by the decision in *Newsome v. Earnheart,* 86 N. C., 395, in which *Chief Justice Smith* said: "The third exception is to the irregular manner of registration in that, while the notice to the voters desiring to register directed them to the residence of the registrar, the books were kept and the registering actually conducted at his store some three hundred yards distant. This irregularity does not, in our opinion, vitiate the registration made and the election held in accordance with

it. It appears that word was left at the house for every elector, who might there apply to have his name registered, to be advised of the change of place; and while it does not appear, nor is it suggested that a single elector who applied failed to be registered, it is in proof that the registration was full and the books were kept open on the day of election to enable all who had not been before then to have their names entered. Every substantial object of the law has been attained and a deviation from the directions of the law, in the course pursued, while by no means to be encouraged in those charged with its execution, ought not to be allowed to avoid the election and neutralize its results."

In reference to the questions included in the third issue, the plaintiffs alleged that the registrar cast seven votes of absentees who were then in the district in support of the special tax and the bond issue when the voters had not complied with the provisions of the statute; that the pretended right to cast the ballots was the alleged physical inability of the voters to attend the election for the purpose of voting in person; that all spectators were excluded from the polling place just before the return envelopes used by the absent electors were opened in order that a secret session might be held, and that as to these votes the right of challenge was done away with. It is upon these grounds that the appellants impeach the sufficiency of the seven votes so cast and insist that they be declared illegal and deducted from the number adjudged to have been cast for the tax and the bonds.

The question whether these votes were legal is presented by exception to his Honor's refusal to instruct the jury to answer the third issue "Yes" upon the admitted facts and by exception to the following charge: "The only question is whether or not the failure of the election officials to require a certificate from a physician or an affidavit that the person so offering to vote was physically unable to attend the election renders their ballots unlawful. I instruct you that if you find the facts to be that each of these seven persons whose ballots they accepted were physically unable to attend in person and vote at the election, that each placed the ballots in an envelope and sealed them and sent the envelopes down to the registrar, and that the registrar opened the envelopes and took therefrom the ballots and submitted them to the judges of election, and that the judges of election accepted the ballots and placed them in the ballot box, then I instruct you that notwithstanding the fact there was no physician's certificate or affidavit, that these ballots were lawfully cast, and therefore you will answer the third issue 'No.' If, however, you find that these persons were not physically unable to be present on that day, then you will answer the issue 'Yes.' "

The statutes providing how absent electors may vote were passed by the General Assembly of 1917 primarily to enable those engaged in the

military service to cast their votes by mailing them to the proper officials, and in 1919 they were amended so as to include voters physically unable to attend the election and vote in person. P. L. 1917, ch. 23; P. L. 1919, ch. 322; *Jenkins v. Board of Elections,* 180 N. C., 169; *S. v. Jackson,* 183 N. C., 695. The following is the amended statute: "In all primaries and elections of every kind hereafter held in this State any elector who may be absent from the county in which he is entitled to vote, or physically unable to attend for the purpose of voting in person, which fact shall be made to appear by the certificate of a physician or by affidavit, shall be allowed to register and vote as hereinafter provided." C. S., sec. 5960. As shown by reference to the acts of 1917 and 1919 heretofore cited, this section is applicable to two classes of electors: (1) those who may be absent from the county in which they are entitled to vote, and (2) those who are in the county but are physically unable to attend the election and vote in person. The clause relating to the affidavit and the physician's certificate is limited to the latter class.

It is admitted that the seven impeached votes were cast in favor of both the proposed measures and that the absent voters resided in the school district, and did not show by affidavit or by the certificate of a physician that they were unable to attend the election in order to vote in person. So the question raised by the exceptions is whether the provision of section 5960 relating to the affidavit and certificate is mandatory or directory.

While no universal rule may be laid down for determining whether a statutory provision is imperative or directory beyond the fundamental rule that it depends on the scope and object of the enactment, it is generally held that if a statute in granting a new power prescribes how it shall be exercised it can lawfully be exercised in no other way. Likewise the requirement is usually regarded as imperative where compliance is made a condition precedent to the exercise of a special privilege. Indeed, a statute which affects the public interest or the claims *de jure* of third persons or promotes justice is construed with practical unanimity to be more than directory; for, wherever public policy favors the imperative meaning, the word "shall," according to the prevailing rules, will be construed as mandatory. 2 Lewis' Sutherland on Stat. Con. (2d Ed.), secs. 627, 629; Enlich on Interpretation of Statutes, sec. 431; *Johnston v. Pate,* 95 N. C., 68; *Jones v. Comrs.,* 137 N. C., 580; *Battle v. Rocky Mount,* 156 N. C., 329.

In several cases of contested elections in which these principles have been applied the distinction is drawn between the duties imposed by law upon the election officers and those imposed as conditions precedent upon the absent voter. The former are frequently regarded as direc-

tory; the latter are usually held to be mandatory. For example, in *Straughan v. Meyers,* 187 S. W. (Mo.), 1159, it appeared that the absent elector was required to present himself during voting hours and subscribe before one of the judges an affidavit relative to his residence and his qualifications as an elector together with the reasons of his absence, and that he had not voted and would not vote elsewhere. Construing the provision, *Revelle, J.,* said: "This being a special privilege conferred upon such person, and being available only under certain conditions, it seems to us that until these conditions are complied with the privilege cannot be exercised and that the voter has not performed his full duty until they have been met. Special privileges usually enjoin additional duties, and so it is with this act." There is a more comprehensive statement of the distinction in *Moyer v. Van de Vanter,* 29 L. R. A. (Wash.), 671: "There is good ground for recognizing a distinction between the obligations placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby. The individual voter may well be called upon to see that the requirements of the law applying to himself are complied with before casting his ballot; and if he should wilfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should in good faith comply with the law, upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of the law over which the voter had no control. It is also a question in which the public has a direct and important interest; for the loss of such vote may have controlling effect upon a public matter. The constitutional provision aforesaid guarantees the right to vote, and this, of necessity, carries with it the right to have the vote counted. Of course, the manner of voting and canvassing votes must be subject to all reasonable legislative requirements. Many cases have been cited by counsel as supporting the positions taken by them, respectively, and many of these involve a consideration of various phases of the law commonly known as the 'Australian Ballot Law,' in force here, but which is a comparatively new thing in this country. These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter and those imposed upon election officers. There is a disposition to hold

the former valid and mandatory; but, where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been in fact an honest expression of the popular will, there is a well-defined tendency to sustain the same, though there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them. Language may have been employed in some of the cases in conflict with this position; but, when such cases are examined, with reference to the specific facts decided, it will appear that this distinction has been adhered to, and it may truly be said to be the one great underlying principle of all the cases."

Our own decisions are of like import. The mere irregularity of an election officer who has neither rejected a qualified voter nor admitted one who was disqualified, is ordinarily overlooked as the failure to comply with a directory provision; but it is otherwise if the irregularity is caused by the agency of a party who seeks to obtain a benefit for himself. *DeBerry v. Nicholson, supra.* Instances of the disregard by an election officer of directory provisions which ordinarily will not deprive the elector of his right to vote are an improper method of administering an oath or failure to administer it, providing ballots slightly beyond the required size, certifying the count made not by but in the presence of the officers of election, and other irregularities not affecting the result of a fair expression of the popular will. *Newsome v. Earnheart, supra; DeBerry v. Nicholson, supra; Roberts v. Calvert,* 98 N. C., 581; *Hampton v. Waldrop,* 104 N. C., 453; *Quinn v. Lattimore,* 120 N. C., 426; *Hendersonville v. Jordan,* 150 N. C., 35; *Gibson v. Comrs.,* 163 N. C., 511; *Hill v. Skinner,* 169 N. C., 409.

But when the voter fails to perform the duties required of him as precedent to his right to vote, he generally does so at his peril. This doctrine has repeatedly been approved by the Court and seems now to be well established in this jurisdiction. "If the elector purposely refrains from qualifying himself by registration for the enjoyment of the privilege of voting, it is his own fault; and if he is prevented by physical disability from having his name entered on the registration books before the time prescribed by law, it is his misfortune. . . . It must appear that the voter did or offered to do all that the law required at his hands." *Harris v. Scarboro,* 110 N. C., 239. "A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise quality of the paper, or the particular character of type or heading used, where the law has provisions to that effect; but if the elector wilfully neglects to comply with requirements over which he has control, such as seeing that his ballot when delivered is not so marked that it may be identified, the ballot

should be rejected. *Kerr v. Rhodes (Kirk v. Rhoads)*, 46 Cal., 398," quoted with approval in *Wright v. Spires*, 152 N. C., 6.

It is needless to pursue the investigation. From these and other authorities we deduce the conclusion that the statutory provision that the physical inability of the voter to attend the election for the purpose of voting in person shall be made to appear by the certificate of a physician or by affidavit is mandatory, and that without at least a substantial compliance with the requirement the voter who is in the county cannot exercise the right which the statute is intended to confer. True, section 5968 provides that the election laws shall be liberally construed in favor of the elector's right to vote, and as we have said, they are liberally construed as to the duties of the election officers; but a different situation arises when the voter ignores the conditions on which his right to vote as an absentee is based.

We have given reflection to the argument that the judges of election acted upon personal knowledge of the illness of the seven absent voters; but we cannot approve the suggestion that such knowledge should be allowed to abrogate the imperative demand of the statute. The registrar and judges of election, when acting in their official capacity, are authorized to determine whether in matters of this kind the voter has complied with the law, but they are not clothed with power to nullify its plain mandate. If the doctrine insisted on were approved it would be necessary in all similar cases to refer to a jury the pertinent questions whether the absent voters were physically unable to attend the election and whether the judges of election had knowledge of their physical condition at the time the ballots were cast. This, of course, was not in the contemplation of the Legislature when the several statutes were enacted, and, as remarked by *Avery, J.*, in *Boyer v. Teague*, 106 N. C., 571, it would be obviously unwise to permit it after it is once ascertained what effect the votes would have upon the result of the election.

Upon careful examination of the record we conclude that the registration of the five voters at the registrar's store under the circumstances disclosed was an irregularity which did not vitiate the registration, and that the failure of the seven absent electors, who were in the county, to comply with the requirement of section 5960 was fatal to their right to vote. As the votes of the absentees were illegal, and without them a majority of the registered voters did not support the proposed measures, or either of them, we hold that there was error in the verdict and in the judgment dismissing the action. This conclusion is supported by the policy of the General Assembly as manifested in the recent amendment of the law relative to absent electors. P. L. 1923, ch. 111, sec. 5.

Error.

A. B. JOHNSON v. J. M. JONES AND C. L. GUY, TRUSTEE.

(Filed 10 October, 1923.)

Injunction—Issues—Material Facts—Questions for Jury.

An order to restrain the sale under a purchase-price mortgage of a lot of land for industrial purposes, upon proper affidavits tending to show that a railroad siding thereon was a part of the consideration and that the plaintiff was damaged by the acts of the defendant in depriving the plaintiff of this benefit, should be continued to the hearing to determine the amount actually due the defendant mortgagee.

APPEAL by defendants from a judgment of *Horton, J.*, continuing a restraining order to the final hearing.

On 17 May, 1919, the plaintiff purchased from the defendant Jones certain lots, situated in the town of Godwin, known as the gin and sawmill property. The Atlantic Coast Line Railroad had constructed a side-track on the lots, and it was agreed between the parties that the "siding" should constitute a part of the consideration for the trade. The plaintiff executed a deed of trust to C. L. Guy, trustee, to secure the purchase money, and the trustee advertised the property for sale.

H. L. Godwin for plaintiff.
Young, Best & Young for defendants.

ADAMS, J. The action was brought to enjoin the trustee from selling the property under the deed of trust, on the ground that the defendant Jones had refused to comply with the contract by preventing the use of the side-track, and had thereby caused the plaintiff to suffer loss. The verified complaint contains allegations to this effect, and is supported by the plaintiff's affidavit and other evidence. The answer of the defendants, and the affidavits filed in their behalf, deny the plaintiff's allegations and thereby raise issues of fact. Under these circumstances, his Honor made no error in continuing the injunction until the rights of the parties could be determined and the amount actually due could be ascertained. *Harrington v. Rawls,* 131 N. C., 39; *Smith v. Parker, ib.,* 470; *Jones v. Buxton,* 121 N. C., 285; *Harrison v. Bray,* 92 N. C., 489; *Pritchard v. Sanderson,* 84 N. C., 300; *Purnell v. Vaughan,* 77 N. C., 268.

The finding that the defendant is solvent does not affect this conclusion. It would be an obvious hardship on the plaintiff to require him to incur the risk of an assignment of the notes or to make payment of their face value and then bring suit to recover damages for the defendant's breach of contract, when the whole controversy can be

settled in the pending action. The policy of the law is to prevent a multiplicity of suits and needless litigation.

It is further argued that the receiver of the Bank of Coats is the owner and holder in due course of one of the notes executed by the plaintiff, and that the land was advertised for sale at his request; but in view of the allegations in the pleadings and affidavits, we regard it unnecessary to consider this question, especially as the receiver is not a party to the action and the issue between him and the plaintiff is not properly raised.

The judgment is

Affirmed.

J. B. HARVEY v. W. H. HUGHES.

(Filed 10 October, 1923.)

Evidence—Questions for Jury.

In this action to recover upon a note given for balance of a stock of goods: *Held*, upon establishing the defense of fraud, the question was for the jury, and the judgment below adjusting the relative claims of the parties, as to the cash payment and the evidently increased value of the merchandise from date of purchase, was a proper one.

APPEAL by plaintiff from *Calvert, J.*, at chambers in Kinston, 19 June, 1923. From CRAVEN.

Civil action, arising out of contract. Defense interposed upon the ground of a breach of warranty in connection with the value of the stock sold by plaintiff to defendant, and for which the note in suit was given.

The jury returned the following verdict:

"1. What is the amount of the note sued on? Answer: '$5,800 and interest from 21 May, 1920.'

"2. Did the plaintiff represent and warrant to the defendant that the $6,800 in stock sold the defendant was worth par at the time of the sale to the defendant? Answer: 'Yes.'

"3. If so, what was the actual value of the stock at the time of the sale? Answer: 'Nothing.'

"4. What damage is defendant entitled to recover of the plaintiffs for breach of said warranty? Answer: 'Return note of $5,800.'

"5. What damage, if any, is defendant entitled to recover of the plaintiff by way of counterclaim? Answer: 'None.'"

Judgment for defendant and a further order that the defendant surrender the stock in question to the plaintiff upon the payment by him of $1,000, this being the amount received by plaintiff over and above the note given at the time of sale of said stock. Plaintiff appealed.

Moore & Dunn for plaintiff.
Ward & Ward for defendant.

STACY, J. In March, 1920, plaintiff sold to the defendant 68 shares of the capital stock of the Craven Tobacco Company at and for the price of $100 per share. Defendant paid $1,000 in cash and executed his note to the plaintiff for $5,800, representing the balance due on the purchase price of said stock. This suit is to recover on the note. Defendant denies liability on the ground of an alleged breach of warranty in connection with the value of said stock; and he seeks to recover, by way of counterclaim, the $1,000 paid at the time of sale. The fifth issue is addressed to the counterclaim.

The controversy on trial narrowed itself principally to questions of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the law bearing on the subject, and we have found no sufficient reason, upon the exceptions presented, for disturbing the verdict.

The value of the stock at the time of trial evidently was greater than it was at the time of sale, or else a different verdict would have been rendered. But however this may be, his Honor has given the plaintiff an opportunity to redeem the stock by returning the cash payment of $1,000. Otherwise, under the verdict and judgment, the plaintiff is entitled to keep the cash payment, and the defendant is entitled to retain the stock. This, as we understand it, is the correct interpretation of the verdict and judgment.

The record presents no reversible error, and hence the judgment below must be upheld.

No error.

W. R. SORRELL ET AL. v. T. V. STEWART.

(Filed 10 October, 1923.)

Evidence—Nonsuit—Title to Lands—Inheritance.

Upon defendant's motion to nonsuit, the evidence will be construed in the light most favorable to the plaintiff, and where the defendant is in possession of the lands in controversy and plaintiff has shown title thereto by possession and by inheritance, through successive ancestors, for a long period of time, the defendant's motion as of nonsuit is properly denied.

APPEAL by defendant from *Horton, J.,* at February Term, 1923, of HARNETT.

Civil action in ejectment, tried upon the following issues:

"1. Are the plaintiffs the owners of the lands described in the complaint? A. 'Yes.'

"2. Did the defendant trespass upon said lands by cutting timber therefrom? A. 'Yes.'

"3. What damage, if any, are the plaintiffs entitled to recover of the defendant therefor? Answer: '$200.' "

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

Clifford & Townsend for plaintiffs.

Godwin & Williams, L. L. Levinson and Charles Ross for defendant.

STACY, J. The defendant's main exception, as stressed on the argument and in his brief, is the one directed to the refusal of the court to grant his motion for judgment as of nonsuit, made first at the close of plaintiffs' evidence, and renewed at the close of all the evidence.

Viewing the evidence in its most favorable light for the plaintiffs, 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:

Plaintiffs offered a grant from the State, issued in 1785 to John Atkins. There was some evidence tending to show that this grant covered the *locus in quo*. Lovett Ryals, grandfather of the plaintiffs, bought the land and was in possession of it for many years prior to his death in 1856. After his death, the land was divided and Eliza Ryals, daughter of Lovett Ryals, came into possession of the portion now in dispute, which she held until her death, eighteen or twenty years ago. Nancy J. Sorrell and John L. Ryals, the only other children of Lovett Ryals, inherited the property from their sister, Eliza Ryals, and Nancy J. Sorrell, mother of the plaintiffs, took possession of the portion involved in this controversy. Nancy J. Sorrell died in 1916, leaving a last will and testament in which she devised the property to her children, plaintiffs herein. Defendant is now in possession, claiming the property as his own.

This evidence, we think, was sufficient to carry the case to the jury. Hence the defendant's motion for judgment as of nonsuit was properly overruled.

The remaining exceptions are untenable. They are directed to portions of the charge, but we have found no valid reason for disturbing the verdict and judgment entered below.

No error.

J. S. HOWELL ET AL. v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 October, 1923.)

1. Carriers — Railroads—Acceptance of Freight—Fires—Presumptions—Damages.

Where the carrier accepts goods offered to it for immediate shipment, it is presumed that its acceptance was that of a common carrier, and not as a warehouseman; and where the carrier has so negligently delayed the shipment that it was destroyed in the burning of its warehouse, it is responsible to the consignor in damages.

2. Same—Evidence—Interstate Commerce Commission—Burden of Proof.

Where the evidence is conflicting as to whether the delay was caused by the shipper's instruction for prepayment upon the carrier's later calling at his place of business, according to local custom, and collecting freight, this does not affect the carrier's liability upon the facts of this case, nor does the regulation of the Interstate Commerce Commission requiring prepayment when the shipment is so forwarded, it being incumbent upon the carrier to refuse the consignment or forward the same, charges collect, with the burden on it to establish this defense.

APPEAL by defendant from *Cranmer, J.*, at February Term, 1923, of FRANKLIN.

The plaintiffs delivered to the defendant at Louisburg, N. C., 5 January, 1922, a package of harness packed, addressed and in all respects ready for shipment. The bill of lading was immediately filled in, signed by the shipper and the agent of the carrier company. The agent of the carrier called the shipper over the telephone and asked if the harness was to be prepaid. He was told yes. The testimony of the witness for the plaintiff is that the defendant's agent said that he would call and get the money at plaintiff's office and that this was their customary way of dealing. A witness for the defendant testified that the shipper replied that he would call at the office of the defendant and pay the freight. The inquiry was for the purpose of ascertaining whether the goods were to be shipped prepaid or collect.

On 14 January the warehouse of the defendant company at Louisburg was destroyed by fire, including this shipment. The issues submitted to the jury were: "Is the defendant indebted to the plaintiff? If so, how much"; to which they responded, "Yes; $320.88." The freight was never paid and the evidence is that the bill of lading made out the day the shipment was brought to the station was put in a pigeon-hole in the desk but was not delivered until after the fire.

At the conclusion of the evidence the defendant moved for a judgment of nonsuit which was overruled, and defendant excepted. Judgment upon the verdict in favor of the plaintiff. Appeal by defendant.

W. H. Yarborough and S. A. Newell for plaintiff.
Ben T. Holden and Murray Allen for defendant.

CLARK, C. J. The motion for nonsuit was met by this charge of the court which, as it relates to the controversy in this case, was as follows: "I instruct you, gentlemen of the jury, that the delivery of the bill of lading is not necessary to make the carrier liable for goods sent to it for shipment. The delivery of goods to a common carrier raises the presumption that it received them as a common carrier, and the burden is upon the company to show that it received them only as a warehouseman and that the shipper either assented to that arrangement as, for instance, by request to hold the goods or was notified by the company that it held them for further orders." There was no contest as to the value of the shipment.

In *Berry v. R. R.*, 122 N. C., 1002, which was almost identical with this case, the court charged the jury that where the shipper wrote the freight agent as follows: "Will you be kind enough to have these three pieces marked according to the address already tacked on, and forward as soon as possible to Newport, R. I.? Will you mark them prepaid? I will be at the depot tomorrow and get the bill of lading and pay the freight." It was held that such letter was a direction for immediate shipment, and did not make the marking of the pieces as prepaid a condition precedent to the shipment. The delivery of a bill of lading is not necessary to make a carrier liable for such goods as are sent to it for shipment. When goods are delivered to a carrier for shipment, the presumption is that they are received for shipment and not for storage, and the burden is upon the company to show that it received the goods as a warehouseman and not as a carrier. This case quotes *Wells v. R. R.*, 51 N. C., 47, that delivery of a bill of lading is not necessary to fix liability upon the defendant. In the *Wells case* the Court said: "If the article is put on the company's platform at the depot with the knowledge of the agent, that amounts to an acceptance, and it is not necessary that it should be entered on the way-bill or freight bill or any written memorandum made in order to make the company liable for it to the same extent as if it is actually put on the freight train."

Both this case and *Berry's case,* cited above, have been cited and approved in a number of cases, including *Smith v. R. R.*, 163 N. C., 145; *McConnell v. R. R.*, 163 N. C., 507; *Lyon v. R. R.*, 165 N. C., 147; *Davis v. R. R.*, 172 N. C., 209; *Aman v. R. R.*, 179 N. C., 313, and others.

In *Berry v. R. R., supra,* after quoting the letter, the Court said: "This order was a direction for the immediate and earliest shipment of the goods. The request to mark them prepaid was not a condition prece-

dent to the shipment but a collateral request that as a favor to her they be so marked, as she would pay the agent the next day."

"No formal acceptance is necessary where the agent has knowledge of the delivery of the goods with the intention that they be shipped, and makes no objection thereto." 6 Cyc., 413. The defendant offered no evidence that it received the goods as warehouseman rather than as carrier. Having received the goods, the burden was on the defendant to show that it did not receive them as a common carrier. Joyner, agent of the defendant company, admitted on cross-examination that it was the custom of the defendant to carry a charge account for freight with the plaintiff. The evidence is much stronger than in *Davis v. R. R.*, 172 N. C., 209, a very similar case, in which the plaintiff recovered and the Court found no error.

The appellant in his brief complains for the first time of omissions in the charge of the court. There was no request for instructions and no exception whatever taken by the defendant that the court did not fully present its contentions. Only exceptions taken at the trial or assigned in the case on appeal will be considered by this Court. *Rawls v. R. R.*, 172 N. C., 211; *Worley v. Logging Co.*, 157 N. C., 499.

It is true that under the regulations of the Interstate Commerce Commission freight rates were required to be collected on a prepaid consignment before the shipment was forwarded, but the railroad agent accepted this shipment to be forwarded, and before the freight was actually paid over to him the goods burned. Though the fire occurred before the goods left the station, they were by virtue of this agreement in possession of the goods as a carrier and not as a warehouseman.

Under the regulations of the Interstate Commerce Commission, the goods should not be forwarded marked prepaid until the freight had been actually received by the company. None the less, by the actual receipt of the goods for shipment, they were in possession of the defendant as a common carrier.

Goods could be accepted for shipment either prepaid or collect. If the goods had been marked "prepaid" when shipped, when in fact they were not, this would have been in violation of the regulations of the Interstate Commerce Commission. They were not shipped so marked nor was there notice that they were held for prepayment of freight.

Though the shipper stated, when asked by defendant's agent, that he wished them shipped prepaid, there is no evidence that they were held for lack of prepayment. They were in the hands of the defendant for shipment—that is, as a common carrier and not as a warehouseman, and it is responsible for the loss by its failure to ship. If it had demanded prepayment and this had not been made, then they would have been in the hands of the defendant simply as a warehouseman. On

the contrary, it accepted the goods absolutely for shipment, and there is testimony that its agent stated that he would call for the freight charges according to its custom with the plaintiff, who testified that he thought the goods had been shipped and that he stood ready to pay the defendant's agent whenever he should call, according to his promise.

The jury found that the delay in shipment was the neglect of the common carrier.

No error.

A. D. BYRD v. GEORGIA HICKS ET AL.

(Filed 10 October, 1923.)

1. Parties—New Parties—Failure to Answer—Verdict—Judgments.

Where a new party has been suggested to make a complete and final conclusion of the matters at issue, and the party has been duly served with summons and fails to plead or appear in his own interests, it becomes immaterial as to whether the verdict rendered is sufficient to disprove his rights.

2. Instructions—Conflicting—Appeal and Error—New Trials.

An instruction upon the evidence that is conflicting upon material points is *held* to be reversible error.

3. Same.

The mortgagee resisting the foreclosure of the mortgage, pleaded and introduced evidence to show that the mortgagor had agreed to cancel several notes thereby secured upon being repossessed and seized of the lands; and there was further evidence that a new party, made to the proceedings, had been duly served with summons and had failed to plead or appear at the trial: *Held*, an instruction to find for defendant upon his reconveying the lands, and an instruction requiring him upon appropriate findings of the jury to pay off the note he had acquired from the plaintiff, are conflicting upon a material matter, upon which a new trial will be ordered on appeal.

APPEAL by plaintiff from *Calvert, J.*, at March Term, 1923, of DUPLIN.

Civil action tried upon the following issues:

"1. Was there an agreement between the plaintiff, A. D. Byrd, and the defendant, Miss Georgie Hicks, under which said defendant would resume the ownership of the land described in the deed of trust to I. R. Williams in full satisfaction and discharge of the plaintiff's indebtedness to said Miss Hicks secured by said deed of trust? Answer: 'Yes.'

"2. If so, is the defendant S. T. Hooker the owner of a one-half interest in the note referred to in the pleadings, and was he, prior to 28 October, 1921, and if so, how much is due said Hooker thereon? Answer: 'Yes, $1,032.84, with interest from 18 December, 1920.'

"3. In what amount is the plaintiff indebted to Miss Georgie Hicks? Answer: '.....'

"4. What amount is in the hands of the receiver? Answer: '$263.99.'"

Judgment against the plaintiff that he reconvey the lands in question to Miss Hicks in discharge of the notes held by her, and that S. T. Hooker be allowed to recover of plaintiff the value of the note held by him.

Plaintiff appealed, assigning errors.

H. D. Williams and R. D. Johnson for plaintiff.

Robinson & Robinson and Stevens, Beasley & Stevens for defendant.

STACY, J. This case was before us at the Fall Term, 1922, and is reported in 184 N. C., 628, where the facts are stated in the opinion and need not be repeated here. We suggested then that S. T. Hooker ought to be brought in and made a party, to the end that all the rights and interests involved in this controversy might be fully determined in one proceeding. Summons was duly issued and served on the said S. T. Hooker, but he has filed no pleading herein and he has not appealed from the verdict and judgment rendered. It is unnecessary, therefore, for us to consider, as was urged on the argument, whether the verdict as rendered is sufficient to dispose of his rights. He seems to be content. But after a very careful and critical examination of the record, we are persuaded that a new trial must be granted for error in the charge, which, we think, is prejudicial to the plaintiff. On the first issue his Honor instructed the jury as follows:

"If you find from the evidence, and by the greater weight of it, that there was an agreement between the plaintiff, Byrd, and the defendant, Miss Hicks, under which said defendant would resume the ownership of the lands described in the deed of trust, in full satisfaction and discharge of said indebtedness secured by said deed of trust, you should answer the issue 'Yes.' Unless you are so satisfied, you should answer it 'No.'"

Here it will be observed the "indebtedness secured by said deed of trust" covered all the notes, including those—six in number—held by Miss Hicks and the one held by S. T. Hooker. According to plaintiff's allegation, it was the understanding that all the notes were to be discharged upon a reconveyance of the lands, and this included the note held by Hooker, as well as those held by Miss Hicks. But, on the verdict, plaintiff is required to surrender the several tracts of land and deed them back to Miss Hicks, and also to pay the balance due on the note held by S. T. Hooker. The second issue was answered in accordance with the court's direction, to which the plaintiff excepted. This

instruction appears to be in direct conflict with the previous charge on the first issue; and it is well settled that a new trial must be awarded where there are conflicting instructions in the charge with respect to a material matter. *S. v. Falkner,* 182 N. C., p. 799, and cases there cited.

True, the first issue, in terms, purports to deal only with the "plaintiff's indebtedness to Miss Hicks," but the note now held by Hooker was originally a part of this indebtedness—evidently so understood by the jury—and it is the accepted position with us, under our liberal system of procedure, that a verdict should be interpreted and allowed significance by proper reference to the pleadings, the evidence, and the charge of the court. *Holmes v. R. R.,* 186 N. C., p. 61. Tested by this rule, we think the first and second issues are in conflict.

Venire de novo.

LERCH BROS., INC., v. D. F. McKINNE AND MALCOLM McKINNE, TRADING AS McKINNE BROS. COMPANY.

(Filed 10 October, 1923.)

Pleadings—Clerks of Court—Time to Plead—Statutes—Judgments.

Under the present practice of having the summons returnable before the clerk and the issues made up by the pleadings before him, the object of the statute is to expedite the proceedings and give information of the cause by serving a copy of the complaint with the summons, and to require an answer filed by the defendant within twenty days from the time of its receipt or its filing in the clerk's office, extending the time accordingly when in the exercise of his discretion the clerk has extended further time to the plaintiff to file his complaint; and upon the failure of the defendant to file his answer accordingly, a judgment by default is properly rendered against him.

APPEAL from *Cranmer, J.,* at May Term, 1923, of FRANKLIN.

On 28 December, 1922, the plaintiffs caused a summons to be issued commanding the defendants "to appear before the clerk of the Superior Court for the county of Franklin, at his office in Louisburg, on the 8th day of January, 1923, and within twenty days thereafter to answer the complaint," etc. The sheriff served the summons, with a copy of the complaint, on 28 December, 1922. The complaint was duly filed, and on 27 January, 1923, the defendants answered. On 5 February, 1923, it being the first Monday, the plaintiffs moved for judgment by default, and the clerk denied the motion on the ground that the answer had been filed in apt time and the cause had been transferred to the civil docket for trial by jury. The plaintiffs appealed, and *Judge Cranmer* reversed the ruling of the clerk and rendered judgment for the plaintiffs, and from his judgment the defendants appealed to the Supreme Court.

T. T. Hicks & Son for plaintiffs.
S. A. Newell and W. H. Yarborough for defendants.

ADAMS, J. The summons and the complaint were regularly served upon the defendants on 28 December, 1922; the summons was returnable on 8 January, 1923; and within twenty days thereafter the answer was filed. The question is whether it should have been filed within twenty days after service of the complaint.

The amended statutes relating to process and pleadings provide that the summons in a civil action in the Superior Court shall be made returnable before the clerk at a date named therein, not less than ten days nor more than twenty days from the issuance of the writ, and shall be served by delivering a copy thereof to each of the defendants; that the complaint shall be filed on or before the return day of the summons, unless the clerk for good cause extends the time; and that the answer shall be filed within twenty days after the return day or after service of the complaint upon each of the defendants.

These statutes were evidently intended to provide for more than one situation. If the complaint is not served as indicated, and the time for filing it is not extended, the defendant shall have twenty days after the return day in which to file his answer; and if it is extended for good cause, he shall have twenty days after the final day fixed for such extension in which to answer. On the other hand, if the complaint is served as provided in the statute, the defendant shall have twenty days after such service in which to answer, and in such event the clerk has no authority to extend the time for filing an answer beyond twenty days after service of the complaint. This provision is a material part of the statute, "in which latter case (service of the complaint) the clerk shall not extend the time for filing answer beyond twenty days after such service." P. L. Ex., Ses. 1921, ch. 92, sec. 1, subsecs. 1, 2, 3, 4, 11.

The object of the statutes is to give the defendant for filing his answer a period of twenty days after he is informed of the complaint, whether by service or, in the absence thereof, by filing in the clerk's office, on or before the return day, and thereby to prevent needless delay in bringing the controversy to an issue between the parties.

If the clerk had no authority to extend the time by an order, he evidently had none to extend it by a direction in the summons to answer within twenty days after the return day.

The judgment of his Honor is

Affirmed.

O. T. BELSHE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 17 October, 1923.)

1. Railroads—Carriers—Negligence—Safe Place to Work—Rule of Company.

It is required of railroad companies to provide reasonably safe conditions under which the employees on their freight or inferior trains are required to do their dangerous work; and should a rule of the company be in conflict with this rule of law, the former is to that extent ineffectual.

2. Same.

In this action by an employee to recover damages against a railroad company for negligently injuring him while serving as a lookout on the caboose car of a backing train, at night, in a town, by running into a car left unguarded on the main-line track, and without signals, there was evidence tending to show that the train on which the plaintiff was employed was regarded as an "inferior" train, and a rule of the defendant was introduced in evidence to the effect that the usual method of lights and signals were not required to give warning, under the circumstances, to trains of this character: *Held*, the question of defendant's actionable negligence in failing to exercise reasonable care to provide its employee a proper place, or reasonably safe conditions under which to do his work, was properly a question for the jury to determine.

3. Railroads — Carriers — Rules of Company — Custom — Abrogation of Rules.

A rule of a railroad company in regard to not displaying lights upon a freight car left at night on the main-line track of a station, under certain conditions, may become abrogated by a long-continued custom to display red lights under these conditions.

4. Evidence—Character—Expert Witnesses—Skill.

Where a physician, a witness for plaintiff on the trial in a personal-injury case, has been attacked, on cross-examination of the defendant, as to his truthfulness and skill, it is competent for the plaintiff to prove his general character and his ability as a physician and surgeon by other medical expert witnesses.

5. Instructions—Damages—Negligence—Appeal and Error—Harmless Error.

In an action against a railroad company to recover damages for a personal injury, a charge otherwise unexceptionable will not be held for reversible error, to the defendant's prejudice, for the use of the words, upon the measure of damages, allowing a recovery, "for the reasonable present value of the diminished earning capacity forever," it being the apparent endeavor of the judge, taken in connection with other portions of the charge, to impress upon the jury that plaintiff could not recover for the entire difference caused by the injury, but only the present value of such difference so caused, it appearing from the charge, considered as a whole, that any juror of average intelligence must have understood the application of the proper instructions, and that recovery was not permitted for all time to come, or that the injury was permanent, or otherwise.

BELSHE *v.* R. R.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1923, of NASH.

Civil action. The action is to recover damages for physical injuries caused by alleged negligence of defendant company to plaintiff, on 26 October, 1921, while he was employed as brakeman, engaged in taking a train from Norlina, N. C., to Petersburg, Va.

There were facts in evidence on part of plaintiff tending to show that on the night of 25 or 26 October, 1921, plaintiff, an employee of defendant as brakeman, was sent with a train from Norlina, N. C., to Petersburg, Va., for the purpose of bringing back a full train of cars from Petersburg. The others of the crew, with plaintiff, at the time, being the engineer, J. J. Horton; a fireman, Holt; and C. M. Barkley, the conductor. That at Alberta, a point south of Petersburg, by orders of the conductor, the engine and tanks were turned around on a "Y," so as to leave the engine headed south for the return trip, there being no facilities of this kind at Petersburg, and from Alberta to Petersburg the engine was at the rear, pushing the caboose before it towards Petersburg. That as plaintiff's train went into the yard at Petersburg on the main track, plaintiff being in the front door of the caboose, with a white lantern, as directed, looking out for obstructions on the track, and the conductor in the cupola of the caboose, having an arrangement by which he could apply the brakes on call, plaintiff's train ran into a heavy gondola car, loaded with gravel, standing on the main line, without lights or signals of any kind. The caboose in which plaintiff was placed was torn up, and plaintiff received painful and permanent injuries, from which he still suffers. That plaintiff's train, on entering the yard, was moving at the rate of four or five miles an hour, and that it was the custom of the railroad whenever a car was left standing on the main line to have red lights on the rear, or to place torpedoes, and that there were neither for that train at the time of the collision. Speaking more directly to the occurrence and the conditions presented, plaintiff testified in part as follows:

"In entering the yard at Petersburg the track was rather crooked at that point, and on that was the cars. My train was being operated on the main line of the Seaboard Air Line. The effect that had upon our view of the main line was that it darkened the location of the cars that were there. On entering the yard I was in the cupola until I came to the yard board. I was in the door, with a lantern in my hand, and one on either side of the door. I was there to keep a lookout for obstructions on the track. While I was keeping this lookout we got to that A. C. L. crossing, and there is an overhead bridge, and I looked at the scale track, and when I come to the scale track it was mighty dark. I

could not swear what it was, but I saw something big in front of me; it appeared to be a gondola car, loaded with gravel, standing on the main line, and there was no lights or any person near; there was no signal of any kind. When I observed that there was a gondola car, loaded with gravel, without lights, I hollered for the conductor to pull air. The conductor had his hand on the valve, and you pull air and that sets the brakes. As quick as I looked I said, 'Pull air, Si'—he was the conductor, and that is what I called him. The caboose was torn up and made kindling-wood of it, and it balled me around in there for a while. I had no notice of the existence of that car—the gondola car on the main line at Petersburg—until I saw it there that night. When the collision occurred I was rolled up in the splinters, and I got up in the air 15 feet, and when it stopped rolling I fell from the top of that pile of mess, 12 or 15 feet, and it was an awful fall."

There was further evidence as to the extent and nature of the injuries received at the time.

On the part of defendant it was contended that there was no breach of duty shown, and certain rules of the company were introduced tending to show that the train standing on the yard at the time was not required to provide for the usual protection as against an inferior train, such as that on which plaintiff was working. And it was claimed that plaintiff, and those who were with him at the time of the occurrence, were guilty of contributory negligence in various particulars as to the positions they occupied and as to the manner in which they entered the yard, and that plaintiff had assumed the risks of conditions presented. There was further evidence tending to show that the injuries received by plaintiff were not at all of the seriousness claimed by him, but that they were comparatively trivial, and that he had long since entirely recovered. On issues submitted, the jury rendered the following verdict:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

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

"4. What damages, if any, is plaintiff entitled to recover? Answer: '$10,000.' "

Judgment for plaintiff, and defendant excepted and appealed.

R. L. McMillan, R. N. Simms, and Douglass & Douglass for plaintiff.
Murray Allen for defendant.

HOKE, J. The jury having accepted plaintiff's version of the occurrence, there is ample evidence to support the verdict, and we find no valid reason for disturbing the results of the trial.

Defendant's motion for nonsuit, on the ground that no rule of the company required the train on the yard at the time to put out or establish protection as against an inferior train, and, therefore, no breach of duty is shown, was properly overruled. True, the rule chiefly relied upon for this position, as we understand it, No. 658½ D, seems to relieve defendant's train on the yard at the time from putting out the full and specific protection required by new rule 99, but there is doubt if this is capable of the construction that the train referred to is relieved of putting out any notice whatever of its presence on the yard at the time. And on the facts presented in this record, if defendant's rules are susceptible of such interpretation, it would seem that the rules themselves might be held to constitute or countenance a breach of duty on the part of defendant, in that the company did not, in the exercise of reasonable care, provide for its employees a proper place or reasonably safe conditions under which to do their work. *Chicago, etc. R. R. v. Wright,* 239 U. S., 548-550. In that case, one where a switching engine had collided with an extra on the yard of defendant company, causing the injury complained of, the negligence imputed being an excessive rate of speed under conditions presented, the Court, among other things, said: "While doubting that the rules, rightly understood, permitted the switching crew to proceed at a speed which obviously endangered the safety of the extra which they know might be coming through the cut, on the same track, we agree that if this were permitted by the rules, they were in that respect unreasonable and void."

Apart from this, there is evidence on part of plaintiff to the effect that it was the custom for the company to have either red lights in the rear or torpedoes put out, if cars were left standing on the main line, and if this should be accepted by the jury, our decisions hold that such a custom known to exist by the company, or existent and followed for such a length of time that the company should have taken note of it, may have the force and effect of abrogating any rule to the contrary. *Tisdale v. Tanning Co.,* 185 N. C., 497, citing *Smith v. R. R.,* 147 N. C., 603; *Biles v. R. R.,* 139 N. C., 528.

Defendant excepts further because plaintiff was allowed to ask Dr. Caveness and Dr. Horton, both professional experts, as to the general character of plaintiff's witness, Dr. Glascock, as physician and surgeon. Dr. Glascock himself was examined as an expert witness for plaintiff, and had given an opinion as to the nature and extent of plaintiff's injuries, ascertained from an examination in the line of professional

duty, and in this respect had been made the subject of aggressive attack by defendant, both as to his character for truthfulness and professional skill, and in such case it is eminently right that plaintiff should be allowed to support and strengthen his witness in both respects from the testimony of other witnesses who were themselves qualified to speak to the question. Authority with us also is in support of his Honor's ruling. *Alley v. Pipe Co.,* 159 N. C., 327, citing among other cases *Lamb v. Littman,* 132 N. C., 978; *R. R. v. Jewell,* 46 Ill., 99; Wigmore on Evidence, sec. 1894.

Defendant further and very earnestly insists that prejudicial error was committed in his Honor's charge on the question of damages, the portion excepted to being as follows: "There is a rule by which you will be guided if you should reach the fourth issue, and that rule is as follows: The plaintiff would be entitled, if at all, to recover a fair and reasonable sum for the pain and suffering he has undergone by reason of the defendant's negligence, and for a fair recompense for loss of what he could otherwise have earned in his trade, and has been deprived of his capacity for earning by way of defect, for his expenses for medical attention, and the reasonable present value of his diminished earning capacity forever in the future, and not the 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. Or, to state it differently, the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference caused by the injury."

The objection being more especially to the clause, "for the reasonable present value of the diminished earning capacity forever," but in our opinion the exception cannot be sustained. His Honor, in this particular portion of the charge, was endeavoring to impress upon the jury the position that plaintiff could not recover for the entire difference caused by the injury, but only the present value of such difference—a position that is in accord with our decisions on the subject, and in this respect makes in favor of defendant. The expression, "the present value of his diminished earning capacity forever in the future," clearly did not mean for all time to come, nor to indicate that the injury was permanent or otherwise, but merely that the present value of diminished earning capacity for all future time to the extent affected by the injury complained of, and any juror of fair average intelligence must have so understood it. The position is put beyond question by the closing clause, "Or, to state it differently, the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference *caused by the injury.*" Considering the charge as a whole, and even the portion of it excepted to, the jury, in the ascertain-

ment of damages, have been instructed in substantial accord with our decisions on the subject, and in a manner that gives defendant no just ground of complaint. *Ledford v. Lumber Co.*, 183 N. C., 614; *Johnson v. R. R.*, 163 N. C., 451. On careful consideration, we find no reversible error in the record, and the judgment of the court below is affirmed.

No error.

CLAUDE L. FELMET v. COMMISSIONERS OF BUNCOMBE ET AL.

(Filed 17 October, 1923.)

1. Statutes—School Districts—Taxation—Local Laws—Repugnances—Repeal.

The provisions of a public-local law, allowing a special school-tax district to tax itself, or issue bonds for school purposes, is not repealed for repugnance to the provisions of a general later law upon the subject (chapter 136, Public Laws), it being clearly manifest from a construction of the provisions of the two statutes that it was not the intent of the Legislature to do so, and the special local law is considered as an exception to the provisions of the later general one, and not affected by a general repealing clause therein.

2. Constitutional Law—Appeal and Error—Burden of Proof.

The burden is upon the appellant attacking as unconstitutional the provisions of a statute to show its unconstitutionality beyond a reasonable doubt.

3. Constitutional Law—Taxation—School Districts.

A school district is not within the purview of our Constitution, Art. VIII, sec. 4, restricting the power of cities, towns, and incorporated villages, as to taxation, assessment, borrowing money, contracting debts, loaning their credit, etc.

APPEAL by plaintiff from *McElroy, J.*, at September Term, 1923, of BUNCOMBE.

This is an action by a taxpayer to enjoin the defendant, County Commissioners and Board of Education of Buncombe, from issuing $75,000 worth of bonds by Grace, a special school-tax district in that county, pursuant to chapter 722, Public-Local Laws 1915. The court held that the voters were duly authorized and denied the prayer for a restraining order against the issuance and delivery of said bonds. Appeal by plaintiff.

George D. Robertson for plaintiff.

C. N. Malone and G. A. Thomasson for defendants.

CLARK, C. J. The plaintiff claims that the bonds are illegal, for two reasons: (1) That chapter 722, Public-Local Laws 1915, is inconsistent with the general school law (chapter 136, Laws 1923), and that the latter repeals chapter 722 aforesaid, and, therefore, the bonds issued pursuant to said special act would be void. (2) The plaintiff also contends that said chapter 722 aforesaid is contrary to Article VIII, section 4, of the Constitution.

There is no controversy as to the facts. There is no allegation in the complaint that chapter 722 has not been complied with. When two acts covering the same subject-matter are inconsistent or in conflict, the following is laid down as the general rule in 36 Cyc., 1090: "When the provisions of a general law, applicable to an entire State, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication."

A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by the enactment of a subsequent general law. *Rogers v. U. S.*, 185 U. S., 83; *Wilson v. Comrs.*, 183 N. C., 638; *Alexander v. Lowrance*, 182 N. C., 642; *Bramham v. Durham*, 171 N. C., 196; *S. v. Johnson*, 170 N. C., 688; *Cecil v. High Point*, 165 N. C., 431; *School Comrs. v. Aldermen*, 158 N. C., 197.

In *S. v. Johnson, supra, Walker, J.*, says: "The general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general, later, affirmative law does not abrogate an earlier special one by mere implication. . . . The general statute is read as silently excluding from its operation the cases which have been provided for by the special one." And again, *ib.*, 690, it is said: "Where there are two opposing acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special act must be intended to constitute an exception to the general act."

The general law in this case clearly shows that the Legislature did not intend to repeal or modify the special act. The general act contains repealing clauses in sections 373 *et seq.*, and made numerous specific repeals therein, including a clear intention not to repeal any acts except those specifically mentioned. The fact that the Legislature repealed so

many prior acts by special reference to them, if it intended to repeal other special acts it would have named them in the repealing clauses.

It is true that section 378 of the general school law repeals all laws in conflict with the provisions of the act, but this is a general repealing clause and cannot be taken as an intention of the Legislature to repeal special acts. *S. v. Johnson, supra.*

Moreover, this identical question was presented in a recent case, *Wilson v. Comrs.*, 183 N. C., 638, in which it was contended by plaintiffs that certain sections in the Consolidated Statutes, or contained in chapter 55, Laws 1915, were in conflict with that act (chapter 722, Public-Local Laws 1915) and would be invalid unless the general laws had been complied with. The court held, however, that the general laws were not applicable to that particular state of facts, and even if they were, the general act was inconsistent with the special act, and the latter would prevail. In this case the special act provides that the election for bonds shall be instituted by petition, signed by 25 per cent of the voters, and the petition shall be approved by the board of education, whereas section 257, Article 22 of the general act, merely requires a petition of the board of education.

The special act requires that the notice of election shall be given by posting a notice at the courthouse door and at three public places in the school district, whereas section 221 of the general act requires that the notice of election shall be given by publication in a newspaper circulating or published in the district thirty days before the close of the registration books.

The special act provides that bonds shall mature at such time or times as the board of commissioners may determine, whereas section 258 of the general act requires that the bonds shall be serial bonds, beginning not more than three years after date and ending not more than thirty years.

The special act provides that the county commissioners may order the sale of the bonds, and the general act provides that the bonds shall be sold in the manner prescribed in the Municipal Finance Act.

The general and the specific acts are inconsistent in other respects, showing that if the General Assembly had intended to repeal the provisions of the special act it would have named it among the statutes mentioned in the repealing clause.

The plaintiff further contends that chapter 722 is unconstitutional, being in violation of Article VIII, section 4, of the State Constitution. He claims that the words therein, "cities, towns, and incorporated villages," included school districts, and, besides, is unconstitutional, in that there is no limit as to the amount of indebtedness that may be incurred by school districts under said statute.

The burden is upon the appellant to show that said act is unconstitutional, beyond a reasonable doubt. The words, "school district," are not within the purview of Article VIII, section 4, of the Constitution. It is neither a city, town, or incorporated village, and the Court has decided this point as to the legal meaning of city or town in that section of the Constitution in *S. v. Green,* 126 N. C., 1032, and in *Trustees v. Trust Co.,* 181 N. C., 306, it was specifically held that a school district was not within the purview of said section 4, Article VIII of the Constitution, *Hoke, J.,* saying that said section "referred only to those corporations of a governmental character acting under and only affected by the amendment to Article VIII, sections 1, 2, 3, and 4, and does not and is not intended to affect or control "school districts." This case is cited and approved at the same term in *Sechrist v. Comrs.,* 181 N. C., 511.

Besides, the validity and constitutionality of chapter 722, Public-Local Laws 1915, has been passed upon and sustained in several cases. *Board of Education v. Bray,* 184 N. C., 484; *Wilson v. Comrs.,* 183 N. C., 638; *Comrs. v. Malone,* 179 N. C., 110.

Affirmed.

CHARLES F. DUNN v. A. W. TAYLOR, SHERIFF OF LENOIR COUNTY.

(Filed 17 October, 1923.)

Courts—Emergency Judges—Mandamus—Jurisdiction—Statutes—Constitutional Law.

Emergency judges, appointed under the provisions of our statute as to Supreme and Superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of *mandamus,* or when he is not holding a term of court assigned to him. Const., Art. IV, sec. 11.

CIVIL ACTION for *mandamus,* heard before *Allen, J.,* at chambers, 20 July, 1923, in LENOIR.

Appeal by plaintiff.

The facts sufficient for the determination of this cause are set forth in the order of the court below, which was as follows:

"This cause coming on to be heard before his Honor, O. H. Allen, judge of North Carolina, upon summons and complaint, said summons being returnable on the 19th day of July, before the undersigned judge, at chambers, and hearing having been continued until 20 July, 1923, and it appearing to the court that the plaintiff is seeking a writ of

mandamus to compel the sheriff of Lenoir County to execute a tax deed; and it further appearing to the court that a *mandamus* hearing is not within the jurisdiction of emergency judges:

"It is now, therefore, on the court's own motion, adjudged and decreed that the court has no jurisdiction to hear the matters in controversy, and the motion is therefore denied.

"O. H. ALLEN, *Emergency Judge, etc.*"

Charles F. Dunn, brief in propria persona.
No counsel for defendant.

CLARKSON, J. The only question presented in this case is: Has an emergency judge a right to issue the writ of *mandamus?* The statutes creating emergency judges, and defining their power and authority, are as follows:

"Section 1. Every Justice of the Supreme Court and judge of the Superior Court who has heretofore resigned or retired from office at the end of his term, or who shall hereafter resign or retire at expiration of his term, who has attained the age of seventy (70) years at date of his resignation or retirement, and who has served for fifteen (15) years on the Supreme Court or on the Superior Court, or on the Supreme and Superior courts combined, shall receive for life two-thirds (⅔) of the annual salary now received by the Justices of the Supreme Court or judges of Superior Court, respectively, payable monthly.

"Sec. 2. The persons embraced within the provisions of this act are hereby constituted special or emergency judges of the Superior Court under Article IV, section 11, of the Constitution of this State, and are authorized to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same, and to hold special terms when commissioned so to do by the Governor, and as compensation for holding such special terms shall receive their actual expenses and in addition thereto fifty dollars per week, to be paid by the county in which such special term is held.

"In case of emergency arising as provided in said section, the Governor shall designate the person to act as emergency judge, who shall receive his actual expenses only incurred while so acting, to be paid by the Treasurer upon warrant of the Auditor, upon certificate of the judge: *Provided,* that the county asking the Governor for an emergency judge shall have the privilege of requesting the assignment of a particular judge.

"Sec. 3. That such emergency judges shall be subject to all the regulations respecting Superior Court judges, except as otherwise provided herein."

(Section 2 of chapter 20, Extra Session 1921, not copied, as not germane.) Public Laws 1921, ch. 125; Public Laws, Extra Session 1921, ch. 20.

Laws 1921, Extra Session, ch. 94, secs. 1 and 2, are as follows:

"Section 1. That special or emergency judges provided for in chapter one hundred and twenty-five, Public Laws of one thousand nine hundred and twenty-one, shall at all times have the same jurisdiction in matters of injunction, receivership, and *habeas corpus* as any other Superior Court judge.

"Sec. 2. That if any special or emergency judge has made any matters returnable before him, and subsequent thereto he should be called upon by the Governor to hold court elsewhere, said judge shall make an order directing said matter to be heard before some other judge, setting forth in said order the time and place same is to be heard, and send a copy of said order to the attorney or attorneys representing the parties plaintiff and defendant in such matters."

Public Laws 1923, ch. 66, secs. 1 and 2, are as follows:

"Section 1. That in all civil actions and special proceedings instituted in the Superior Court in which a commissioner or commissioners are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority, and he is hereby authorized and empowered, to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree, or judgment, which fee shall be taxed as a part of the costs in such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same *de novo*.

"Sec. 2. That in all special proceedings where it is now by law required that the orders, judgments and decrees of the clerk shall be approved or heard by the judge of the Superior Court, the emergency judges shall have full power and authority and jurisdiction to hear and determine such matters under the course and practice of the court."

State Constitution, Art. IV, sec. 11, is as follows:

"Every judge of the Superior Court shall reside in the district for which he is elected. The judge shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years; but in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts

of the said district; and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts in the courts which they are so appointed to hold, and the General Assembly shall provide for their reasonable compensation."

Under the Constitution, the emergency judges *"shall have the power and authority of regular judges of the Superior Courts in the courts which they are so appointed to hold."* (Italics ours.)

The Legislature has seen fit to give emergency judges, by express language, the following power and authority: *"shall at all times have the same jursidiction, in matters of injunction, receivership, and habeas corpus as any other Superior Court judge."*

In construing this legislative enactment, with the constitutional provision on this subject, it would seem that a proper interpretation, and the intent of the Legislature, was to limit the writ of *mandamus,* and it could not be issued by emergency judges, except when they were holding regular terms of court, as provided by the Constitution and legislative act conforming thereto.

The application for this writ of *mandamus* was requested, not at a regular term of court which an emergency judge was holding, but at chambers. The emergency judge had no power or authority at chambers to issue a writ of *mandamus,* and there was no error in the order of the court below denying same.

For the reasons given, the judgment is

Affirmed.

MATTIE BELLE MOORE, ADMX. OF W. T. MOORE, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 October, 1923.)

1. Railroads—Employer and Employee—Negligence—Contributory Negligence—Assumption of Risks.

It is sufficient evidence of defendant railroad company's negligence to refuse a motion as of nonsuit which tends to show that the plaintiff's intestate was seen absorbed in his duty of conductor of a freight train, standing on the end of a sill of the railroad track busily checking the cars of his train, and was run over and killed by an extra passing along that track, in full view of the engineer and fireman on the extra, who saw him in sufficient time, and who approached without signal or warn-

ing, either upon the issue of defendant's actionable negligence, the intestate's contributory negligence, or assumption of risks; and the fact that the locomotive just before the killing obstructed the view of the engineer does not vary the result, as to the defendant's negligence. See *S. c.*, 185 N. C., 189.

2. Same—Commerce—Federal Employers' Liability Act — Negligence — Nonsuit.

Under the Federal Employers' Liability Act for injuries inflicted upon railroad employees by the railroad company while engaged in interstate commerce, the rule of comparative negligence in awarding damages applies, and the contributory negligence of the intestate does not bar his recovery if the railroad is negligent in producing his death.

APPEAL by defendant from *Devin, J.*, at April Term, 1923, of CUMBERLAND.

This case was before us at last term (*Moore v. R. R.*, 185 N. C., 189), when the nonsuit which had been appealed from was reversed. On this trial the facts seem to be identical in every particular, and the former case is herein referred to for a fuller statement of the facts. On this trial the defendant made again a motion for nonsuit, and a refusal thereof is the sole assignment of error. Verdict and judgment for plaintiff. Appeal by defendant.

Dye & Clark for plaintiff.
Rose & Rose for defendant.

CLARK, C. J. The appeal being from the refusal of a nonsuit, the evidence must be taken in the aspect and with the most favorable inferences therefrom reasonably to be drawn in favor of the plaintiff.

According to the evidence thus viewed, the deceased, who was in charge of the defendant's local freight train between Fayetteville and Smithfield, was run over and killed by a northbound extra, consisting of locomotive and caboose, while standing about 500 yards north of the station, on the end of the cross-ties on the west side of the northbound main-line track. He was standing there in order to get a proper view of the cars as they came out of the spur-track, so that he could check off the same, and was deeply engrossed and absorbed in studying a paper, on which was written a list of the cars to be shifted, and while the engine of his own train was close by, engaged in shifting these cars to the west side, in which direction he was facing. The list contained divers cars which were to be shifted around, some of them bearing numbers carrying five figures. While thus engaged, about 4 o'clock in the afternoon, the engineer of the extra had a clear view of him for four or five hundred yards, but he blew his whistle only once, which was at the crossing of the other railroad track at that point south of the station.

We have already discussed this evidence on the former trial, and in a unanimous opinion we then held that the evidence of negligence was sufficient to carry the case to the jury, and they have in this trial returned a verdict in favor of the plaintiff.

In addition to the evidence above recited, it also appeared that the deceased, while standing on the ends of the cross-ties on the west side of the track, had his back, partly at least, towards the extra, whose engineer could have seen him (and could tell which track he was on) for four hundred yards, until he got so close that the view was obstructed by his own locomotive; but even that did not relieve the defendant of the duty to keep a lookout on the left side, where the fireman sits (*Arrowood v. R. R.*, 126 N. C., 631), and the fireman testified, indeed, that he saw him.

Before the view was shut off, the engineer of the extra not only could have seen that deceased was deeply engrossed, but he could have heard the other engineer give the four short blasts on his whistle and seen that Moore, without looking up, gave him a signal. The engineer of the extra could also have seen that the engineer of the train, under the orders of the deceased, did not move his train back and drop a car in the clear in response to that order. Yet, with this knowledge, the engineer of the extra neither blew the danger signal on the extra nor slackened his speed. He had only given the crossing blow 500 yards away. There is no evidence that the bell was ringing on the extra, which was running light at a speed of thirty to thirty-five miles an hour past the station and in the yard at Smithfield, where persons were expected to be, and where the local freight could be seen by the engineer, Bishop, and his fireman for several hundred yards. Having passed the caboose near the tank, they knew the freight crew were engaged in shifting near a point which the extra would have to pass.

As said in the former opinion, "The whistle cord was in reach of the hand of the engineer of the extra; the bell cord was close to the fireman; yet they took a chance with another man's life, and lost."

The only difference on this appeal is that, under the instruction of the court, the jury found, in answer to the fourth issue, that the intestate at the time of the injury was engaged in interstate commerce, and the recovery is under the terms of the Federal Employers' Liability Act. Under this, as under the State act, if there was negligence on the part of the defendant, contributory negligence of the deceased does not bar a recovery, but only diminishes the damages in proportion to the amount of negligence attributable to such an employee. Under both State and Federal act, when there is no negligence on the part of the master, but the injury is solely the result of the employee's negligence, there can be no recovery. The proper issues of fact on this proposition were left to

the jury, who found that the defendant was negligent; that the deceased was guilty of contributory negligence; that upon the facts as the jury found them, the plaintiff's intestate did not assume the risk of being killed in the way and manner in which he was killed, and assessed the damages to the widow and each of the three children separately, as required by the Federal statute.

There is no assignment of error for exceptions to evidence or to the charge, except that the court refused to charge that "if the jury found the facts as testified to by all the witnesses, they should answer the first issue 'No.'"

In the former opinion the court cited authorities, which we need not repeat, and to which many others could be added, that there is a clearly recognized distinction "between the presumption which arises when a person in the apparent possession of all his faculties is seen walking on the track, and the duty owed to one of the railroad employees who is absorbed and engrossed in his work, as is the evidence in this case."

In this case there was evidence that the engineer of the extra, Bishop, first saw the deceased 350 yards, or farther, away, and that up to the time the fireman, Lamb, says he saw him 75 yards away, the deceased had not changed his position nor looked up from the paper which they saw was engrossing his attention. According to his own statement, Bishop could have stopped his extra in 200 yards, and at any time within that 350 yards he could have given the danger signal with his whistle, and Moore would have realized instantly that it was not the whistle of the locomotive attached to his own train, though deeply engrossed.

It should have been apparent to the engineer of the extra that the deceased was deeply engrossed by his work, and this should have been the more apparent to the engineer of the extra by the efforts made to attract his attention by the engineer of the shifting train and others near him. Yet the engineer of that extra, running at the rate of thirty-five miles an hour at a railroad crossing and through the yards where the engrossing work of shifting was going on, was guilty of a recklessness which could not have been anticipated and was not assumed by the deceased.

Railroad companies cannot speculate upon the chances of its warning signals being heard by persons on its track, and excuse its omission to give them upon the ground that they would have been ineffectual. *R. R. v. St. John,* 73 Am. Dec., 149.

The defendant places his entire case upon the contention that the plaintiff's intestate being engaged in interstate commerce, that there is no liability under the Federal decisions, and that the court should have sustained its motion to nonsuit or have directed a verdict in its favor.

On this proposition *R. R. v. Koennecke,* 239 U. S., 352, is exactly in point. In that case, as in this, the deceased was run over by a train while acting as switchman in the defendant's yards, and the Court said: "It would be impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk." This case is stronger for the plaintiff than the facts reported in that.

No error.

STATE v. JOHN W. PLUMMER.

(Filed 17 October, 1923.)

Commerce—Taxation—Shipment in Bulk—Distribution—Municipal Corporations—Ordinances.

The shipment of yeast by a manufacturer into this State, to its agent herein, in bulk, to be broken by the agent and the separated packages delivered to present customers and those to be acquired, the agent collecting therefor and remitting to his principal in another State, is an intrastate transaction as between the agent and his customers, and subject to the tax thereon imposed by an ordinance of the town in which he conducted his business.

APPEAL by defendant from *Sinclair, J.,* at June Term, 1923, of NEW HANOVER.

The defendant was convicted of a violation of a tax ordinance of the city of Wilmington. He was an agent of the Liberty Yeast Company, of Baltimore, in the sale, delivery and collection of yeast.

The company in Baltimore each day shipped him a quantity of yeast by express. The box or boxes in which it was contained were taken out of the express office by the defendant, to whom the boxes were directed; the bulk was then broken, and he carried around to his customers on a truck the small packages contained in these boxes, that he might deliver to these customers any amount they wanted. He not only delivered the yeast in this way to regular customers, but he also sought to increase the trade by securing other purchasers when he delivered the yeast, and from whom he collected the cost price at the same time. When he sold the yeast in this way he took orders from his customers in advance and ascertained the quantity of yeast each person would want on the following day, and when he went around and delivered the yeast to the purchasers he took up what yeast was left over on the hands of the purchasers of the day before and destroyed it.

The defendant, on his cross-examination, stated: "I solicit the orders for the yeast. The yeast is shipped to me, and I distribute it. I collect for it and remit to the company. I collect for them. I send the collections on to my house. They cut the yeast in Baltimore at the plant and ship it down here to be distributed. They ship it in bulk packages, and I divide it and distribute it to my customers." Upon this testimony, which was uncontradicted, the court said: "If you believe the evidence, you will return a verdict of guilty; if you do not believe it, return a verdict of not guilty." Verdict of guilty. Appeal.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Herbert McClammy for defendant.

CLARK, C. J. The transaction, which was made taxable by the statute, was not the shipment of the goods from Baltimore to the defendant here, nor was the burden borne by such transportation. The transaction that was made subject to the tax was the sale and delivery of these articles to purchasers after the bulk was broken. Had the goods been lost in transit, the title thereto was in the shipper and would not have passed to the purchasers until the defendant on his daily rounds delivered them to the several purchasers. This transaction was an intrastate matter between the defendant and the purchasers, and the immunity by reason of the Federal Constitution does not exist.

There were no orders solicited for customers which were sent to the Baltimore house with the result that the Baltimore house shipped to the customers here, if approved by the yeast company, but it was the sending of the yeast by the Baltimore house to their agent, the defendant, upon his estimate of the amount which he could dispose of in his rounds next day by reason of his canvass for orders, and of the additional orders he calculated he might pick up in delivering the other orders.

This is not like *Robbins v. Taxing District,* 120 U. S., 480, in which it was held that the business of offering for sale, or selling goods to be shipped by the vendor to the buyer in another State, would be clearly interstate commerce (*S. v. Caldwell,* 187 U. S., 622); but it is exactly like the case of *S. v. French,* 109 N. C., 722, and *S. v. Wessell, ib.,* 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer was sold to his customers, or, as in this case, were shipped to the agent here of the vendors, and by him sold to the customers here and the proceeds remitted to the vendor. The sale by such buyer was a North Carolina business, and taxable. The distinction between the two is discussed in *S. v. Caldwell,* 127 N. C., 527, and such distinctions affirmed on writ of error (187 U. S., 622).

In *S. v. French,* 109 U. S., 722, it was held that such a tax as that in the present case was not a property tax, but a license tax upon an intrastate business. The distinction is stated in that case, which, like the present one, came up from New Hanover. That case has been often cited and affirmed; and, among other cases in point, the whole matter has been admirably and fully discussed by *Allen, J.,* in *Smith v. Wilkins,* 164 N. C., 147, citing *Machine Co. v. Gage,* 100 U. S., 675; *May v. New Orleans,* 178 U. S., 497; *Austin v. Tenn.,* 179 U. S., 352, and *Cook v. Marshall,* 196 U. S., 269. It is held in *Smith v. Wilkins, supra,* that "Where separate articles are shipped into this State in larger packages, they are not the subject of interstate commerce after the bulk has been broken here for distribution, and a peddler's tax upon a person thus selling these separate articles which have in this manner been shipped to him from beyond the State is not an interference with the commerce clause of the Federal Constitution."

The whole subject has been fully discussed and the conclusion reached (upon which this opinion is based) in *Sonneborne v. Keating,* in the United States Supreme Court, opinion filed 11 June, 1923.

There being no conflict in the evidence, and no question of intent to be drawn, but purely a question of law upon the evidence, if believed, there was no error in the instruction of the court to the jury: "If you believe the evidence, you will return a verdict of guilty; if you do not believe it, return a verdict of not guilty." This was so held in *S. v. Murphrey, ante,* 113.

No error.

GEORGE E. CHERRY, JR., v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 October, 1923.)

1. Carriers—Railroads—Employer and Employee—Master and Servant—Negligence—Evidence—Instructions—Appeal and Error.

Where, in an action to recover damages against a railroad company negligently inflicted upon an immature employee, the questions are presented for the determination of the jury, whether the lad had been killed in consequence of his having negligently been sent by defendant's agent on defendant's business upon a dangerous errand in defendant's freight yard among moving trains, or whether his killing was caused by a pile of cinders negligently left by defendant at the side of its track in violation of a city ordinance, it is reversible error for the trial judge in his instructions to the jury to exclude from their consideration the question of defendant's negligence on the second phase of the case, and confine them solely to the consideration of the evidence on the first one.

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

Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, C. S. secs. 643, 520(1). And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1923, of PITT.

Civil action to recover damages for physical injuries caused by alleged negligence of defendant company. There were allegations, with evidence, tending to show that on the afternoon of 6 April, 1909, plaintiff, being at the time a minor of 12 years of age, he was sent by J. R. Moore, station agent of defendant company in Greenville, N. C., to mail a letter on a passenger and mail train of defendant, on the yard at the time and just in the act of moving out of the yard; that the letter was addressed to officers of defendant company; that plaintiff went up to the moving train and threw the letter into the mail car, running along the track a short distance to do so, and as he turned away he stumbled and fell over a pile of cinders dumped near the track by defendant company or its employees, rolled under the train, and thereby received painful and serious injuries, including a broken leg, etc.; that the dumping of these cinders was on a public street or avenue of the town and was in violation of a town ordinance in existence at the time and applicable to the conditions presented.

The defendant denied that J. R. Moore was agent or that the company was in any way responsible for his acts, denied the existence of the ordinance or any negligence in reference to this question, alleged contributory negligence on part of plaintiff, and offered evidence in support of its positions.

On issues submitted, the jury rendered verdict:

"1. Was plaintiff injured by negligence of defendant, as alleged in the complaint? Answer: 'No.'"

Other issues not answered.

Judgment on verdict for defendant, and plaintiff excepted and appealed, assigning for error chiefly his Honor's charge on the first issue: "If you find that Moore was agent, the burden being on plaintiff to so satisfy you, and the injury occurred as a result of his direction to plaintiff while he was acting in the scope of his authority as agent, you will answer the first issue 'Yes'; otherwise, you will answer it 'No.'"

F. G. James & Son, F. C. Harding, and D. M. Clark for plaintiff.

Skinner & Whedbee for defendant.

HOKE, J. The allegations of the complaint and the evidence introduced on part of plaintiff present, and are intended to present, the question of defendant's liability in two aspects:

First, by reason of an alleged negligent order on part of defendant's agent.

Second, the violation of a town ordinance applicable to conditions presented and alleged to be a proximate cause of plaintiff's injury.

The two grounds of liability were distinctly recognized on a former appeal in this cause, wherein *Associate Justice Adams,* delivering the opinion, interpreting the complaint, said: "The principal alleged acts of negligence are the breach of a town ordinance and the negligent employment by defendant of an immature and inexperienced youth to go upon a dangerous mission." *Cherry v. R. R.,* 185 N. C., 90-92.

The ruling in respect to the violation of a valid town ordinance, when shown to be the proximate cause of plaintiff's injury, or one of them, is in accord with our decisions on the subject (*Stultz v. Thomas,* 182 N. C., 471; *Paul v. R. R.,* 170 N. C., 230), and there was prejudicial error, therefore, in restricting the issue of liability to the question of the agency of Moore and his conduct in the matter. It is contended for defendant that plaintiff is precluded from this, his principal objection, by reason of an entry appearing in the case on appeal immediately preceding his Honor's charge, in terms as follows:

"The court then stated that upon the first issue he would charge the jury that in order for them to answer it in the affirmative, they would have to find that the plaintiff was sent to mail the letter by an agent of the defendant while acting in the scope of his authority, to which there was no exception, the case having been heard upon the theory that plaintiff was injured while acting under the direction of the defendant's local agent. Whereupon the court charged the jury as follows:" But, in our opinion, this position cannot be maintained.

It is the approved construction of our statute regulating appeals, more especially C. S., secs. 643 and 520, subsec. 2, that exceptions to the charge are not required to be made at or immediately after the trial, but appellant is entitled to have them considered if they appear for the first time in the case on appeal, where the same is tendered in apt time. *Paul v. Burton,* 180 N. C., 45, citing *Bernhardt v. Brown,* 118 N. C., 700; *Lowe v. Elliott,* 107 N. C., 718; C. S., sec. 590, subsec. 2, and other cases. And a party is not to be deprived of this privilege because the trial judge sees proper in advance to intimate what his instructions will be, unless the propositions as stated are expressly agreed to by the parties. When they become and are made a part of the charge, they are open to exception, as the statute provides. True, the entry referred to closes with the statement that the case was tried on the theory that

plaintiff was injured while acting under the direction of defendant's local agent, but there is nothing in the record to indicate that appellant assented to any such procedure, and in the absence of such assent he was entitled to have his cause presented to the jury in every aspect that his pleadings and evidence would justify, and a failure to do this in any substantial or essential feature of the case will constitute reversible error. *S. v. Merrick,* 171 N. C., 788-795.

In our opinion, there should be a new trial of the cause, and it is so ordered.

New trial.

HENRY TURNAGE v. WILLIAM AUSTIN.

(Filed 17 October, 1923.)

1. **Evidence—False Arrest—Malicious Prosecution—Instructions—Appeal and Error—Reversible Error.**

   An instruction in an action of false arrest and malicious prosecution, that if the defendant in the civil action believed the plaintiff therein was the person guilty of the larceny, then they should also find that the defendant was not actuated by malice in causing the arrest, constitutes reversible error in the judge expressing his opinion, upon the evidence, as the existence of malice may exist, independent of probable cause, and upon the evidence the jury may find the one and not necessarily find the other.

2. **Same—Presumptions—Requests for Instruction.**

   In an action of false arrest and malicious prosecution, plaintiff's exception to the judge's charge for failure to instruct the jury that their finding the absence of probable cause would be *prima facie* evidence of malice, requiring the defendant to satisfy the jury that the prosecution was not actuated by malice, is untenable, in the absence of a special request to that effect.

3. **Same—Termination of Criminal Action—Questions for Jury.**

   In order to recover in an action of false arrest and malicious prosecution, the criminal action, the basis of the civil one, must have terminated, which is a question for the jury in cases of uncertainty or doubt.

APPEAL by plaintiff from *Grady, J.,* at March Term, 1923, of PITT.

This was an action for false arrest and malicious prosecution, in that the defendant maliciously and falsely charged the plaintiff with having stolen from the defendant's car the inner tube of his automobile and caused him to be falsely arrested and tried on said charge.

Upon the issues submitted, the jury found:

"1. Was the plaintiff unlawfully arrested, as alleged in the complaint? Answer: 'No.'

"2. If so, did the defendant procure said arrest to be made? Answer: 'No.'

"3. Did the defendant cause the plaintiff to be prosecuted for larceny in the mayor's court of Tarboro and in the Superior Court of Edgecombe County, as alleged in the complaint? Answer: 'Yes.'

"4. If so, was such prosecution without probable cause? Answer: 'Yes.'

"5. If so, was such prosecution malicious? Answer: 'No.'

"6. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$400.' "

Upon which verdict the court adjudged that the plaintiff recover nothing and that the action be dismissed, from which judgment the plaintiff appealed.

P. R. Hines and Albion Dunn for plaintiff.
F. G. James for defendant.

CLARK, C. J. The plaintiff has assigned eighteen errors, but it is sufficient to pass upon two of the exceptions taken.

Exception 12. The court charged the jury as follows: "Gentlemen, if you find that at the time of the arrest, and at the time of the prosecution in the mayor's court, that the defendant believed that the plaintiff was the guilty man, then I charge you that you ought to find from that, and you can find from that circumstance, that the defendant was not actuated by malice, and if you do so find, it would be your duty to answer the fifth issue 'No.' " That is, that the prosecution was not malicious.

This instruction was erroneous, in that it instructed the jury what they "ought to find upon the evidence," and the jury did find in accordance with that instruction that the prosecution was not malicious.

Another exception is to the following portion of his Honor's charge: "I charge you, gentlemen, and this is really a repetition of what I have already told you, if you are satisfied from the evidence that the defendant was justified in instituting the criminal prosecution, or if you find from the whole evidence that the defendant had reasonable grounds for believing that the plaintiff had taken his tire and inner tube, and that his belief was based upon facts and circumstances which would induce a man of ordinary prudence and intelligence to have such belief, and that, acting upon such belief, he caused the plaintiff to be arrested and prosecuted, he could not have been said to have been actuated by malice, and it would be your duty to answer the fourth and fifth issues 'No.' " That is, that the prosecution was with probable cause and that it was not malicious.

The jury found that the plaintiff had been arrested and tried on a charge of larceny without probable cause, but that such prosecution was

not malicious. The plaintiff excepts because the court did not charge that "If the jury should find the prosecution was without probable cause, failure to prove probable cause would be *prima facie* evidence of malice, and that if such *prima facie* evidence of malice was established it was the duty of the defendant to go forward and satisfy the jury that the prosecution was not actuated by malice." It is true that if such prayer had been asked it would have been error not to have given it, but it was not error not to so charge when the case was fully given to the jury and there was no prayer to that effect.

It appears from the evidence that the original charge against the plaintiff was instituted before the mayor, who testified that he found probable cause. It appears that the case was tried in the Superior Court, and the clerk of the court testified to the original papers being on file in his office, and offered in evidence a "certified copy of the judgment of the Superior Court and the indictment." It must appear in an action of this kind that the original action, on account of which this is brought, had been terminated, and if this leaves anything in doubt it should be made to clearly appear on the next trial.

In an action of this kind it must appear both that the prosecution was malicious and that it was instituted without probable cause. Proof of only one of the essential features, in the absence of proof of the other, will avail the plaintiff nothing. However malicious the defendant may have been, he cannot be held liable if he had probable cause for preferring the criminal cause against Turnage; and however lacking in probable cause his original action may have been, he cannot be held liable in this action unless his proceeding against the plaintiff was actuated by malice. Both are essential requisites in an action for malicious prosecution. *Stanford v. Grocery Co.*, 143 N. C., 419.

The absence of probable cause is not the equivalent of malice, nor does it establish malice *per se*, though it is evidence from which malice may be inferred, and the existence of probable cause does not make the existence of malice. The presence or absence of malice in its final analysis is a question of fact to be determined by the jury, while probable cause is a mixed question of law and fact.

The instruction of the court, that if the defendant believed the plaintiff to be guilty at the time of the arrest, then they "ought to find" and could find from this circumstance that the defendant was not actuated by malice, was erroneous, not only, as above stated, because it contains an expression of opinion as to what the jury ought to find from the evidence, but because it is incorrect as a charge on the element of malice. *McGowan v. McGowan*, 122 N. C., 145.

There was error in the trial, as pointed out by the above assignment of error, for which the plaintiff is entitled to a

New trial.

FIREMAN'S FUND INSURANCE COMPANY v. THE ROWLAND LUMBER COMPANY.

(Filed 17 October, 1923.)

1. Insurance, Fire—Policies—Contract—Principal and Agent—Waiver.

Where a clause in a fire-insurance policy provides that it is upon condition of unconditional and sole ownership of the property insured, and the agent writing the policy is aware of the fact that it was owned by the insured and certain others whose names do not appear therein, the knowledge of the agent will be imputed to the insurer, and the provision will be deemed as waived by it.

2. Same—Fires—Negligence—Tort Feasor—Subrogation—Parties.

Where the property insured has been destroyed by the negligence of a third person, and the insurer has paid the loss, it is subrogated to the rights of the insured and has a right of action against the *tort feasor*, and the defendant may not set up any defense that the insurer may have had under the policy contract, not being a party thereto.

3. Same—Damages.

Where the property insured has been destroyed by fire by the negligence of a third party, and the insurer by paying the loss has been subrogated to the rights of the insured, the measure of damages in the insurer's action against the *tort feasor* is the actual market or cash value of the property at the time of the fire, unaffected by any stipulation in the policy to the contrary, the *tort feasor* not being a party thereto.

APPEAL by defendant from *Calvert, J.,* at March Term, 1923, of DUPLIN.

Civil action, tried upon the following issues:

"1. Was the tobacco belonging to J. A. Ricks and tenant, J. S. Wagstaff, burned by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did J. A. Ricks and J. S. Wagstaff, jointly, insure said tobacco, and if so, was it under the six insurance policies offered in evidence? Answer: 'Yes.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$2,181.95 and interest from date that insurance was paid.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed, assigning errors.

H. D. Williams, D. L. Carlton, and George R. Ward for plaintiff.

R. D. Johnson and Stevens, Beasley & Stevens for defendant.

STACY, J. J. A. Ricks, J. S. Wagstaff, and P. L. Page owned some tobacco which had been cured and stored in a pack-barn located on

certain leased premises. On 23 September, 1919, this tobacco was destroyed by fire. Defendant's liability for the fire is established by the present verdict. The tobacco in question was insured by plaintiff against loss or damage, to the extent of $3,000. Following its destruction by fire, plaintiff paid to Ricks, Wagstaff, and Page $2,181.95, the actual loss sustained, and it now brings this suit to recover said amount from the defendant, alleging that, by reason of the provisions contained in the several policies and payments thereunder, plaintiff has become and is now subrogated, to the extent of such payments, to all the rights of recovery existing in favor of J. A. Ricks, J. S. Wagstaff, and P. L. Page, and against the defendant, on account of the wrongful, careless and negligent burning of said tobacco. For this position plaintiff relies upon the following authorities: *Ins. Co. v. R. R.*, 132 N. C., 75; *Cunningham v. R. R.*, 139 N. C., 434; *Fidelity Co. v. Grocery Co.*, 147 N. C., 513; *Ins. Co. v. R. R.*, 165 N. C., 136, and cases there cited. See, also, *Powell v. Water Co.*, 171 N. C., 290; *U. S. v. Amer. Tob. Co.*, 166 U. S., 468, 41 L. Ed., 1081.

Defendant seeks to avoid liability to the plaintiff in the present suit, not because of any want of negligence on its part in setting out the fire, but because of a stipulation in each of the policies to the effect that the insurance company shall not be liable for loss or damage occurring "if the interest of the insured (in the property) be other than unconditional and sole ownership." The policies were taken out in the name of J. A. Ricks, as sole owner, whereas his tenant, J. S. Wagstaff, and P. L. Page each owned an interest in the property, and this fact was known to the plaintiff's agent at the time of the issuance and delivery of said policies. Indeed, when plaintiff made settlement for the loss, the money was divided and paid to the different owners according to their respective interests. Hence, the stipulation of "unconditional and sole ownership" was waived by the insurance company, making its liability absolute under the policies. The rule applicable is stated by *Douglas, J.*, in *Horton v. Ins. Co.*, 122 N. C., 503, as follows:

"It is well settled in this State that the knowledge of the local agent of an insurance company is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and that such waiver may be presumed from the acts of the agent," citing a number of authorities. See, also, *Johnson v. Ins. Co.*, 172 N. C., 147; *Robinson v. B. of L. F. and E.*, 170 N. C., 548; *Modlin v. Ins. Co.*, 151 N. C., 43, and *Arnold v. Amer. Ins. Co.*, 25 L. R. A. (N. S.), 6, and note.

From the foregoing it follows that the defense based upon the alleged ground of non-liability on the part of the insurance company, because

the policies in question were not legally enforceable, must be denied. 19 Cyc., 894. "Moreover, if the insurer has paid the loss, the fact that it might have successfully contested the claim under the policy and relieved itself of liability to the insured, does not affect its right of subrogation. The equities between the insurer and the insured are not matters with which the wrong-doer has any concern." Briefs on the Law of Insurance, by Cooley, Vol. IV, p. 3896. See, also, *Pearse v. Quebec S. S. Co.,* 24 Fed., 285.

Defendant further contends that, in assessing the value of the property destroyed, the rule stipulated in each of the policies of insurance is alone applicable in the present suit. This was as follows: "The cash value of the leaf tobacco covered by this policy shall be computed at not more than the average price obtained on sales of leaf tobacco in public sales warehouses nearest to the agency issuing this policy, said sales to embrace a period of one week prior to date of fire, as per authentic official records of such warehouses; said average price to be found by dividing the total quantity sold during the period specified into the total price obtained during said period."

This method of ascertaining the value of the property injured or destroyed is a matter of contract between the insurer and the assured, and with which the wrong-doer, or *tort feasor,* can have no concern, as he is not a party to the contract. *Monticello v. Mollison,* 58 U. S., 152. He is bound to make satisfaction for the injury he has done, and no more, without inquiry as to the relative rights, *inter se,* of the parties claiming the damages. *In re Harris,* 57 Fed., 247. His only interest in this respect is to be protected against a second claim for the same injury or loss. The measure of damages, so far as the present defendant is concerned, is the fair market value or the fair cash value of the property destroyed, at the time and place of its destruction. *Grubb v. Ins. Co.,* 108 N. C., 472; 14 R. C. L., 1304. If this be equal to, or in excess of, the sum paid by plaintiff to the owners of the property, the defendant is in no position to complain. *Powell v. Water Co., supra.*

The remaining exceptions are without special merit, and they warrant no extended discussion. From a careful perusal of the whole record, we have found no error, and this will be certified.

No error.

KATHLEEN TYNDALL AND RUTH TYNDALL v. T. R. TYNDALL AND LOUISE TYNDALL.

(Filed 17 October, 1923.)

1. Trusts—Resulting Trusts—Husband and Wife—Purchase Money—Evidence.

Where the wife has furnished the purchase money for lands, and the husband has taken a deed conveying the legal title to himself, without valid agreement between themselves that he should acquire it, the law raises a resulting trust in the lands in favor of the wife, the husband holding the mere legal title under the general equitable principles applying, which she may enforce as the beneficial owner. The rule admitting parol evidence to rebut a resulting trust has no application to the facts of this case.

2. Same—Descent and Distribution—Statutes.

The resulting trust in favor of the wife in lands the legal title to which has been acquired by her husband by deed is now descendible to her heirs under our canons of descent, defining seizin to be any right, title or interest in the inheritance, under the definition of seizin, for the purpose, being any right, title or interest in the inheritance (C. S., sec. 1654, rule 12), though she may not have been in separate possession thereof during her life. *Barrett v. Brewer*, 153 N. C., 547, cited and distinguished.

3. Same—Tenant by the Curtesy.

Where the husband had the legal title to lands conveyed to him, in which the wife had a trust resulting in her favor, she having furnished the purchase money, after her death her husband is entitled to an estate therein as tenant by the curtesy (C. S., sec. 1654, rule 12), there being children of the marriage born alive and capable of inheriting. The old common-law rule, and changes therein made by statute, discussed by ADAMS, J.

APPEAL by all parties from *Calvert, J.*, at June Term, 1923, of LENOIR.

Civil action. W. J. Tyndall and Addie E. Tyndall were husband and wife. On 15 November, 1898, J. A. McDaniel and wife executed a deed in fee simple to W. J. Tyndall for a lot in the city of Kinston, the entire consideration thereof, according to the verdict of the jury, being the sole and separate money of Mrs. Tyndall. A small house was then built on the lot and was occupied by the family, the plaintiffs contending that it was built by W. J. Tyndall, the defendants contending that the money which went into the building was the property of the wife, and that a part of it was secured by a mortgage on the property. On this question the evidence is not definite. The plaintiffs were the only children born of this marriage. While the family were living in this house, W. J. Tyndall died, but the date of his death does not appear. On 23 Feb-

ruary, 1904, Addie E. Tyndall and T. R. Tyndall were united in marriage, and on 6 January, 1905, the defendant Louise was born. The evidence indicates that Mrs. Tyndall did not know that the title to the lot was taken in the name of her first husband until some time after her second marriage. She died 28 November, 1908, survived by the parties to the action.

The object of the suit is to remove an alleged cloud from the plaintiffs' title.

Cowper, Whitaker & Allen for plaintiffs.
Rouse & Rouse and P. D. Croom for defendants.

PLAINTIFFS' APPEAL.

ADAMS, J. The plaintiffs rest their alleged cause of action on these two grounds: (1) The complete title to the lot vested in their father, W. J. Tyndall, as grantee of McDaniel, and upon his death descended to the plaintiffs as his heirs at law. (2) Even if the lot was paid for out of money belonging to Mrs. Tyndall, she did not contest or dispute the title during the life of her first husband, and had only a right in equity and not such seizin as was necessary to transmit the inheritance to her heirs.

On the other hand, the defendants insist that out of the purchase by W. J. Tyndall there arose a resulting trust in favor of Mrs. Tyndall, whereby she held such title or estate in the property as was descendible to her surviving children, subject to the curtesy of her surviving husband. The rights of the parties are dependent upon a proper solution of these respective contentions, and the solution cannot be worked out without reference to the equitable doctrine of trusts.

By means of the doctrine of uses as developed in the common law, the title to land was decomposed or separated into the constituent elements of legal and beneficial ownership, the feoffee holding the legal title with no beneficial right, and the *cestui que use* the beneficial interest with no legal title. While the feoffee was originally regarded in law as the real owner, the *cestui que use* could alien or devise the use, which, if not aliened or devised, descended according to the rules of the common law pertaining to inheritances in land. This situation developed two classes of beneficial interests—the simple use and the special trust—each of which was enforceable by a subpœna issuing out of chancery; for the courts of common law took no cognizance of these equitable interests. But no restraint was imposed on the feoffee's right of alienation; consequently, if the feoffee and the *cestui que use* disposed of their respective interests, the alienee of the feoffee could interfere with the beneficial

enjoyment of the alienee of the *cestui que use*. This was one of the several evils which occasioned the enactment of the statute of uses (27 Henry VIII).

It was the purpose of this statute to execute the use or to transfer the use into possession by providing that wherever one person was seized of an estate for the use of another, the *cestui que use* should be deemed to be seized and possessed of the same estate in the land that he had in the use, and should have power to protect his possession by action or entry for waste, disseizin, trespass, condition broken, or other similar wrong. Under these circumstances the estate could be dealt with at law, and the *cestui que use* was no longer compelled to appeal to the conscience of the feoffee or to call in aid the powers of a court of chancery. But in construing the statute the courts afterwards concluded that there were certain uses which the statute did not execute—for example, an estate to A to the use of B in trust for C. At law, it was held that the statute extinguished A's interest and transferred the legal estate to B, but did not affect the trust for C. Although B was bound in good conscience to give C the enjoyment of the estate, still at law C had no remedy, and he could proceed, as before the statute, only by subpœna in chancery to compel B to execute the trust. There were other non-executed uses which could not be enforced in a court of law; and the courts of chancery, for the purpose of compelling performance, took jurisdiction of the uses which were not executed by the statute, from which situation was evolved the modern doctrine of trusts. Pollock & Maitland's His. Eng. Law, Vol. 2, pp. 226, 236; Select Essays in Anglo-Am. Legal His., Vol. 1, p. 218; 2 Bl. Com., 328; Bispham's Prin. Eq., 84 *et seq.;* 1 Perry on Trusts, Chs. 1 & 10; 4 Kent's Com., 290; *McDonogh's Exs. v. Murdoch,* 15 Howard, 367, 14 L. Ed., 750.

From the foregoing discussion it is apparent that where land is held by a trustee for the benefit of another, the courts of chancery generally treat the *cestui que use* or *cestui que trust* as the beneficial owner of the land, and not the mere possessor of an equitable right. "Under the system now generally prevailing, the *cestui que trust* is regarded as the real owner of the property, the trustee being merely a depositary of the legal title. His is not a property right, but a legal duty, founded upon a personal confidence; his estate is not that which can be enjoyed, but a power that may be exercised. No person but the trustee, or one claiming under him, can set up his legal estate against the equitable estate of the *cestui que trust.*" 39 Cyc., 203.

If it be contended that the doctrine we have referred to applies to express trusts and not to those arising by implication of law, and that in the latter class entry or actual seizin is necessary to the inheritance, a sufficient answer may be found in the change brought about by amend-

ments to the canons of descent. The subject is clearly and fully discussed by *Justice Walker* in *Early v. Early,* 134 N. C., 258, in which he emphasizes the distinction between the actual or legal seizin formerly necessary to cast the descent and the right, title or interest in the inheritance which constitutes a sufficient seizin under the amended rules. Revised Statutes, ch. 38; Revised Code, ch. 38; C. S., ch. 29, sec. 1654 (12). In that case he said: "We must conclude, after carefully reading *Lawrence v. Pitt,* 46 N. C., 344, which was decided in 1854, that it was thought the then existing law as declared by the Court, which had its origin in the feudal system, and which was applied in that case, should be changed and brought more into harmony with modern conditions and requirements. It was manifestly in consequence of that decision that the amendments to the Revised Statutes of 1836 were made in the Revised Code of 1854, which amendments are as follows: "Rule 1 of chapter 38 of the Revised Statutes provides that 'Inheritance shall lineally descend to the issue of the person who died last, actually or legally seized, forever, but shall not lineally ascend, except as is hereinafter provided for'; while section 1 of chapter 38 of the Revised Code provides that 'When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rule: Rule 1. Every inheritance shall lineally descend forever to the issue of the person who dies last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided.'

"By the proviso to rule 6 of the Revised Statutes, where the person last seized left no issue, nor brother, nor sister, nor the issue of such, the inheritance vested for life only in the parents of the intestate, or either of them, or the survivor of them, while in the corresponding rule in the Revised Code and the present Code it vests in the father, if living, and if not, then in the mother, if living, in fee. But in order that the meaning of the Legislature, as expressed in section 1 of the Revised Code, might be made plain and unmistakable, it was enacted by rule 13 of chapter 38 that 'Every person in whom a seizin is required by any of the provisions of this chapter shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance.'

"We therefore see that the seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while the latter requires that there need be only a right to or interest in the inheritance, with or without actual possession or the present right of possession, in order to establish a stock sufficient as a source of descent."

The seizin of the common law was a seizin either in deed or in law, and, as suggested in *Early's case,* the principle of the ancient law of inheritance was that the stock of descent could be established only by seizin in deed—by the actual occupation of the land with intent to claim a freehold interest. As indicated, this principle of the common law was materially changed by the amendments we have cited. C. S., sec. 1654 (12). *Sears v. McBride,* 70 N. C., 152. It is in the light of these changes that *Lawrence v. Pitt,* 46 N. C., 344, *Thompson v. Thompson,* 46 N. C., 430, and similar cases should be considered. The decision in *Barrett v. Brewer,* 153 N. C., 547, is not inconsistent with this position, for it was there held that mere color of title in the absence of possession did not descend to the heir because the ancestor had no title and could avail himself of "color" only by actual possession.

At the time of her death, did Mrs. Tyndall have such right, title, or interest in the lot in question? The answer to the only issue submitted shows that the entire purchase price of the land was paid with her money. Her husband made the purchase and took title in his own name. This transaction created a resulting trust in favor of Mrs. Tyndall, such as arises by implication of law, and is founded upon the presumed intention of the parties. In *Beam v. Bridgers,* 108 N. C., 277, the Court said: "It is a well-settled principle that where, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, but the purchase-money is paid by another at the same time or previously, and as a part of one transaction, a trust results in favor of him who supplies the purchase-money. Adams Eq., 33; Malone on Real Property, 509. The principle has frequently been applied where land is purchased with funds arising from the separate estate of the wife (*Cunningham v. Bell,* 83 N. C., 328; *Lyon v. Akin,* 78 N. C., 258) or with funds which, by agreement of the husband, are to be treated as such separate estate. *Hackett v. Shuford,* 86 N. C., 144, and the cases cited." *Lyon v. Aiken, supra; Ross v. Hendrix,* 110 N. C., 403; *Brisco v. Norris,* 112 N. C., 671; *Ray v. Long,* 128 N. C., 90; *McWhirter v. McWhirter,* 155 N. C., 146.

When in such cases the relation of husband and wife exists, the husband holds the legal title, it has been said, as a mere naked form and as evidence of title in favor of his wife. 26 R. C. L., 1228. In our decisions the wife's interest has been defined as a "beneficial interest" or an "equitable estate"; and it has been held that such interest or estate makes her the "equitable owner" or the "absolute owner" of the property held in trust. *Pegues v. Pegues,* 40 N. C., 418; *Cunningham v. Bell,* 83 N. C., 328; *Brisco v. Norris, supra; Cobb v. Edwards,* 117 N. C., 245; *Houck v. Somers,* 118 N. C., 607.

For these reasons upon the record as now presented we must hold that Mrs. Tyndall's right, title, and interest in the lot descended to her children as tenants in common and that the defendant Louise should not be excluded from participation therein.

Also we think his Honor properly refused the prayer for instructions tendered by the plaintiffs. While parol evidence may be received to rebut a resulting trust (*Summers v. Moore,* 113 N. C., 403) our decisions hold that where a husband buys land with his wife's money and takes title in his own name a resulting trust arises in favor of the wife in the absence of an agreement to the contrary; and we find no evidence whatever of an agreement that the wife or the defendants or either of them should relinquish the beneficial ownership created by the trust. *Kirkpatrick v. Holmes,* 108 N. C., 206; *Ross v. Hendrix, supra; Ray v. Long, supra.*

While we do not approve the ruling that Mrs. Tyndall had only a right in equity, we concur in his Honor's conclusion that the plaintiffs and the defendant Louise are seized in fee of the land as tenants in common, each having a one-third undivided interest therein, subject to the curtesy of T. R. Tyndall as adjudged in the defendants' appeal. On the plaintiffs' appeal as thus modified the judgment is affirmed.

Modified and affirmed.

APPEAL OF T. R. TYNDALL.

ADAMS, J. His Honor adjudged that the defendant T. R. Tyndall has no interest in the land and is not entitled to an estate therein as tenant by the curtesy.

At common law the four requisites of a tenancy by the curtesy consummate were marriage, seizin of the wife, issue, and the death of the wife; and the wife's seizin must have been not a mere right or seizin in law, but actual possession or a seizin in deed. 2 Bl. Com., 127; *Gentry v. Wagstaff,* 14 N. C., 270; *Nixon v. Williams,* 95 N. C., 103. This principle prevailed with us before the adoption of the Revised Code (1 January, 1856), but since that time, as we have said in the plaintiffs' appeal, seizin in deed or actual possession is not essential to the devolution of estates. *Sears v. McBride,* 70 N. C., 153; *Norcum v. Savage,* 140 N. C., 473; *Early v. Early, supra.*

In the present case the four requisites of such tenancy concur, the wife's seizin being such as to cast the descent under the amended canons; and the defendants consequently have a life estate in the land as tenants by the curtesy. On the defendants' appeal the judgment is

Reversed.

S. P. HANCOCK AND GEORGE W. HUNTLEY, TRADING AS HANCOCK-HUNTLEY COMPANY, v. T. S. SOUTHGATE, G. D. POTTER, J. C. MALBON AND ELIAS ETHRIDGE, TRADING AS SOUTHGATE PACKING COMPANY.

(Filed 17 October, 1923.)

1. Evidence—Nonsuit—Trials—Questions for Jury—Partnership—Vendor and Purchaser—Instructions.

Defendant's motion as of nonsuit, upon the evidence introduced at the trial of the cause, is properly denied, though the evidence is circumstantial, if the plaintiff's evidence, taken collectively, is more than a scintilla tending to establish the plaintiff's demand; and upon conflicting evidence the issue is for the determination of the jury; and in this case *held* there was more than a scintilla of evidence tending to show the liability of an alleged partnership, for goods sold and delivered to it through one who purchased for himself, but in the name of the defendant partnership, denying liability. The court's instruction is approved.

2. Same—Judgments—Statutes.

Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. C. S., sec. 497 (1).

APPEAL by defendant T. S. Southgate from *Grady, J.*, at June Term, 1923, of CARTERET.

Civil action. The plaintiffs, who are partners, claim that they sold defendants, who are partners, trading as Southgate Packing Company, certain fertilizers, goods, supplies and merchandise from and during the period of January, 1920, to 27 April, 1921, totaling the sum of $3,044.70.

The plaintiffs further allege that G. D. Potter was general manager of the Southgate Packing Company at the time the fertilizer, etc., was sold.

The defendant G. D. Potter was served with summons but filed no answer. T. S. Southgate alone files an answer and denies that he is in any way liable to plaintiffs, and says that "Southgate Packing Company is an unincorporated entirety, owned exclusively by T. S. Southgate."

Hancock-Huntley Company, the plaintiffs, and Southgate Packing Company both did business in the town of Beaufort, N. C. The testimony of G. W. Huntley, one of the plaintiffs, was substantially as follows: He knew Southgate Packing Company only so far as Mr. Potter told him, and the stationery spoke for itself; that defendant G. D. Potter told him he was a member of Southgate Packing Company from its organization in 1920. He sold Southgate Packing Company, under

G. D. Potter, manager, during the spring of 1921, some forty (40) tons of fertilizer, several items of salt in lots of ten (10) bags each. Also bargained to sell a hay press to be used on Southgate farm at Sea Level. They owed the plaintiffs for salt, hay press, plow and fertilizer. That he loaded 44 bags of fertilizer on a barge in charge of L. W. Hassell to go to T. S. Southgate's farm at Sea Level. All of his dealings had been with Southgate Packing Company, and they owed plaintiffs $3,044.70, and no part had been paid. Potter told him to charge it to Southgate Packing Company, to be used on his contract. No one but Potter said anything to him about it. The orders for fertilizer were from Potter, or his bookkeeper. The various items of fertilizer were delivered by phone order of the manager of Southgate Packing Company and invoices mailed immediately each day covering delivery made to Southgate Packing Company, Beaufort. Knew Southgate Packing Company several years prior to 1920. Sold them fertilizer in 1917, 1918, 1919, and 1920. Prior to 1920, Southgate Packing Company had not, to his knowledge, furnished fertilizer to any farmers. All prior accounts with Southgate Packing Company, from 1917 to 1921, had been paid. Never before 1921 did plaintiffs have any contract to furnish fertilizer to Southgate Packing Company or Potter, or to other persons for them. The first deal of this kind — Potter proposed to give plaintiffs $1,000 cash and notes for two-thirds of the account, 60 and 90 days. Plaintiff made the note out "Southgate Packing Company, per ....," and then Potter said the fertilizer was for him personally. Plaintiffs charged $90 for a hay press, $15 for a plow, the hay press and plow to be tried out and if satisfactory paid for, and $2,939.70 for fertilizer—total claims, $3,044.70. Huntley produced duplicates of the original charges of fertilizer as delivered to Southgate Packing Company, originals were sent to Southgate Packing Company. He never had any personal transactions with Potter.

Several witnesses testified that they farmed and planted potatoes in 1921. Got the fertilizer from plaintiffs. Potter sent them to plaintiffs for the fertilizer. It was also in evidence that Southgate and Potter cultivated 56 acres in potatoes, and that Southgate Packing Company, through Potter, furnished the fertilizer.

L. W. Hassell, for plaintiffs, testified that he was at one time employed by Southgate Packing Company and that the firm was composed of Potter, Malbon and Ethridge. Mr. Potter was manager at this end. He worked under Potter. In 1921 he transferred fertilizer for Potter down to Southgate farm, four tons of which came out of plaintiff's store. Southgate plant was engaged in packing oysters and tomatoes. Did not know what, if any, interest Mr. Potter and other gentlemen had in the business. "All I ever heard was what I learned from the letter head." This was in substance plaintiff's testimony.

T. S. Southgate, one of the defendants, testified as follows: "I have never had a partner. I had Mr. Potter, Mr. Ethridge and Mr. Malbon direct the affairs of the company at Beaufort; they received a percentage. They had no authority to make debts for Southgate Packing Company. They received salary. For eleven years Southgate Packing Company has been engaged in packing oysters almost exclusively. In 1920 we bought some potatoes and undertook to sell them in order to give the factory something to do. I never at any time authorized Mr. Potter to make contracts for furnishing fertilizer; nor did I ever receive or accept any such contract, if made. Bought no fertilizer except 60 tons sent down by me from Norfolk. First I knew of this matter was in July, when they wrote and asked me if I was going to pay this bill and for hay press and plow. I at once told them I had not bought, or authorized to be bought, any fertilizer; so far as hay press and plow, that was Potter's own personal business. Had no contract with Pamlico Fertilizer Company in 1921, and in fact advised them I would not furnish any fertilizer before a bag was furnished of this in dispute. Identified letter. I dictated it. At top appears names of T. S. Southgate, G. D. Potter, J. C. Malbon, Elias Ethridge; that is a form of terminology used with Southgate Packing Company. Those men are my agents. They do not constitute Southgate Packing Company. Have registered my name in Raleigh. Planted potatoes in 1921. Mr. Potter directed operations, under name of Southgate Packing Company. Mr. Potter sold the potatoes, those that came from the 56 acres. I never at any time authorized Mr. Potter to buy any fertilizer from Hancock-Huntley Company."

The letter head referred to above is as follows:

T. S. SOUTHGATE G. D. POTTER J. C. MALBON
ELIAS ETHRIDGE

SOUTHGATE PACKING COMPANY

Packers

High-Grade Sea Foods and Vegetables

Manufacturers

Crushed Oyster Shells and Agricultural Lime

Norfolk, Virginia

Brands:	COVE OYSTERS
DOUBLE EAGLE	SHRIMP
POTTER	BEANS
BABY MARY	TOMATOES
	SWEET POTATOES

Factory: Beaufort, N. C.

August 5, 1921.

G. D. Potter, for the defendants, testified substantially as follows: Was in Beaufort in 1921. I bought fertilizer from Hancock-Huntley Company for my personal account without reference to Mr. Southgate. Told plaintiffs Southgate Packing Company had nothing to do with it. I was a salaried man with Southgate Packing Company. Had no interest in Southgate Packing Company except if I made a profit for him I got a per cent. Southgate is owner and proprietor of Southgate Packing Company. Farm and packing company are both owned by Southgate. Those gentlemen on that letter head had nothing to do with the business. I did sign contracts. (These contracts were certain contracts between Southgate Packing Company, of Norfolk, Va., by G. D. Potter, manager, and individuals who were furnished fertilizer to grow potatoes.) I sent these individuals to plaintiffs to get fertilizer for myself personally. Letter heads have been in use about ten years—used by Potter & Southgate. The credit was extended to me.

The following issues were submitted to the jury:

"1. At the time of the transaction referred to in the complaint, were T. S. Southgate, G. D. Potter, J. C. Malbon and Elias Ethridge co-partners in trade, doing business under the name of Southgate Packing Company? Answer: 'Yes.'

"2. If so, in what amount, if any, is Southgate Packing Company indebted to the plaintiffs? Answer: '$3,044.70.'

"3. If not, in what amount is defendant Potter indebted to the plaintiffs? Answer: '——.'"

C. R. Wheatley for plaintiffs.
Julius F. Duncan for defendant.

CLARKSON, J. The main assignments of errors by the defendant T. S. Southgate are: (1) refusal to nonsuit plaintiffs at close of plaintiffs' evidence; (2) refusal to nonsuit plaintiffs at close of all the evidence.

No summons has been served on J. C. Malbon and Elias Ethridge. The defendant G. D. Potter was served with summons, but filed no answer, and admits liability. The only question involved in this appeal is the liability of T. S. Southgate.

The evidence, taken in a light most favorable to plaintiffs, on the motion of nonsuit, at the close of all the evidence, was circumstantial. There were many circumstances pointing to the fact that T. S. Southgate was a partner in the business and that he obtained beneficial results from the transaction. These circumstances, standing alone, would not be sufficient, but taken all together, and the further fact that he obtained some benefit from the fertilizer, would, under the evidence in this case,

entitle the plaintiffs to have the matter submitted to the jury. From the facts and circumstances the jury *might* reasonably infer that the defendant Southgate was a partner. There was more than a scintilla of evidence of this fact. Where there is *any* evidence to support plaintiff's claim it is the duty of a judge to submit it to the jury, and the weight of such evidence is for the jury to determine. The court below was correct in refusing to nonsuit at the close of all the evidence.

Stacy, J., in *Harper v. Supply Co.*, 184 N. C., 205, says: "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 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," citing C. S., 567; *Blackman v. Woodmen of World*, 184 N. C., 75; *S. v. Killian*, 173 N. C., 792.

In *Williams v. Mfg. Co.*, 177 N. C., 515, *Walker, J.*, says: "There was evidence given for the defendant which conflicted with that introduced by the plaintiff, but the jury alone could settle this conflict; and while the plaintiff did not make out a strong case, but rather a weak one, when we review all of the facts in concourse, we cannot withdraw the case from the jury, who are the triers of the facts, if there is any evidence reasonably tending to support the plaintiff's allegations," citing *Wittkowsky v. Wasson*, 71 N. C., 451; *Byrd v. Express Co.*, 139 N. C., 273, and cases cited.

The defendant Southgate complains of the charge of the court below in his other exceptions. We have examined the record carefully and can find no reversible error. The whole matter was left to the jury—the burden of the greater weight of the evidence put on plaintiffs by the court below—and the jury found the issues for the plaintiffs. The jury is responsible for the findings of fact, the court can only declare the law. We can find no error in law.

The judgment seems to be drawn in conformity with C. S., sec. 497, subsec. 1, which is as follows: "If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served."

The judgment of the court below is affirmed.

No error.

STUART TURLINGTON, ADMR. OF B. C. LUCAS, DECEASED, v. PHEBE LUCAS.

(Filed 17 October, 1923.)

1. Estates—Husband and Wife—Entireties—Right of Survivorship.

The right of survivorship exists between husband and wife in devises or conveyances of land to them in entirety, which, during the continuance of this estate, is not subject to execution for the debts of either, and this estate may not be severed without the conveyance of the sole title by the one to the other, and except by a divorce *a vinculo*.

2. Same—Personal Property—Constitutional Law.

The common-law rule giving to the husband the actual or potential ownership of the separate *choses in action* belonging to his wife by reducing them into possession is now changed by the Constitution of 1868, State Const., Art. X, sec. 6, giving to the wife the sole ownership of her separate estate.

3. Same.

The right of survivorship recognized as now existing between husband and wife as to lands held by them in entirety does not apply to personal property so held.

4. Same—Mortgages—Executors and Administrators.

Where a husband and wife convey to a third person lands held by them in entirety and receive bonds from the purchasers, secured by a mortgage thereon for part payment of the purchase price, the bonds so received are regarded and dealt with as personal property to which the *jus accrescendi* is inapplicable; and where the husband then dies, one-half the value of such bonds goes to his administrator, or personal representative, and the other half thereof is the property of his wife.

5. Same—Limitation of Actions.

The statute of limitations will not run against the estate of either the husband or wife in lands held by them in entirety, unless it is a bar to them both.

APPEAL by both parties from *Horton, J.*, at May Term, 1923, of HARNETT.

Civil action. Submission of controversy without action, and the statement of facts are as follows:

"1. The plaintiff is the duly qualified and acting administrator of B. C. Lucas, deceased, and the defendant, Phebe Lucas, is the wife of said deceased, both plaintiff and defendant being residents of Harnett County, North Carolina.

"2. The said B. C. Lucas died intestate, a resident of Harnett County, North Carolina, on 21 February, 1923, leaving him surviving six children and a widow, who is the defendant in this action.

"3. That on or about 22 October, 1919, the plaintiff's intestate and his wife, the defendant, joining in the conveyance, sold and conveyed three tracts of land, containing in the aggregate 72.1 acres, to C. E. Strickland and E. B. Durham, and as part of the purchase price accepted fourteen bonds, in the sum of $500 each, secured by a deed of trust on the property, three of said bonds having been heretofore paid, leaving eleven of said bonds, aggregating $5,500 and interest, due serially on 1 January, 1924, to and including 1 January, 1934.

"4. That the aforesaid bonds and deed of trust were executed by C. E. Strickland and E. B. Durham to the plaintiff's intestate, B. C. Lucas, and wife, Phebe Lucas, said deed of trust being registered in the office of the Register of Deeds for Harnett County, in Book 117, page 364.

"5. That the plaintiff insists that there can be no entirety in personal property, and therefore the aforesaid bonds secured by said deed of trust should go into his hands, as administrator of the B. C. Lucas estate, and be distributed by him, share and share alike, among the heirs at law of his intestate, the personal estate being otherwise sufficient to pay debts, widow's year's support, etc.

"6. Defendant insists that tenancy by entirety in personal property exists under the laws of North Carolina, and that therefore she is lawfully entitled to all of said bonds and deed of trust.

"7. It is agreed that in the event plaintiff is successful in maintaining his position then he, as administrator, is to pay the court costs of this controversy; otherwise the same is to be paid by the defendant."

The court rendered the following judgment:

"It is thereupon ordered, considered and adjudged that the estate of entirety in personal property does not obtain in North Carolina, and that the plaintiff is entitled to a one-half interest in and to the notes in controversy in this action as a tenant in common with the defendant, and that the defendant is entitled to a one-half interest in said property."

From the judgment both plaintiff and defendant excepted and appealed to this Court.

L. L. Levinson for plaintiff.
W. P. Byrd for defendant.

CLARKSON, J. The sole question raised by the controversy without action is: Does an estate by the entireties with the right of survivorship in personal property obtain in North Carolina?

This is the first time that this question has been presented to this Court for decision. There have been *obiter dicta* but no direct authority

that there can be no survivorship in personalty. Where a bond is made to a husband and wife, on the death of either does the entire interest in the bond go to the survivor? We are of the opinion that it does not and the parties hold the interest in common, share and share alike.

It is well settled in this State that when land is conveyed or devised to a husband and wife, nothing else appearing, they hold by entirety, and, on the death of either, the survivor gets the entire estate in the land. This is applicable to conveyance or devise "during their natural lives." The most recent authority in this State on the subject is by *Walker, J.*, in *Moore v. Trust Co.*, 178 N. C., 123, which is as follows: "The characteristics of the anomalous estate, which is denominated as one by the entirety, are well understood. Blackstone (Book 2, p. 182) defines this estate by these words: 'If an estate in fee be given to a man and his wife they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law, they cannot take the estate by moities, but both are seized of the entirety *per tout et non per my*, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor.' Mordecai's Law Lectures (1907), 559. This Court has held that the husband is entitled to the income, increase or usufruct of the property. *Long v. Barnes*, 87 N. C., 329; *Simonton v. Cornelius*, 98 N. C., 437; *Bruce v. Nicholson*, 109 N. C., 204; *Greenville v. Gornto*, 161 N. C., 341; *West v. R. R.*, 140 N. C., 620. The estate was predicated upon the fact that in law the husband and wife, though twain, are regarded as one—there being, in other words, a unity of person, which has been called the fifth unity of this estate, the others being of time, title, interest and possession, which also belonged to an estate by joint tenancy. When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entirety, and upon the death of either, the other takes the whole by right of survivorship. 2 Bl., 182; *Topping v. Sadler*, 50 N. C., 357; Freeman on Cotenancy and Partition, sec. 64, and *Harrison v. Ray*, 108 N. C., 215, and the cases *supra*, beginning with *Long v. Barnes*. The statute (1784, ch. 204, sec. 5; Revisal of 1905, sec. 1579) abolishing the right of survivorship in joint tenancies does not apply to this estate. *Motley v. Whitemore*, 19 N. C., 537; *Todd v. Zachary*, 45 N. C., 286; *Woodford v. Higly*, 60 N. C., 234."

The decision in the above case goes thoroughly into a discussion of this peculiar estate, with a concurring opinion by *Clark, C. J. Allen, J.*, in *Freeman v. Belfer*, 173 N. C., 581, and *Hoke, J.*, in *McKinnon v. Caulk*, 167 N. C., 411, have written interestingly on this subject in sus-

taining the views above expressed. See, also, *Odum v. Russell,* 179 N. C., 6; *Jernigan v. Evans,* 180 N. C., 89; *Roberson v. Griffin,* 185 N. C., 38.

This peculiar estate has come down to us from the common law, and we deduce from the authorities in this State:

That if an estate be given to A, B, C, and A and B are husband and wife, they being one person, will take a half interest, and C will take the other half.

That neither husband nor wife can dispose of their interest, or any part thereof, without the assent of the other. The deed of either without the joinder of the other is void. Nor could a partition of the estate be had.

That neither can such land be sold under execution or order of court, nor can the interest of either husband or wife be thus sold.

That one cannot be barred by the statute of limitations unless the other be barred also.

That this rule applies to devises to man and wife, contracts to convey land to man and wife, and likewise applies to a gift or devise to a man and his wife "during their natural lives."

That the interest and control is in the husband during the existence of the joint estate, or the joint lives of the two parties.

Neither can convey during their joint lives so as to bind the other or defeat the right of survivor to the whole estate. Subject to the limitation above named, the husband has the same rights in it which are incident to his own property. By the overwhelming weight of authority the husband has the right to lease the property so conveyed to him and his wife, which lease will be good against the wife during coverture, and will fail only in the event of her surviving him.

That the unity or entirety of the estate may be destroyed or dissolved by the joint acts of the parties, and the estate which was entire turned into a tenancy in common or into one in severalty, each taking separately a share thereof to be determined by them.

A divorce *a mensa et thoro* does not destroy the unity or entirety, but a divorce *a vinculo* does, as it destroys the unity and will convert the estate by entirety into one in common.

That a conveyance of land in fee to husband and wife, they take by entireties with right of survivorship, and during their lives the lands are not subject to the debts of either, except with consent of both properly given.

That the interest of neither becomes subject to the lien, or any proceeding to sell for the satisfaction of any judgment during their joint lives; nor can the interest of either be reached by the trustee in bankruptcy during their joint lives.

Mr. Mordecai, in his Law Lectures, Vol. 1 (2d Ed.), p. 608, says: "The unity of man and wife, to the extent of being but one person in law, has been severed to a considerable extent by the Constitution of 1868; for the husband can now convey directly to his wife, and thereby pass the legal title. And by complying with the provisions of the statute, the wife may convey directly to the husband. But notwithstanding this practical severance of their unity, the law as laid down by Blackstone remains the law in this State to this day. In this instance the maxim, *cessante ratione,* etc., seems to sleep."

This anomaly does not prevail in reference to personal property. *Clark, C. J.,* in *Gooch v. Bank,* 176 N. C., 216, says: "The estate originated in feudal reasons, that when the wife died the land should go to the husband by survivorship; *but there was no such reason as to the personal property of the wife* (italics ours), which became absolutely the property of the husband on marriage. There was no estate by entireties in personalty in England, and it has been abolished as to realty by the Married Woman's Act of 1882. *Thornley v. Thornley,* 2 Ch. Div. (1893), 229. The estate is an exception to the general rule, that where there is a conveyance or devise to two, they should hold as tenants in common, and gave to the husband survivorship in the wife's realty, of which he had the income only, and not the absolute property, as he had of her personalty. . . . In this State we have no decision holding that there is an estate by entirety in personalty, and there is no reason in this case, and at this late day, to extend it to personalty, for the point does not arise on the facts in this case, and the judge below made no ruling upon it. The objection urged to the estate by entireties is not only that it is an anomaly in our judicial system, without any statute recognizing it, and that it is contrary to our policy as to property rights of women, as stated in the Constitution, but that it abstracts the property embraced in it from liability to debt during the joint lives, and that during all this time the husband enjoys the income from the wife's half of the property, as well as from his own half. Whatever force may be given to these objections, the matter may well be left to the law-making department of the government. This Court has more than once suggested the abolition of the estate by entireties to the Legislature. *Bynum v. Wicker,* 141 N. C., 96; *Finch v. Cecil,* 170 N. C., 74, 75."

Clark, C. J., in *Moore v. Trust Co.,* 178 N. C., 128, says: "I concur in all that is so clearly and convincingly stated in the opinion of *Walker, J.,* and for the additional reason that when the land was converted into money the estate by entireties ceased, for in England, whence was derived this anomalous estate, *there was never any estate by entireties in personalty.*" (Italics ours.)

The authorities in other States are conflicting. The text writers differ. Schouler's Domestic Relation (3d Ed.), latter part of section 193, says: "And the drift of modern policy, we may add, is unfavorable to extending to personalty this rule of survivorship, applicable originally to real estate."

"No Tenancy by the Entirety in Personal Estate.—We shall see, in another chapter, that if real estate is conveyed by deed to a husband and his wife, this creates in them a peculiar kind of tenancy, known as tenancy by the entirety; the consequence of which is, that during the coverture neither can alien the land to the prejudice of the rights of the other, and on the dissolution of the coverture by the death of one of them, the survivor takes the whole. Nothing of this sort is known in respect of personal property. Since the wife cannot own personal property in her possession in her own right, but whatever title she has to such property vests in the husband, if a chattel is given or sold to husband and wife jointly, the title passes wholly to him." Bishop on the Law of Married Women, Vol. 1, sec. 211.

"It is generally considered that there may be a right of survivorship in choses in action held in the name of husband and wife, but the courts are not wholly agreed as to this." 30 C. J., p. 574, sec. 107. In the same section we read: "Other courts, however, hold that estates in entirety may exist only in lands and not in personalty of any kind," citing numerous authorities under note 28.

There are a great many States that now hold that estates by entirety in personal property with the right of survivorship still exists. *In re Sloan,* 254 Pa., 346.

In re Klenke's Estate, 210 Pa., 572, citing *Bramberry Appeals,* 156 Pa., 628. In this latter case the original deed was made to Bramberry and wife, and they sold the land, and the vendees gave a bond and mortgage to secure the purchase price to both.

In *Den v. Hardenberg* (5 Halsted, 42 N. J.), reported in 18 Am. Dec., p. 371 (this was a deed, to husband and wife, of land) the whole matter is exhaustively treated in note to this case, and the position of Bishop, *supra,* criticised. *Boland v. McKowen,* 189 Mass., 563; *Phelps v. Simons,* 159 Mass., 415. See, also, 13 R. C. L., sec. 128, which quotes Bishop, and says: "There is authority that supports this view. This does not seem, however, to be in accord with the better authorities, and there seems to be no valid reason why such a tenancy may not exist as regards personal property."

A great many States hold that estates by entireties in personal property with the right of survivorship do not exist.

It is, however, equally well settled in Michigan that there can be no estate by the entirety in personal property. *In re Berry,* 247 Fed., 700,

stating rule obtaining in Michigan, no survivorship as to personal property. The same rule applies in New York. *In re McKelway,* 221 N. Y., 15, citing *In re Albrecht,* 136 N. Y., 91. See *Whittlesey v. Fuller,* 11 Conn., 340; *Sergeant v. Steinberger,* 15 Am. Dec., 553; 2 Ohio, 305; *Wilson v. Fleming,* 13 Ohio, 68; *Hoffman v. Stigers,* 28 Iowa, 307.

We could write *ad infinitum* on this ancient interesting legal heirloom that has come down to us from the common law. At common law, when a man married a woman her personal property and choses in action belonged to the husband; he could reduce them into possession.

"So it is also of chattels personal (or choses) in action, as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery they are absolutely and entirely his own, and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they shall continue *choses in action,* they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them. And so, if an astray comes into the wife's franchise, and the husband seizes it, it is absolutely his property; but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs; for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same in case the wife survives the husband; but in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action;* for he shall have the *chattel real* by survivorship, but not the chose in action, except in the case of arrears for rent due to the wife before her coverture, which, in case of her death, are given to the husband by statute, 32 Hen. VIII, ch. 37. And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint tenancy with his wife; wherefore the law will not wrest it out of his hands and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all during the coverture; and the only method he had to gain possession of it was by suing in his wife's right; but as after her death he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator, and may, in that capacity, recover such things in

action as become due to her before or during the coverture." 2 Blackstone's Com. (Lewis Ed.), Vol. 2, sec. 434.

So, at common law, if a bond was made, as in the instant case, to B. C. Lucas and wife, Phebe Lucas, an estate by entirety, with right of survivorship, would not exist. The wife's interest in the choses in action would belong to the husband at common law, and he had a right to reduce it into possession, and all the personal estate owned by the wife at any time during the coverture became actually or potentially the absolute property of the husband. This is changed by the Constitution of 1868.

"The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." State Const., Art. X, sec. 6.

At common law, where real and personal property was made to husband and wife, there was survivorship in one and not in the other. We have stated the reasons for this difference.

The principles of justice should always prevail in the adjustment of the rights of parties. This is in accord with the spirit of the present age. Where there is no evidence that there was an intention of a gift, on which many of the decisions are based, the fundamental of equal rights should prevail, and a division of equal shares adjudged. It was this idea of natural justice, following the common law as we interpret it, in the *dicta supra* of *Chief Justice Clark,* that there was no survivorship in personal property, and each took share and share alike. The better reason, we believe, is with the opinion as expressed by the *Chief Justice.* We adhere to the position heretofore taken by the Court.

B. C. Lucas and wife, Phebe Lucas, each had a half interest in the bonds, and on the death of B. C. Lucas his administrator, the plaintiff, took a half interest in the bonds, and the other half interest belonged to Phebe Lucas, the defendant.

The judgment of the court was in accordance with law.

Affirmed.

LOUISA RICHARDSON v. CLARKE EGERTON.

(Filed 24 October, 1923.)

1. Bastardy—Civil Actions.

Proceedings in bastardy for an allowance to be made to the woman are civil and not criminal, for the enforcement of police regulations, and C. S., sec. 273, raising the jurisdiction of the justice of the peace to an amount not exceeding two hundred dollars, is not contrary to the provisions of our Constitution, Art. IV, sec. 27.

2. Bastardy — Courts — Justices of the Peace — Jurisdiction — Appeal—Agreement—Questions of Law—Judgments.

Where, on appeal from an award made to the woman in bastardy proceedings, the counsel for both parties have waived a jury trial and agreed that the Superior Court judge should pass upon the questions of law involved, it is error for the judge, under the terms of the agreement, to increase the allowance awarded by the justice of the peace to the woman, and upon his affirmance of the law applicable, the amount awarded by the justice is the amount of the judgment to be awarded in the Superior Court.

CIVIL ACTION, tried before *Cranmer, J.*, at February Term, 1923, of FRANKLIN.

Appeal by defendant.

This was a bastardy proceeding, commenced before a justice of the peace, and from a judgment of the justice of the peace, in favor of the plaintiff, in the sum of $125 and costs, the defendant appealed to the Superior Court.

A jury trial was waived, by consent, and the question of law was left to the decision of the court below. The court gave judgment in the sum of $200 in favor of the plaintiff. The defendant excepted to the judgment, and assigned as errors:

1. That the judgment is contrary to law and unconstitutional; that the action was in tort, and the justice of the peace did not have original and exclusive jurisdiction of an amount in excess of $50.

2. That the court erred in increasing the allowance to $200.

William Y. Bickett and W. H. Yarborough for plaintiff.

William H. Ruffin and Thomas W. Ruffin for defendant.

CLARKSON, J. The Constitution of North Carolina, Art. IV, sec. 27, is as follows: "The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties

where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature, the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice he shall make a record of the proceedings and file the same with the clerk of the Superior Court for his county.

"When the issue of paternity is found against the putative father, or when he admits the paternity, the judge or justice shall make allowance to the woman not exceeding the sum of two hundred dollars, to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed by law; and in default of such payment he shall be committed to prison." C. S., ch. 6, sec. 273; Public Laws 1921, ch. 109.

The allowance to the woman was increased from not exceeding the sum of fifty dollars to not exceeding two hundred dollars by chapter 109, Public Laws 1921.

The question presented: Is the allowance of over fifty dollars and not exceeding two hundred dollars constitutional? We think it is.

This Court has decided that bastardy proceedings are civil and not criminal in their nature, and are intended merely for the enforcement of a police regulation. *S. v. Addington,* 143 N. C., 685; *S. v. Liles,* 134 N. C., 735; *S. v. Edwards,* 110 N. C., 511. In the *Liles case, supra,* the matter is fully discussed and authorities cited.

In *Duckworth v. Mull,* 143 N. C., 461, it was held that the clause in the Constitution which provided that "the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars," and the statute giving jurisdiction to justices of the peace in like terms, operates to confer upon said justices concurrent jurisdiction with that of the Superior Court of all actions of tort wherein the amount demanded in good faith for plaintiff's injury did not exceed the sum of fifty dollars, the Court in that case construing the words, "property in controversy," as meaning the "value of the injury complained of and involved in the litigation." And the opinion further decides that where a plaintiff, in good faith, states or limits his demand in actions of that character at fifty dollars or less, the justice has such concurrent juris-

diction, citing with approval *Malloy v. Fayetteville,* 122 N. C., 480; *Watson v. Farmer,* 141 N. C., 452. See, also, *Houser v. Bonsal,* 149 N. C., 51.

The first exception cannot be sustained, for the reasons given.

We think the second exception is well taken, that "The court erred in increasing the allowance to $200." The defendant appealed to the Superior Court, where the matter shall be heard anew. The usual technical language *de novo.*

When the cause came on for hearing, instead of being heard anew the record in the cause shows that the counsel for both plaintiff and defendant agreed that "the case was submitted to his Honor on questions of law and a jury trial waived." We think the language of the agreement would indicate that the "questions of law" were submitted for the court's decision, and the judgment of the justice of the peace as to the allowance would be the judgment of the Superior Court. The increase over $125 was evidently an inadvertence.

We think this is the better interpretation of the agreement. The judgment of the court is reduced to $125 and costs, as rendered originally by the justice of the peace.

Modified and affirmed.

DILL-CRAMER-TRUITT CORPORATION v. G. D. B. REYNOLDS ET AL.

(Filed 24 October, 1923.)

Deeds and Conveyances—Contracts—Timber Deeds—Extension Period—Registration—Notice.

A contract for cutting and removing timber growing upon lands given by the owner, with privilege of extension thereof upon certain conditions, when registered, is notice to subsequent purchasers of the title of the conditions upon which the grantee or optionee of the extension period had acquired the right, and upon his performing them, according to the terms of the instrument, it is not required that he register the instrument under which he has extended the original term as against a subsequent purchaser of the title.

APPEAL by plaintiff from *Calvert, J.,* at April Term, 1923, of ONSLOW.

Civil action to enforce specifically extension provisions contained in a timber deed authorizing and conveying the right to cut timber for a given number of years, with the right of extension, etc. A jury trial was waived, and, upon the facts found by his Honor, by consent, acting as judge and jury, judgment was entered in favor of the defendants. Plaintiff appealed.

I. M. Bailey and McLean, Varser, McLean & Stacy for plaintiff.
H. F. Seawell for defendants.

STACY, J. The essential facts of this case are as follows:

1. On 9 August, 1905, Elijah Hardison and others conveyed to Jesse Lukens, by deed, in proper form and duly registered, a quantity of timber, situate in Onslow County, together with certain timber rights and privileges, as contained in the following pertinent provisions of said deed:

"And the said parties of the first part hereby grant and assure unto the said party of the second part, his heirs, executors, administrators and assigns, a term of ten years from this date, subject to the right of extension, hereinafter provided for, within which to cut and remove the timber conveyed. . . .

"And the parties of the first part hereby contract and agree to extend the time within which the party of the second part, his heirs, executors, administrators and assigns, shall have to cut and remove the said timber from the said lands after the expiration of the term hereinbefore specified for removal thereof from year to year for a period of ten years, said extension to be yearly upon the request of the party of the second part, its successors and assigns; the party of the second part, its successors and assigns to pay the parties of the first part the sum of $72 upon each yearly extension of said time."

2. Thereafter, on 28 February, 1907, Jesse Lukens and wife, for value, conveyed all their rights under this deed to the plaintiff, which conveyance was duly registered 19 March, 1907.

3. Subsequent to the execution of the aforementioned deed from Hardison to Lukens, M. L. Parker acquired the fee-simple title to the land on which this timber stands, without any reservation as to the timber or timber rights appearing in his deed, and this deed was duly registered 2 August, 1916.

4. Prior to 9 August, 1915 (the expiration of the first term of ten years given in the Hardison-Lukens deed), the plaintiff, being then the owner of the timber as grantee of Lukens, paid to the then owners of the land $72 for one year's extension to cut said timber, took a receipt therefor, and had the same registered. And, again, prior to 9 August, 1916 (the expiration of the first year's extension), plaintiff paid to the then owners of the land $216 for three years extension to cut said timber, took a receipt therefor, and had the same registered.

5. Prior to 9 August, 1919 (the expiration of the fourth year's extension), plaintiff paid to M. L. Parker and J. C. Parker, the then owners of the land (each owning separate portions as individuals), the sum of $216, the price of three years extension under the Hardison-Lukens

deed, took a receipt therefor in due form, but the same was not registered, as was the case with the two former receipts.

6. Thereafter, on 19 November, 1920, the defendants, G. D. B. Reynolds, Mike Parker, and Arnold Parker, purchased in fee simple the land covered by the Hardison-Lukens timber deed, except a small portion thereof not material to the present inquiry.

7. Prior to 9 August, 1922 (the expiration of the seventh year's extension), plaintiff tendered to Reynolds, Mike Parker, and Arnold Parker, the then owners of the land, $216, the price of the remaining three years extension under the Hardison-Lukens deed, which tender was refused.

8. The plaintiff has cut none of the timber covered by the conveyance mentioned in the present record.

9. It further appears as a fact that G. D. B. Reynolds, Mike Parker, and Arnold Parker had no actual notice of the unregistered extension receipt at the time they acquired title to the property, 19 November, 1920.

Upon the foregoing facts, the court concluded that, inasmuch as the plaintiff had failed to register the receipt for $216, paid immediately prior to 9 August, 1919, and given for three years extension from that date, the plaintiff was not entitled to the relief sought, and not entitled to the last three years extension under the Hardison-Lukens deed, beginning 9 August, 1922, and running to 9 August, 1925. Hence, the question squarely presented by his Honor's ruling is whether or not the third extension receipt, above mentioned, should have been registered in order to be effectual as against the defendants, the subsequent purchasers of the fee-simple title to the land, and whose deed was duly registered in the proper county on 4 February, 1921. The plaintiff holds the negative, the defendants the affirmative, of this proposition, and the decision of the case, it is agreed, depends wholly upon the answer to be given.

The defendants contend that the stipulation in the Hardison-Lukens deed for the extension of time within which to cut the timber is an option, or unilateral executory contract to convey land (standing timber being real estate), subject to be converted into a bilateral executed contract only upon compliance by the optionee with the terms stated therein; that upon the exercise of this option a new estate is created out of the estate of the then fee-simple owners of the land, who are entitled to the extension money; that the conveyance of such an estate is subject to the statute of frauds and the registration laws of North Carolina; and that, even if the defendants had had notice of the receipt given to the plaintiff, 9 August, 1919, no notice other than actual registration of said receipt in the proper county would be sufficient to pass the estate as against the registered deed of the defendants. For this position the

defendants rely chiefly upon the following authorities: *Timber Co. v. Wells,* 171 N. C., 262; *Ward v. Albertson,* 165 N. C., 218; *Lumber Co. v. Whitley,* 163 N. C., 47; *Williams v. Lumber Co.,* 174 N. C., 230; *Timber Co. v. Bryan,* 171 N. C., 265; *Morton v. Lumber Co.,* 178 N. C., 166; *Lumber Co. v. Atkinson,* 234 Fed., 432; *Clark v. Guest,* 54 Ohio St., 298.

The plaintiff, on the other hand, contends that, even if the extension clause in the Hardison-Lukens deed be an option or unilateral contract to convey land, compliance with its terms converted said option into an executed bilateral contract, whereby mutual rights and obligations were created, and immediately vested in the plaintiff the right to exercise the privileges and enjoy the property, conveyed by the original deed, for and during the period covered by the extension paid for. Plaintiff further contends that the extension clause in question is self-executing and complete within itself and does not contemplate or require the execution of any further assurance of title when the extension money is paid. For this position plaintiff cites for its chief reliance the following decisions: *Lumber Co. v. Corey,* 140 N. C., 462; *Williams v. Lumber Co.,* 174 N. C., 229; *Bateman v. Lumber Co.,* 154 N. C., 248; *Ward v. Albertson,* 165 N. C., 218; *Bangert v. Lumber Co.,* 169 N. C., 628; *Taylor v. Munger,* 169 N. C., 727; *Hardy v. Ward,* 150 N. C., 385.

The court below apparently took the defendants' view of the matter and held that the extension clause in the Hardison-Lukens deed conferred no rights or interests in and to the timber conveyed, beyond the original period of ten years, unless the extension payments were made in advance and a receipt or deed taken therefor and registered prior to the acquisition of any interest in the land by a subsequent purchaser.

We think there was error in holding that it was necessary to register the extension receipts. The source of plaintiff's title is the Hardison-Lukens deed, and this was registered in 1905. The original consideration for that deed gave the grantee and his assigns the right to cut the timber for a term of ten years, and also the right to extend that term from year to year for an additional period of ten years upon the yearly *request* and *payment* of the stipulated annual extension price. *Bangert v. Lumber Co.,* 169 N. C., 628. Defendants bought with full notice of this deed.

The cause will be remanded, to the end that judgment may be entered for the plaintiff. *Thomason v. Bescher,* 176 N. C., 622; *Blalock v. Hodges,* 171 N. C., 134.

Reversed.

BANK OF VARINA v. J. L. SHERRON.

(Filed 24 October, 1923.)

1. Bills and Notes—Negotiable Instruments—Fraud—Burden of Proof—Statutes.

Where the maker of a note alleges and offers evidence tending to show that it had been obtained by fraud, upon the holder, in his action to recover thereon, is cast the burden of showing that he had acquired it *bona fide*, for value, and without notice. C. S., sec. 3040.

2. Same—Evidence—Appeal and Error.

Where fraud in the procurement of a note given for shares of stock in a corporation is alleged in an action thereon, by an endorsee, claiming to be a *bona fide* holder in due course, etc., it is competent for the defendant to show by his evidence that the stock salesman representing the corporation had induced him to make the note by misrepresentations of the company's solvency, and that he was solicited in violation of the "Blue-Sky Law" (C. S., sec. 335), and the endorsee's connection with the corporation and his evident previous knowledge of the fraud alleged to have been perpetrated; and, also, that the stock salesman had made similar misrepresentations to other purchasers of the stock under the same conditions.

STACY, J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1923, of WAKE.

This is an action to recover upon an alleged promissory note of the defendant for $2,500, dated 18 November, 1919, payable to the defendant himself twelve months after date. The defendant denied he had executed said note or had endorsed it, and denied that the plaintiff had purchased it for full value before maturity and was the owner of the same. He also denied that he had made payments upon it or was indebted thereon to plaintiff as alleged. He alleged that the said paper-writing was fraudulent and void and was without consideration, and denied that the plaintiff was a *bona fide* owner and holder for full value and without notice. He alleged that certain agents of the Cumberland Railway and Power Company, in November, 1919, came to his home, near Cardenas, N. C., and solicited him to purchase certain stock and bonds of said company, and, in connection therewith, made to him many false and fraudulent representations, specifically set out in the answer, representing that said company was a strong corporation, abundantly solvent, and in prosperous financial condition, all of which was false; and that it owned certain specific properties which it did not own, and that its bonds were extremely valuable, which was not true; that the said company was worth a million dollars, etc.; that the said

agents of the Cumberland Railway professed to read over to him a paper utterly different from the alleged note, and by their false representations obtained his signature to a paper-writing totally different from the alleged note, and which said paper-writing they read falsely to him as not maturing until forty years after date, and being payable to the Cumberland Railway and Power Company; that the defendant could not read or write, and relied upon the representations made to him by said agents; that the same were material, false, and calculated and intended to deceive him, and did deceive him, and that the transaction was fraudulent and void. He further alleged that the paper-writing or note was procured contrary to and in violation of the laws of North Carolina; that it came within the provisions of C. S., 6367, and chapter 156, Public Laws 1913, and chapter 121, Public Laws 1919, known as the "Blue-Sky Law," and that there was no contract in writing executed containing the clause required by said statutes. He alleged that neither the name of the Cumberland Railway and Power Company nor of the said agents appeared in the said pretended note, as required by law, and that the said writing was fraudulent and void and contrary to the laws of North Carolina, and part of an illegal and forbidden transaction. He further alleged that the plaintiff had knowledge of the fraudulent character of the transaction of the Cumberland Railway and Power Company, and that the defendant had, prior to plaintiff's acquisition of the paper-writing in controversy, notified the plaintiff that the defendant disputed the validity of the same and the grounds thereof. The further and fuller allegations of the defendant appear in the answer, as set forth in pages 4-12 of the record.

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

Pou, Bailey & Pou for plaintiff.
R. N. Simms for defendant.

CLARK, C. J. The defense set up by the defendant is that the note sued on was procured by false and fraudulent representation and by disregard of the requirements of the "Blue-Sky Law," and the defendant offered evidence to show that the plaintiff bank in this case acquired about the same time $15,000 or $20,000 of similar paper held by the Cumberland Railway and Power Company, and that it had knowledge of the defects alleged.

There are numerous other exceptions assigned as error, but it is unnecessary to do more than to mention the following evidence, which was excluded and its exclusion excepted to by the defendant, which was

offered to show knowledge on the part of the bank, and especially that the bank had acquired a note executed by A. W. Thompson to the Cumberland Railway and Power Company; that said Thompson was, and had been for many years, one of the directors of plaintiff bank, and offered evidence to show that said Thompson acquainted the cashier of the bank with the said fraudulent practices by which this paper in question was procured, and that after some controversy the bank returned said paper to Thompson. It is true that the cashier testified that Thompson paid the paper, but there was also evidence offered that he had acquainted the cashier with the defects, and that the paper was returned to him by the cashier canceled and without payment.

C. S., 3040, provides: "When it is shown that the title of any person who had negotiated the instrument was defective, the burden is on the holder that he, or some person under whom he claims, acquired the title from the holder in due course." There are numerous cases which hold: "Upon proof of fraud or illegality being offered, burden is shifted to holder, and he must show that he received the instrument *bona fide* and for value." *Discount Co. v. Baker,* 176 N. C., 546; *Moon v. Simpson,* 170 N. C., 335; *Wilson v. Lewis, ib.,* 47; *Smathers v. Hotel Co.,* 168 N. C., 69; *Bank v. Drug Co.,* 166 N. C., 99; *Bank v. Branson,* 165 N. C., 344; *Trust Co. v. Whitehead, ib.,* 74; *Trust Co. v. Ellen,* 163 N. C., 45; *Bank v. Exum, ib.,* 199; *Hardy v. Mitchell,* 161 N. C., 351; *S. c.,* 156 N. C., 76; *Myers v. Petty,* 153 N. C., 462; and many others. Where evidence establishes the title of party who negotiated a check to defendant was defective, burden is upon the defendant claiming to be *bona fide* purchaser, for value and without notice, to make good claim by greater weight of the evidence. *Mfg. Co. v. Summers,* 143 N. C., 103. Also, where the complaint in an action by endorsee of instrument does not state that he is holder in due course, and defendant alleges that the execution of instrument was procured by fraud of payee, burden is on endorsee to show that he is the holder in due course. *Campbell v. Patton,* 113 N. C., 481.

The evidence offered by defendant for the above purpose, and excluded, is as follows:

Mr. F. W. Kurfees, cashier of the plaintiff bank, testified: "We had bought other notes of the Cumberland Railway and Power Company at the time we bought this. I could not tell you how long we had been doing this. I cannot say. We had bought some stocks or bonds with the Cumberland Railway and Power Company in connection with this matter. They were delivered with the note, or soon afterwards, by the stock salesman. I could not say whether Mr. Sherron brought them in or not. I think that the stock salesman brought them in because I

requested him to bring them in as soon as they were issued. I knew that they were connected with the note. I knew that this was the note given for the purchase of bonds or certificates of the Cumberland Railway and Power Company, as he told me he had sold some stock. That was at the time he was offering us this note for sale. The stock certificate that I mentioned while ago was stock certificate of the Cumberland Railway and Power Company which we had in our possession."

Said Kurfees also testified that they took $15,000 or $20,000 of the notes held by the Cumberland Railway and Power Company. He said he did not take the note of A. W. Thompson and turn it back on him; that said A. W. Thompson was a director of his bank. Question: "I ask you if he did not tell you that it was not a *bona fide* note?" To this the plaintiff objected, which objection was sustained, and the defendant excepted. This is exception 8. The defendant proposed to show that the said Thompson did have a controversy with the bank about some of this Cumberland Railway and Power Company paper.

Kurfees, the cashier, stated that Thompson was a director of the bank from the time it started business in 1914 until 1921. Question: "He had a controversy with your bank about some of this Cumberland Railway and Power Company paper?" The plaintiff objected; sustained, and the defendant excepted. This was the ninth exception.

The defendant Sherron testified that when the Cumberland Railway and Power Company got him to sign the note in question, they read it over to him, and a few days thereafter Kurfees, the cashier of the bank, said, "Mr. Sherron, I will handle some of your paper if you say so," and he replied that he had forty years and that the dividends would pay that off. "I told him they got it through fraud, and that it was not recommended to me like it was. I did not agree that Mr. Kurfees should buy that paper. He mentioned to me about paying the interest, and I told him he would have to get it out of the dividend; that I had forty years on it." When Sherron was asked about the statements made to him by the Cumberland Railway and Power Company's agent—"You found out that it was all to the bad?"—objection by plaintiff; sustained, and defendant excepted. This was the seventeenth exception.

Sherron testified that there was nothing in any contract between him and the Cumberland Railway and Power Company containing the language required by the statute, C. S., 6367: "No sum shall be used for commission, promotion, and organization expenses on account of any shares of stock in this company in excess of one per cent of the amount actually paid upon separate subscriptions (or in lieu thereof may be inserted, or one dollar per share for every fully paid subscription) for such securities, and the remainder of such securities shall be held or invested as authorized by the law governing such company and held by

the organizers (or trustees, as the case may be) and the directors and officers of such company after organization, as bailee for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

He said he knew Mr. A. W. Thompson, and that he was a director of defendant bank. When asked the question, "Was he assisting in the selling of the stock of the Cumberland Railway and Power Company?" the plaintiff objected; sustained, and defendant excepted. This was the eighteenth exception. The defendant proposed by this question to show that A. W. Thompson, one of the directors of plaintiff bank, was assisting in the sale of this stock of the Cumberland Company.

The court informed counsel that it could ask the witness if Thompson sold him any stock. He asked, "Mr. Sherron, did you hear any conversation between Mr. A. W. Thompson, director of the Bank of Varina, and any person concerning the alleged note of A. W. Thompson claimed to have been given to the Cumberland Railway and Power Company?" Objection by the plaintiff; sustained, and defendant excepted. This was the nineteenth exception.

The defendant then asked, "State if you know whether or not the plaintiff, Bank of Varina, claimed to hold the note of A. W. Thompson acquired by said bank of the Cumberland Railway and Power Company, the authenticity of which was disputed by Mr. Thompson." Objection by plaintiff; sustained, and defendant excepted. This was the twentieth exception. The defendant proposed to show by this witness that it did.

Question: "State if you know whether or not the Bank of Varina surrendered to Mr. A. W. Thompson a note similar to the one in controversy, claimed to have been signed by Mr. Thompson and disputed by him." Objection by plaintiff; sustained, and defendant excepted. This was the twenty-first exception. The defendant proposed to show by this inquiry that the said bank did surrender to A. W. Thompson such note.

The defendant also excepted for refusal to admit divers witnesses to testify that stock salesmen made to them the same false and fraudulent representations concerning said Cumberland Railway and Power Company and its stock in order to procure signature to notes similar to the false representation made to Sherron, and to prove by them further that such representations were false and fraudulent. All of these exclusions of testimony were duly excepted to, and assigned as error.

There were other exceptions, for which error is assigned, but, in view of the above assignments, it is not necessary to discuss them.

The case should go back, that this excluded evidence may be admitted and be passed upon by a jury.

New trial.

STACY, J., dissenting: The jury returned the following verdict in this case:

"1. Was the note sued on secured by fraud of the Cumberland Railway and Power Company? Answer: 'No.'

"2. Did the defendant endorse the note, as alleged in the complaint? Answer: 'Yes.'

"3. Are the plaintiffs the holder of the note in due course? Answer: 'Yes.'

"4. What sum is plaintiff entitled to recover of the defendants? Answer: '$2,500, with interest from 18 November, 1919, less two payments of $30, 8 March, 1920, and $150 paid 12 November, 1920.'"

It will be observed, in the first place, that the allegation of fraud has been negatived by the jury's answer to the first issue. In the face of this finding, I do not think the proposed excluded evidence of the defendant, bearing only upon the third issue, meets the test as laid down in *Holleman v. Trust Co.*, 185 N. C., 49: "To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." C. S., 3037.

A careful perusal of the entire record leaves me with the impression that the case has been tried in substantial conformity to the law bearing on the subject, and, in my opinion, the verdict and judgment entered below should be upheld.

STATE v. JAMES ALLEN.

(Filed 24 October, 1923.)

1. Burglary—Definition—Statutes.

The common-law definition of burglary is a capital offense, i. e., the breaking into and entering of the "mansion or dwelling-house of another in the night-time, with an intent to commit a felony therein, whether the intent was executed after the burglarious act or not, has been changed by our statute (C. S., sec. 4232) dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each.

2. Same—Degree of Burglary.

Under the provisions of C. S., sec. 4232, burglary as a capital offense is when the dwelling-house so entered is actually occupied at the time of the burglarious entry as a sleeping apartment, and the lesser offense is where the apartment is not then actually so occupied.

3. Same—Instructions.

In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though the actual commission of the intended felony is not necessary to be charged or proven, or that it was committed at all.

4. Criminal Law—Rape—Intent.

By our statute, C. S., sec. 4204, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not.

5. Same—Instructions.

Where there is evidence of a burglarious entry into a dwelling-house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense.

6. Same.

Where a burglarious breaking into a dwelling-house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous.

7. Burglary—Intent—Evidence—Drunkenness.

While voluntary drunkenness may not excuse in law the commission of the crime of burglary in the first degree, it is competent to show that the mind of the prisoner at the time of the offense charged was so under the influence of liquor that he could not have had the intent necessary to constitute the crime.

8. Burglary—Rape—Evidence—Verdict.

Under the charge of the burglarious entry of a dwelling, etc., with intent to commit rape upon a female sleeping therein, and the supporting evidence: *Held*, in this case the judge should have charged the jury, according to their findings of fact, to render one of the five verdicts: (1) guilty of burglary in the first degree; (2) guilty of an attempt to commit burglary in the first degree; (3) guilty of nonburglarious breaking into and entering a dwelling-house of another with the intent to commit a felony or other infamous crime therein; (4) guilty of an attempt to commit the said last offense, or (5) not guilty.

CLARK, C. J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at May Term, 1923, of FRANKLIN.

STATE *v.* ALLEN.

Criminal prosecution, tried upon a indictment charging the defendant with burglary in the first degree. The initial count in the bill is as follows:

"That James Allen, late of the county of Franklin, on the 13th day of April, in the year of our Lord 1923, with force and arms, at and in the county aforesaid, feloniously and burglariously, did break and enter, on or about the hour of 12 in the night of the said day, the dwelling-house of one A. B. Allen, there situate, and then and there actually occupied by the said A. B. Allen, his wife and family, with the felonious intent, he, the said James Allen, to forcibly and violently ravish and carnally know Mrs. A. B. Allen, a female occupying and sleeping in said dwelling-house at the time, without her consent and against her will, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There is also a second count in the bill, charging a felonious and burglarious breaking and entering of the occupied dwelling-house of A. B. Allen, in the night-time, with intent to commit the crime of larceny therein, but the case was not tried upon this count.

There is evidence on the record tending to show that the defendant entered the dwelling-house of A. B. Allen, in the town of Louisburg, some time after 11 o'clock on the night of 13 April, 1923, by raising a window in one of the rooms and putting a stick of wood under it to hold it up. After entering the house, and some time during the night, the defendant crawled under the bed in which Mr. and Mrs. Allen were sleeping, and thereafter the following happened, according to the testimony of Mrs. Allen:

"I was awakened that night, but I do not know at just what time. The first thing that awoke me was an ice-cold hand, and I almost jumped off the bed. The hand went back when I jumped, and in about a minute the hand came back again. That time it dawned on me it was not Mr. Allen. I was lying flat on my back, with my left hand under my head and my right hand down by my side. I reached out with my right hand and found that Mr. Allen's hand was warm. While I was reaching out for Mr. Allen, the hand came up the third time. I tried to whisper to my husband, fearing we would all be butchered. The ice-cold hand was under the bed-covering and touched my flesh, above my knee, three times, to my knowledge."

The defendant was convicted of burglary in the first degree and sentenced to death. He is a colored boy, 18 or 19 years of age. He testified that he was in a drunken condition during the night in question and did not know what he was doing. He entered a plea of not guilty to the charge.

The defendant requested the court to charge the jury that, before he could be convicted of burglary in the first degree on the initial count in the bill, it would be necessary for the State to show an intent on his part to accomplish his purpose, notwithstanding any resistance made by Mrs. Allen. This was refused, the court stating that an intent generally to commit a felony was sufficient. Defendant excepted.

From the verdict and judgment rendered, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. H. Yarborough, E. H. Malone, W. Y. Bickett, and J. E. Malone, Jr., for defendant.

STACY, J., after stating the case: Burglary, at common law, was the breaking and entering of the "mansion-house," or the dwelling-house, of another, in the night-time, with intent to commit a felony therein, whether such intent were executed or not. *S. v. Langford,* 12 N. C., 253; *S. v. Willis,* 52 N. C., 190; 4 R. C. L., 415; 9 C. J., 1009. It was among the few cases, if not the only one, where crime in the highest degree was not dependent upon the execution of the felonious intent. The purpose of the law was to protect the habitation of men, where they repose and sleep, from meditated harm. And such was the law of burglary in this State until the passage of the act of 1889, now C. S., 4232, by which the crime was divided into two degrees, first and second, with certain designated differences between the two, and with different punishments prescribed therefor. *S. v. Foster,* 129 N. C., 704; C. S., 4233. Now, under our statute, the first degree is where the crime is committed "in a dwelling-house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree." Second: "If such crime be committed in a dwelling-house or sleeping apartment not actually occupied by any one at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house or in any building not a dwelling-house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree."

But it is not enough in an indictment for burglary to charge generally an intent to commit "a felony" in the dwelling-house of another. The particular felony which it is alleged the accused intended to commit must be specified. *People v. Nelson,* 58 Cal., 104; *Portwood v. State,*

29 Tex., 47; *S. v. Doran,* 99 Me., 329. The felony intended, however, need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony, where the State is relying only upon the charge of burglary. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal the goods and chattels of another then being in said dwelling-house, or to commit therein the crime of larceny, rape, or arson. *S. v. Staton,* 133 N. C., 643; *S. v. Ellsworth,* 130 N. C., 690; *S. v. Tytus,* 98 N. C., 705; *S. v. Christmas,* 101 N. C., 755. But it is necessary, in order that the charge may be certain, to state the particular felony which it is claimed the accused intended to commit. *S. v. Buchanan,* 75 Miss., 349; *S. v. Celestin,* 138 La., 407.

The actual commission of the intended felony, however, is not essential to the crime of burglary. *S. v. Beal,* 37 Ohio St., 108; 41 Am. Rep., 490. This is completed or consummated by the breaking and entering of the dwelling-house of another, in the night-time, with the immediate, requisite intent then and there to commit a designated felony therein, though, after entering the house, the accused may forsake his intent to commit the felony, through fear or because he is resisted. *S. v. McDaniel,* 60 N. C., 245; *Warren v. State,* 103 Ark., 165. Indeed, burglary in the first degree, under our statute, consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling-house or sleeping apartment of another, in the night-time, with the further concurrent intent, which may be executed or not, then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony, as aforesaid, must be proved, in addition to the more general one, in order to make out the offense. *S. v. Meche,* 42 La. Ann., 273; 7 So., 573. The crucial question in regard to the ulterior intent, in an indictment for burglary, is: What was the prisoner's intent at the time of the breaking and entry? The offense against the habitation is complete when the burglarious breaking and entering of the dwelling-house or sleeping apartment of another, in the night-time, is effected or accomplished, with the intent to commit a felony therein, though that intent may be subsequently abandoned and the intended felony is not committed. *Conners v. State,* 45 N. J. L., 340. Hence it is no defense to an indictment for burglary that the ulterior felonious intent was abandoned after the breaking and entry. *S. v. Boon,* 35 N. C., 244.

Three elements, at common law, were necessary to constitute the crime of rape, to wit, carnal knowledge, force, and the commission of the act without the consent or against the will of the ravished. *S. v. Jim,* 12 N. C., 142; 22 R. C. L., 1172. By our statute, C. S., 4204, rape is defined as the "ravishing and carnally knowing any female of the age

of 12 years or more by force and against her will," with the further statement as to what constitutes rape when the female is under that age. *S. v. Marsh,* 132 N. C., 1000. So, under the charge of a felonious and burglarious breaking and entering of the presently occupied dwelling-house or sleeping apartment of another, in the night-time, with intent to commit the crime of rape upon the person of any female therein, it is necessary, before the prisoner can be convicted of burglary in the first degree, to show the requisite, specific intent on his part, at the time of the breaking and entry, of gratifying his passions on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part. *S. v. Massey,* 86 N. C., 658. This must have been his intent at the time of the breaking and entry, in order to constitute the capital offense of burglary in the first degree, with which he is charged, but it is not necessary that such intent should be executed or carried out. 9 C. J., 1032. See *Vickery v. State,* Ann. Cas., 1913, C., 514, where a full and satisfactory note covering the whole subject will be found.

The general as well as the specific intent with which the prisoner entered the dwelling-house, or sleeping apartment, of another may be proved by circumstances, or inferred by the jury from the facts in evidence. *People v. Winters,* 93 Cal., 277; *Com. v. Shedd,* 140 Mass., 451; *S. v. Peebles,* 178 Mo., 475.

Whether the ulterior criminal intent existed in the mind of the person accused, at the time of the alleged criminal act, must of necessity be inferred and found from other facts, which in their nature are the subject of specific proof. It must ordinarily be left to the jury to determine, from all the facts and circumstances, whether or not the ulterior criminal intent existed at the time of the breaking and entry. In some cases the inference will be irresistible, while in others it may be a matter of great difficulty to determine whether or not the accused committed the act charged with the requisite criminal purpose. *McCourt v. People,* 64 N. Y., 583.

Applying the above test to the facts of the instant case, we think the prisoner was entitled to the charge as requested, and that the court erred in declining to give it. *S. v. Williams,* 120 Iowa, 36; 94 N. W., 255.

Again, it is a well-recognized rule of practice with us that where one is indicted for a crime, and under the same bill it is permissible to convict him of "a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime" (C. S., 4640), and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views presented to the jury, under a proper charge, and an error in this respect is not cured by a verdict convicting the prisoner of the crime as charged

in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree or of an attempt if the different views, arising upon the evidence, had been correctly presented to them by the trial court. *S. v. Williams,* 185 N. C., 685, and cases there cited.

The number of verdicts which the jury may render on an indictment for burglary in the first degree, under our present procedure, must be determined by the evidence and the manner in which the bill of indictment is drawn. There are three recognized ways in which the bill may be drawn with respect to the intended felony: (1) By charging the breaking and entry to be with intent to commit a designated felony; (2) by charging the breaking and entry, and a designated felony actually committed; and (3) by charging the breaking and entry, with intent to commit a designated felony, and also charging the actual commission of said felony. *S. v. Johnston,* 119 N. C., 897, and authorities cited.

Under the last form just mentioned, the prisoner may be convicted of burglary in the first degree, or of burglary in the second degree, depending on whether or not the dwelling-house was actually occupied at the time, or of an attempt to commit either of said offenses, or he may be convicted of a nonburglarious breaking and entering of the dwelling-house of another, under C. S., 4235, or of an attempt to commit said offense, though the State may fail to prove the commission of the felony as charged. *S. v. Fleming,* 107 N. C., 905; *S. v. Spear,* 164 N. C., 452. On the other hand, the defendant may be convicted of the designated felony as charged, "or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime," though the State may fail to prove the burglary. Archbold's Cr. Pr. & Pl., 1076 and 1108; *S. v. Jordan,* 75 N. C., 27; *S. v. Allen,* 11 N. C., 356; *S. v. Grisham,* 2 N. C., 13.

But under the present bill of indictment the prisoner is not charged with the actual commission of a felony in the dwelling-house of A. B. Allen, and there is no evidence tending to show that the crime might have been committed under circumstances which would make it burglary in the second degree, unless the jury disbelieves the evidence relating to occupancy. *S. v. Alston,* 113 N. C., 666. All the evidence tends to show that said dwelling-house was actually occupied at the time of the alleged offense. Under these circumstances, according to our previous decisions, an instruction that "the jury may render a verdict (of burglary) in the second degree if they deem it proper to do so" (C. S., 4641) would be erroneous, though a verdict of burglary in the second degree, being favorable to the prisoner, would be permitted to stand. *S. v. Johnston,* 119 N. C., 883; *S. v. Fleming, supra; S. v. Alston, supra.* See, also, *S. v. Alexander,* 56 Mo., 131.

The evidence offered by the prisoner is to the effect that he was in a drunken condition during the night in question, and did not know where he was or what he was doing. Voluntary drunkenness, of course, furnishes no excuse for crimes committed under its influence. But this evidence was competent as bearing upon the alleged felonious intent. *S. v. English,* 164 N. C., 498. "Although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made, by law, to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact, affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such a case is, What is the mental status? . . . To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has, in point of fact, been committed." *Reese, J.,* in *Swan v. The State,* 4 Hump., 136; 23 Tenn., 99; *S. v. Murphy,* 157 N. C., 614.

Without the ulterior felonious intent, as already suggested, the crime of burglary, as charged, would not be complete; and if the prisoner, without any prior criminal intent, were so drunk at the time as not to know where he was or what he was doing, and had no intention of committing a felony in the dwelling-house, as alleged, whatever his offense, he would not be guilty of burglary in the first degree, because of the absence of an essential ingredient of the crime. *S. v. Bell,* 29 Iowa, 316.

Hence, it follows that, under the present bill of indictment and the evidence now of record, the jury should be instructed that one of five verdicts may be rendered by them, depending, of course, upon how they find the facts to be: (1) Guilty of burglary in the first degree; (2) guilty of an attempt to commit burglary in the first degree; (3) guilty of a nonburglarious breaking and entering of the dwelling-house of another, with intent to commit a felony or other infamous crime therein; (4) guilty of an attempt to commit the said last-named offense; or (5) not guilty. See *S. v. Spear,* 164 N. C., 452, and *S. v. Merrick,* 171 N. C., 788.

The prisoner is entitled to a new trial; and it is so ordered.

New trial.

CLARK, C. J., dissenting: The prisoner, a negro, 18 or 19 years old, is charged with burglary, in breaking into the dwelling-house of one A. B. Allen, in the night-time, occupied at the time by himself and family, with the felonious intent to ravish his wife, then and there sleeping in said dwelling-house, etc. The evidence for the State shows that the defendant entered said dwelling-house some time after 11 o'clock on the

night of 13 April, 1923, by raising a window in one of the rooms and putting a stick of wood under it to hold it up, and after entering the house, and some time during the night, he crawled under the bed in which Mrs. Allen was sleeping, and thereafter the following happened, according to her testimony: "I was awakened that night, but I do not know just what time. The first thing that woke me was an ice-cold hand, and I almost jumped off the bed. The hand went back when I jumped, and in about a minute the hand came back. That time it dawned on me it was not Mr. Allen. I was lying flat on my back, with my left hand under my head and my right hand down by my side. I reached out with my right hand and found that Mr. Allen's hand was warm. While I was reaching out for Mr. Allen the hand came up the third time. I tried to whisper to my husband, fearing we would all be butchered. The ice-cold hand was under the bed-clothes and touched my flesh, above my knee, three times, to my knowledge." The jury convicted the prisoner of burglary in the first degree.

The prisoner testified that he was in a drunken condition on the night in question and did not know what he was doing. If this were a valid precedent, as a defense, it would leave our women unprotected in their homes at night, at the mercy of any brute who will testify, or even prove, that he was partially intoxicated. He could not have been wholly so, for the evidence is that he entered a window by putting a stick thereunder to hold it. Besides, there was no prayer and no assignment of error upon the ground that the prisoner was drunk.

The prayer, on the refusal of which the prisoner rests his defense, was that the court should "charge the jury that, before he could be convicted of burglary in the first degree on the initial count of the bill, it would be necessary for the State to show an intent on his part to accomplish his purpose, notwithstanding any resistance made by Mrs. Allen." This was refused, the court stating that "an intent generally to commit the felony was sufficient." This was correct, upon all the precedents. There is no case, it is believed, on record that the charge thus prayed has ever been held necessary for any indictment for burglary with intent to ravish. The only case that has been cited to sustain the prayer for such charge is *S. v. Massey,* 86 N. C., 658, but that was not a charge of burglary, but of an assault with intent to commit rape. The charge here is not burglary with *"attempt"* to commit rape, but of burglary with an intent to do so. That is a charge with a simple intent, and upon this evidence the jury found, and it would have been difficult for them, upon the uncontradicted testimony, to have found otherwise if they believed the evidence, than that the negro, entering burglariously, concealed himself under a white woman's bed, did not have the intent to commit that crime.

Indeed, there is no substantial denial of the facts charged and proven as above by the State. It was not necessary that the bill should charge that the rape was accomplished. Indeed, if the facts satisfy the jury that he entered, as charged, with the intent to commit rape, it would not be a defense that he had abandoned such intent after entering. Wherefore is it necessary to charge and prove that he intended to "persist in his intent, in spite of any opposition"?

There is nothing in the nature of this crime that makes it desirable or advisable for the court to create and engraft a new technicality as a defense against the conviction upon the facts of this case. There is no evidence that the prisoner knew that the husband was in the room. This may account for the boldness or rashness of his attempt. He certainly did not expect to be arrested. He entered the house burglariously, and the evidence was sufficient to show the jury, if they believed it, that the entrance was made with the intent charged. The jury has so found.

The burglary was committed by entering the dwelling-house of another in the night-time with intent—not with the *attempt*—to ravish, and there is no evidence tending to show any lesser degree of offense which would have justified the jury in finding the prisoner guilty of a lesser offense.

This is not an indictment for an attempt to commit burglary, nor for an attempt to commit rape, but is an indictment, in the approved form, for the crime of burglary, alleging as an ingredient an intent to commit rape. The precedents require no more to be charged, and the evidence was sufficient, if believed, to justify the jury in finding such verdict. It was not necessary to charge or prove a greater degree than intent to commit rape, and there is no evidence in this record which required the judge to submit to the jury any lesser offense than that charged. If the testimony was true, the prisoner entered the house burglariously with the intent to commit the crime charged, and there is no evidence of any lesser offense to be submitted to the jury.

The prisoner assigned as error the exclusion of the answer of the witness Beasley to the following question: "Do you know James Allen's mental condition on the day in question, and had you observed him before then?" The State objected. The witness said he had only observed him one time. The counsel for defendant proposed to prove by witness that the defendant was not of average intelligence, and on the day of this occurrence refused to take pay for three or four hours work, and that he did not consider him of average mental capacity. The exclusion of the answer to this question was correct. *S. v. Journegan,* 185 N. C., 700. This was the first exception, and the second assignment was to the exclusion of the question whether the prisoner's father and grandfather were not the same man.

The prisoner also objected that, upon inquiry of the jury, the court instructed them that they could not find the prisoner guilty of burglary in the second degree. This was correct. *S. v. Johnston,* 119 N. C., 883, citing *S. v. Alston,* 113 N. C., 666.

There was no error as to the judge's statement in the charge of the jury, in the presence of counsel, that there was no contention as to the number of persons in the house at the time, nor as to the offense being committed in the night-time, nor was it error not to define the crime of larceny, an intent to commit which was charged in the second count, for the prisoner was tried and convicted on the first count.

J. G. LAYTON v. E. J. GODWIN.

(Filed 24 October, 1923.)

Appeal and Error—Burden to Show Error—Record—Omissions—Statute of Frauds—Statutes—Certiorari—Motions.

The appellant must show error on appeal; and where he relies upon the insufficiency of letters from the grantor of lands to meet the requirements of the statute of frauds (C. S., sec. 988), the contents of these letters must be made by him to appear in the record on appeal; and the fact that he noted on his case served that the Superior Court clerk, "here copy" the letters, does not legally excuse their omission. In this case a motion for *certiorari* to correct the record, if it had been made, would have been denied. C. S., sec. 630.

APPEAL by defendant from *Devin, J.,* at March Term, 1923, of CUMBERLAND.

Civil action, to recover damages for breach of contract, alleged to have been made in connection with the sale of certain lands at public auction.

Verdict and judgment in favor of plaintiff. Defendant appealed.

Charles G. Rose and Godwin & Williams for plaintiff.
H. L. Godwin and Clifford & Townsend for defendant.

STACY, J. Plaintiff brings this suit to recover of the defendant the purchase price of certain lands, alleged to have been sold at public auction, and at which sale the defendant became the last and highest bidder. Recovery is resisted upon the ground that the contract is not in writing. The court below was of opinion that certain letters, written by the defendant and in evidence on the trial, were sufficient to meet the requirements of the statute (C. S., 988), which provides: "All contracts to sell or convey any lands, . . . or any interest in or concerning

them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." See *Hall v. Misenheimer,* 137 N. C., 183.

The only question presented for our consideration is the correctness of his Honor's ruling in regard to the sufficiency of the writings signed by the defendant. These letters do not appear in the statement of case on appeal. Hence we cannot say the ruling was erroneous. The presumption is otherwise. The burden is on the appellant to show error, and none has been made to appear. *In re Ross,* 182 N. C., 477. See, also, 1 Michie Digest, 695, and cases there cited, under title "Burden of Showing Error."

When the appellant served his statement of case on appeal, instead of setting out the letters which he deemed material, he simply directed, "Here clerk will copy such letters of the defendant as were introduced in evidence by the plaintiff as the plaintiff may indicate." The plaintiff served no countercase or exceptions, and made no indication to the clerk as to what letters should be copied. Hence none have been incorporated in the transcript. The statement of case as served by the appellant was incomplete, and the plaintiff, instead of supplying the defect, has moved to dismiss the appeal, which he has a right to do. *Sloan v. Assurance Society,* 169 N. C., 257; C. S., 643. No motion was made here for a *certiorari* to correct the record; and, indeed, it would seem that appellant has no meritorious ground upon which to base such a motion. C. S., 630.

Appeal dismissed.

CAROLINA POWER COMPANY v. MARTHA H. HAYWOOD ET AL.

(Filed 24 October, 1923.)

1. Estates—Remainders.

An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument.

2. Same—Contingent Remainders—Vested Interests — Statutes — Charitable Interests.

Upon an estate to W. during his life, and at his death to his eldest son, not then *in esse,* with residuary clause to testator's children: upon the happening of the contingency of the birth to W. of a son: *Held,* the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. C. S., sec. 1654; rule 12; also rules 1, 4, 5.

3. Wills—Interpretations—Interest—Rules of Construction.

A contrary intent of the testator will not be presumed which is at variance with the obvious meaning of the language he has used in his will, construed in accordance with the established canons of construction.

CIVIL ACTION, heard by *Daniels, J.*, at August Term, 1923, of CHATHAM.

A jury trial was waived, and the facts and the law were submitted to, and passed upon by, the court.

The plaintiff alleges that it is the sole owner of the land in controversy, and the defendants make denial and allege that they should be let into possession as tenants in common with the plaintiff. The purpose of the action is to remove a cloud from the plaintiff's alleged title.

The facts are as follows:

1. That William Boylan, late of Wake County, died in said county on 16 July, 1861, seized and possessed of a large estate, including the lands described in the complaint.

2. That the said William Boylan, on 18 June, 1858, made and published his last will and testament, which thereafter, ensuing the death of the said William Boylan, was, at the November Term, 1861, of the Court of Pleas and Quarter Sessions of Wake County, duly admitted to probate and record in said county, and was duly recorded in said county, in Book 32, pages 78 to 85, inclusive; and said will was thereafter certified to and recorded upon the will records of the county of Chatham, in Book H, at page 472-8; that no caveat has ever been filed to said will; that said will shall be treated as if it were set out in this statement in full, but for brevity it will not be copied herein. The parts considered as material and vital to this controversy are the following items, to wit:

"Thirdly—I give, devise and bequeath to my son, John H. Boylan, for and during his natural life, my Cape Fear plantation, in the county of Chatham, and all of the negro slaves on the said plantation at the date of this will. If my said son, John, shall marry and shall have any lawfully begotten child or children, or the issue of such, living at his death, then I give, devise and bequeath the said plantation and negroes to such child or children; but if he shall die, leaving no such child or children, nor the issue of such, then living, then I give the said plantation and negroes to my grandson, William (son of William M. Boylan), during his natural life, and at his death to his eldest son."

"Twentieth—All the residue of my property, whether real or personal, and wherever situate, not herein disposed of, I give, devise and bequeath to my children, to be equally divided between them."

3. That John H. Boylan (son of testator) entered into the possession of the lands mentioned in the third paragraph of said will, which are the lands in controversy in this action, soon after the death of the testator, and remained in possession thereof until his death, in December, 1870; that said John H. Boylan never married, and died, leaving no issue surviving him.

4. That upon the death of the said John H. Boylan, William Boylan (son of William M. Boylan and grandson of testator) entered into the possession of the land in controversy, under and by virtue of said third paragraph of said will hereinbefore set out.

5. That the said William Boylan intermarried with Miss Placide Englehard, and there were born to said marriage two children. The first was William James Boylan, who was born 30 July, 1886, and who was the oldest and only son of the said William Boylan. The other child was Miss Josephine Boylan, who afterwards intermarried with Ellsworth H. Van Patten; that the said William James Boylan predeceased his father and died unmarried and without issue on 14 July, 1906, leaving surviving him his said sister, Josephine Boylan (afterwards Josephine Boylan Van Patten).

6. That after attaining the age of twenty-one, the said Josephine Boylan (afterwards Josephine Boylan Van Patten) executed to her father, William Boylan, a deed, conveying her interest in said land: that said deed was duly delivered, and recorded in the office of the register of deeds for Chatham County, North Carolina, on 22 November, 1912, in Book "FB," pages 25-26; that at the time of the execution and delivery of the said deed the said William Boylan was in possession of said land by virtue of the devise to him in the said third paragraph of said will hereinbefore set out, and continued in the possession of said land, as well before the execution of the said deed from the said Josephine Boylan as after, until his death.

7. That William Boylan (grandson of testator) retained possession of the land in controversy until his death. He died intestate in Wake County, North Carolina, on or about 6 February, 1915, and he left surviving him, and as his only heir at law, his daughter, Josephine Boylan Van Patten; and his estate was duly settled in the probate court of Wake County.

8. That Josephine Boylan intermarried with Ellsworth H. Van Patten, and there was born to that marriage only one child, Ellsworth H. Van Patten, Jr.; that said Josephine Boylan Van Patten died on or about 21 October, 1919, leaving her surviving her only son and heir at law, Ellsworth H. Van Patten, Jr., and her husband, Ellsworth H. Van Patten.

9. That after the death of William Boylan (grandson of testator), in the year 1915, Mrs. Josephine Boylan Van Patten, during her lifetime, and her husband and child after her death in 1919, were in the open, notorious, adverse and peaceable possession of the lands described in the complaint, and exercised upon said land the usual acts of dominion and ownership.

10. That during the early part of the year 1923, by proper and regular deeds of conveyance, all of the interest of Ellsworth H. Van Patten and Ellsworth H. Van Patten, Jr., in the lands described in the complaint were conveyed to the plaintiff; and the plaintiff now owns all the title in and to said lands which the said Ellsworth H. Van Patten and Ellsworth H. Van Patten, Jr., owned prior to 1 January, 1923.

11. That the defendants and the aforementioned grantors of the plaintiff are the only persons who, in any event, would now be entitled to take under the residuary clause (the twentieth item) of the will of said William Boylan, above set out; and they would take thereunder, if at all, the following shares or interests, respectively, that is to say, the grantors of the plaintiff, the said Ellsworth H. Van Patten, Jr., and his father would together take an undivided one-eighth interest in the land in controversy. The defendants, Martha H. Haywood, Elsie B. Haywood, Katherine H. Baker, Mary Snow Baskerville, Adelaide Snow Boylston, and William Boylan Snow, would each take an undivided one-twenty-fourth interest therein; the defendants, William M. Boylan, Rufus T. Boylan, Mary Kinsey Boylan Thompson, and Katherine B. Caperton, would each take an undivided one-fortieth interest therein; and the remaining defendants who are the descendants of Jennie Boylan Green, the only child of the testator by his second marriage, would collectively take an undivided one-half interest therein; and it is hereby stipulated that the attorney for said defendants may, at any time before the hearing, make specification in writing of the several shares of said one-half interest which said defendants would take, respectively.

His Honor rendered judgment, declaring the plaintiff to be the owner in fee simple of the land described in the complaint and in controversy, and that the defendants are not the owners of said land or any part thereof, and have no interest or claim therein. Whereupon the defendants excepted and appealed.

Pou, Bailey & Pou and W. L. Currie for plaintiff.

Long & Bell for grantors of plaintiff.

Carter, Shuford & Hartshorn for the answering defendants, appellants.

ADAMS, J. It seems to be admitted that the controversy depends primarily upon the third and twentieth items of the will, and that these

items must be interpreted in the light of the facts. The appellants insist that the interpretation of these clauses should be governed by the rule of construction adopted in 1827 and embodied in section 1737 of the Consolidated Statutes, and that the only two elements necessary to the operation of the statute are a contingent limitation and the death upon which the limitation is made to depend. Excluding the contingency of John H. Boylan's marriage and of his leaving surviving issue, the appellants contend that, since a quarter of a century elapsed between the death of the testator and the birth of the "eldest son" of William Boylan (grandson), the devise created a contingent limitation to a person not *in esse,* and that the estate, upon the death of William Boylan, vested in the testator's children under the residuary clause (item 20), or, to vary the proposition, that by virtue of the residuary clause, there is a limitation to the testator's children contingent upon the death of William Boylan (the life tenant) without a son; and that the third and twentieth items of the will should be construed as if they read, "I give the said plantation to my grandson, William, during his natural life, and at his death to his eldest son; but if he should die leaving no son surviving him, then I give the said plantation to my children, to be equally divided between them."

On the other hand, the plaintiff argues that the entire controversy may easily be determined by applying to the facts an established legal principle, namely, that William James Boylan, immediately upon his birth, acquired a heritable interest in the estate, which, under the canons of descent, passed upon his death to his sister, Josephine, as his heir at law.

It will be seen, therefore, that in its ultimate analysis the appeal presents this single question: What interest in the land, if any, was acquired by William James Boylan? Was it a vested interest or one contingent upon his surviving the life tenant? If it was vested and descendible, of course, it cannot be construed as coming within the residuary clause, as contended by the appellants.

What, then, is a vested and what a contingent remainder? An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument. 23 R. C. L., 483, sec. 5. Discussing the distinction between vested and contingent remainders, Fearne says: "In short, upon a careful attention to this subject, we shall find that wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse,* and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding

estate (except in the instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited, so as to determine only on an event which is uncertain and may never happen, or wherever the remainder is limited to a person not *in esse* or not ascertained, or wherever it is limited, so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." . . . "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance, if there be a lease for life to A, remainder to B for life, here the remainder to B, although it may possibly never take effect in possession, because B may die before A, yet, from the very instant of its limitation, it is capable of taking effect in possession if the possession were to fall by the death of A; it is, therefore, vested in interest, though perhaps the interest so vested may determine, by B's death, before the possession he waits for may become vacant." Fearne on Remainders, Vol. I, pp. 216, 217. Blackstone's comment is to the same effect: "The remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A be a tenant for life, remainder to B in tail; here B's remainder is vested in him at the creation of the particular estate to A for life; or, if A and B be tenants for their joint lives, remainder to the survivor in fee, here, though during their joint lives the remainder is vested in neither, yet on the death of either of them the remainder vests instantly in the survivor; wherefore, both these are good remainders. But if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son, here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate; and even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. . . . But contingent remainders may be limited to a dubious and uncertain person. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail, this is a contingent remainder, for it is uncertain whether B will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested." 2 Bl. Com., 168 *et seq.* In 23 R. C. L., 499,

sec. 30, the principle is stated as follows: "So long as there is an uncertainty as to the person or persons who will be entitled to enjoy a remainder, it is contingent. In other words, where the person or persons who will take the remainder can only be ascertained upon the determination of the particular estate, the remainder, until then, is contingent. For example, if A be a tenant for life, with remainder to B's eldest son, then unborn, it is uncertain whether he will have a son or not. If A dies before a son is born to B, there is no person *in esse* to take the estate, and the remainder is absolutely gone, for the particular estate is determined before the vesting of the remainder. If B has a son born before A's death, the instant the son is born the remainder is no longer contingent, but vests in the son."

Guided by the foregoing authorities and others which are not cited, we are unable to concur in the argument that the vesting of the remainder was dependent on the decease of the life tenant during the life of the remainderman. In our opinion, the words, "to my grandson, William, . . . during his natural life, and at his death to his eldest son," are not susceptible of this interpretation. One of the prevailing rules of construction is that adverbs of time, or adverbial clauses designating time, do not create a contingency in a devise, but merely denote the time when the enjoyment of the estate shall commence. *Brinson v. Wharton,* 43 N. C., 80; *Rives v. Frizzle, ib.,* 237; *DeVane v. Larkins,* 56 N. C., 377; *Elwood v. Plummer,* 78 N. C., 392; *Harris v. Russell,* 124 N. C., 554. See cases collected in L. R. A., 1918-E, 1098. Accordingly, we regard it unquestionable that William Boylan (son of William M. Boylan), by virtue of the devise in the third item of the will, immediately upon the death of John H. Boylan, unmarried and without issue, took an estate in the land for his natural life, and that the remainder which was contingent theretofore (the remainderman not being *in esse*) became vested in William James Boylan at the moment of his birth. For this reason, section 1737 of the Consolidated Statutes, which pertains to contingent limitations, is not applicable to the facts. If William Boylan, the life tenant, had died before the birth of the remainderman, a very different question would have arisen, involving a limitation to become effective at the time of his death. It will be noticed upon examination that the decisions cited and relied upon by the appellants relate to such contingent limitations — not to vested interests — and are principally influenced, if not entirely controlled, by the provisions of the statute to which we have just referred. We deem it unnecessary, therefore, to enter into an analysis of these decisions and to show wherein the principles upon which they were rendered may be distinguished from the principle by which we are controlled in the instant case.

The next question is this: If the remainderman, William James Boylan, acquired a vested interest in the land, did he have such seizin as is necessary to make his interest heritable or descendible to his heirs, under the canons of descent?

In *Early v. Early,* 134 N. C., 258, *Mr. Justice Walker* remarked that the essential principle of the ancient law of inheritance was that the stock of descent could not be established except by actual seizin of the freehold of inheritance, but under the present law all that is required to constitute a sufficient seizin for the creation of a new stock of inheritance or *stirpes* of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested in possession or not; and, further, that the amendment was made in consequence of the decision in *Lawrence v. Pitt,* 46 N. C., 344. The same conclusion was reached in *Tyndall v. Tyndall, ante,* 272. The statute particularly relevant here is C. S., sec. 1654. It explicitly provides that when any person dies seized of any inheritance or any right thereto or entitled to any interest therein, not having devised the same, it shall descend under the prescribed rules; and rule 12 provides that every person in whom a seizin is required shall be deemed to have been seized if he have any right, title or interest in the inheritance. See, also, rules 1, 4, 5.

We have not overlooked the argument addressed by the appellants to the question of the testator's intent to preserve the estate in all its subdivisions to the direct line of succession in his own family, or ignored any of the provisions in the will, or disregarded the rule which makes the testator's intent a material element of construction; but we are not permitted to substitute a presumed intention which is at variance with the obvious meaning of the language employed when construed in accordance with the established canons of construction. *McIver v. McKinney,* 184 N. C., 393.

We must, therefore, hold in the instant case that William James Boylan acquired a heritable interest in the land in suit, which, upon his death, descended to Josephine, his sister and only heir at law. This being true, upon the facts found, the plaintiff's title is indefeasible, and the judgment rendered by his Honor in the court below is in all respects

Affirmed.

LUTHER A. BLUE v. CITY OF WILMINGTON AND COUNCILMEN OF SAID CITY.

(Filed 24 October, 1923.)

1. Estate—Possibility of Reverter—Entry—Possession.

Where land is conveyed on certain conditions upon a possibility of reverter, only the grantor and his heirs, upon condition broken, can enter and revest the estate, and, such entry being a necessary condition subsequent, it cannot be otherwise conveyed or alienated.

2. Same—Judgment—Estoppel.

Where one claiming the possibility of reverter in lands from the original owner has brought action to establish his right, and a final judgment has been rendered against him, upon demurrer, the judgment so rendered estops a grantee under him, claiming the same right, against the same defendants.

3. Same—Municipal Corporations—Deeds and Conveyances—Title—Fee Simple—Qualifications.

Where the citizens of a city subscribe the purchase price for lands to be used by the State as an encampment for white soldiers, and conveyance is made to the Governor and his successors for that purpose, but upon its cessation to be so used the title shall immediately become divested and "revert" to and vest in the board of aldermen of the city for the purpose of a public park, by this expressed ulterior disposition to the city in fee the principles affecting a reverter can have no application, and the city in that event acquires the fee-simple title. The application of the principles upon which a case or qualified fee is held void, discussed by CLARK, C. J.

4. Trusts—Parol Trusts—Deeds and Conveyances—Grantor.

A parol trust in lands, where a fee-simple title has been conveyed cannot be engrafted in favor of the grantor in the deed.

5. Municipal Corporations — Cities and Towns — Title — Legislative Powers—Statutes.

Where title to lands is conveyed to a city, to be used for the purpose of a park, no parol trust is therein created in the city, and, holding the lands subject to the legislative will, it can convey a valid fee-simple title thereto under the provisions of a statute authorizing it.

APPEAL by defendants from *Sinclair, J.*, who, upon a referee's report, modified one of the findings of fact, and affirmed the other findings of fact and conclusions of law of the referee, and rendered judgment, decreeing the plaintiff the holder of an undivided three-fifths interest in the land. Appeal by defendants.

J. Bayard Clark for plaintiff.

K. O. Burgwin and E. K. Bryan for defendants.

CLARK, C. J. Upon the facts found, it appears that, prior to 31 July, 1889, the citizens of Wilmington, being desirous to obtain the location of a permanent encampment for the white troops of the North Carolina State Guard, appointed a committee to solicit funds from the citizens of Wilmington to purchase such site, and raised $2,500 for that purpose. The site selected was a part of an 800-acre tract of land owned by Bowden, Larkins and Alderman, from whom the committee purchased the 103 acres in controversy and caused a deed for the same to be made to the Governor of North Carolina and his successors in office. The $2,500, the purchase price of the land so raised by the citizens of Wilmington, was paid to the said grantors, as recited in the deed.

It is recited in the deed that the parties of the first part, for and in consideration of the premises, and the further sum of $2,500 to them in hand paid by the citizens of the city of Wilmington, have bargained and sold to the Governor of the State of North Carolina and to his successors in office the land described in said deed; and after describing the tract of land, the deed recited that the land is to belong to the Governor and his successors in office so long as the above-described tract or parcel of land shall be used as a permanent encampment ground for the white troops or soldiers of the State Guard of North Carolina; but if the State encampment should ever be removed therefrom, or the said premises should cease to be used for the purposes of a permanent encampment for the white troops or soldiers of the State of North Carolina, then and in that event the title hereby conveyed, or intended to be conveyed, to the Governor of said State and to his successors in office shall immediately become divested and revert to and vest in the Board of Aldermen of the City of Wilmington for the purpose of a public park for the citizens' use and pleasure, *in fee simple.*

This was clearly a deed of bargain and sale, and, following its execution and delivery, the encampment was established upon said land, and it was used for the specified purpose of an encampment for two or three years, when its use as an encampment ground by the State was abandoned. It is further found as a fact that on 6 December, 1892, the sheriff of New Hanover sold the interest of Bowden and Larkins in the 800-acre tract under execution to the plaintiff, Blue.

From 1892 to 1908 nothing was attempted to be done with the property by the city of Wilmington, until the Legislature passed chapter 13, Private Laws, Extra Session of 1908, which authorized the city to lease the property in controversy, and on 1 April, 1908, a lease of the property was executed to Pembroke Jones for the term of ten years for the sum of $150 per year. Jones took possession thereof and excluded the public therefrom by enclosing the same in a fence, and used it as part of his private lodge grounds.

Some time after Blue got his deed from the sheriff, partition was made, by order of court, of the 800-acre tract of land, except the 103 acres in controversy. In that action Blue contended for the partition of the 103 acres also, which was denied, since which date he had had possession only of the land allotted to him in said division, which included no part of the 103 acres, though there was a very small part of the 103 acres unoccupied left outside of the Pembroke Jones fence.

About 1914, W. H. Alderman instituted suit against the city for the recovery of the 103 acres in controversy, alleging practically the same facts set out in the complaint in this action. The city filed a demurrer, upon the ground that upon the plaintiff's own showing he was not entitled to recover. The demurrer was sustained and the action dismissed. On 4 August, 1919, pursuant to resolution of the city council, made on 18 April, 1919, the city exposed the 103 acres for sale at public auction, when T. C. Daniels became the last and highest bidder thereof. The city refused to confirm the sale, and a resale was ordered by the council, but no sale seems to have been made.

On 19 August, 1919, Blue obtained a deed from W. H. Alderman for all his interest in the 103 acres in controversy. In 1921, chapter 87, Private Laws, amended the aforesaid chapter 13, Private Laws, Extra Session 1908, and authorized the city to sell the 103 acres of land in controversy in this action.

Upon the foregoing facts, the plaintiff Blue is entitled to no part of the land in controversy. By the terms of the deed, and upon the findings of fact, the land was occupied and used as a permanent encampment ground from 1889 up to and including 1892. The plaintiff does not contend that the land reverted until 1919, when the city undertook to sell the land, but he contends that at the expiration of the year 1892, when the land was abandoned by the State as an encampment, under the terms of the deed the legal title vested in the city of Wilmington and remained in it until August, 1919, when (after a lapse of twenty-seven years) it was attempted to repudiate what the plaintiff calls "the trust" by the offer to make the sale, and the plaintiff contends that the lease executed by the city to Jones was not inconsistent with the trust, and hence there was no reverter until the attempt to sell the property even though the sale was not made.

Upon the foregoing facts, the plaintiff Blue did not, by the sheriff's deed in 1892, acquire the interest of Bowden and Larkins in the 103 acres, for at the time the deed was made they had no interest therein, and, at most, could have had only the possibility of a reverter, which is not transferable by deed if it had been made under the execution.

The deed from Alderman to Blue in 1919 did not convey to him Alderman's interest, if any, in this 103 acres, for Alderman could make no

valid conveyance until he had actually entered therein, and by such entry only could a forfeiture become complete; hence such entry was necessary and essential and a condition precedent to Alderman being vested with any assignable interest or right in the property. No one but the grantor or his heirs can reënter and thereby revest the estate. *Church v. Young,* 130 N. C., 8.

The Court will not lend its aid to divest the estate for a breach of condition, and the estate continues until the grantor or his heirs take proper steps by reëntry to consummate the forfeiture. *Helms v. Helms,* 137 N. C., 206.

The first assignment of error is to the ruling of the court that, as a matter of law, the possession of Pembroke Jones under the lease from the city was not adverse and inconsistent with the trust which the plaintiff contends was declared under the deed from Blue and others to the Governor and the city of Wilmington. If the attempt by the city to sell the property, which sale was not consummated, was inconsistent with the alleged trust in the deed of 1889, then the leasing of the property to Jones, which expressly allowed him to exclude the citizens from using the ground as a public park, was as much a breach of the condition subsequent (if any), and as effectual, as the attempt of the city to sell to Daniels, for the lease of ten years excluded the use by the citizens as a public park as effectually as a deed would have done.

The second assignment of error is to the holding by the court that the judgment in 1908, sustaining the demurrer in the action by Alderman against the city in 1908, was not *res judicata.* Even if there had been a possibility of reverter, such possibility was not assignable and could not be conveyed until after reëntry made by the grantors or their heirs and the reverting estate had become vested by completed forfeiture. *Hollowell v. Manly,* 179 N. C., 265; *Helms v. Helms,* 137 N. C., 209; *Church v. Young,* 130 N. C., 8. The plaintiff, therefore, could not acquire the title to the reverting interest (if there were such) of Bowden and Larkins under the deed of the sheriff of the 800-acre tract, nor did Alderman acquire the Larkins one-fifth, because, under the finding of fact and the complaint in the Alderman suit, the reverter had not occurred.

The reverter, if it ever occurred, vested title in Alderman in 1908, and the fact that he brought suit against the city, claiming this land, and the demurrer to Alderman's complaint, which was sustained by the court upon the ground that he had no title, estops the plaintiff to the same extent and with like effect as though Alderman had brought this suit instead of his assignee.

In *Bank v. Dew,* 175 N. C., 79, it was held: "A judgment sustaining a demurrer to the pleadings upon the merits, while it stands unreversed,

is conclusive as an estoppel in another action brought between the same parties (or their successors in title or interest) upon the same subject-matter." To the same purport are *Swain v. Goodman,* 183 N. C., 531; *Hayden v. Hayden,* 178 N. C., 262; *Ferebee v. Sawyer,* 167 N. C., 199.

The third assignment of error is to the ruling of the court in holding as a matter of law that the act of the city in attempting to sell the property amounted to a renunciation of the terms of the trust under the deed to the Governor and city of 31 July, 1889, and that because of such act a reverter occurred to the grantors or their heirs.

We have discussed these matters because they have been raised and argued by counsel; but in fact we think that there is but one real question at issue, and that is whether the deed of 1889 was in any sense a trust in favor of the grantors. As we understand the deed, it was a grant in fee simple to the Governor for the consideration of $2,500 raised and paid for by the citizens of Wilmington, and in consideration thereof there was an absolute grant in fee simple of said 103 acres marked off, allotted and described by the deed, to be held for the use of an encampment for the white troops of North Carolina, and there is no evidence of an oral trust in favor of the grantors under which they are entitled to claim any reservation of a trust or other interest in their behalf. They parted absolutely with the 103 acres for the purposes therein stated, and recited that it was in fee simple. It was provided only that if the property should cease to be used for the original purpose of an encampment for State troops, it should revert, not to the grantors, but "shall immediately become divested and revert to and vest in the Board of Aldermen of the City of Wilmington for the purpose of a public park for the citizens' use and pleasure, in fee simple." To give to the word "revert" the technical meaning of a reversion to the grantors contradicts this expressed purpose of the conveyance.

This was a condition subsequent, dependent upon the abandonment of the property for the beneficial use of the State, and then that it should revert, *i. e.,* that it should change its beneficent use and should become the property of the city, not only to be used for a particular purpose, but that the city should own it *in fee simple.*

The fact that such intention was so clearly and unmistakably expressed that, upon the contingency that if the State should abandon it, the property should belong to the city, is conclusive that there was no possibility of a reverter from the city, for it is declared emphatically that the city in such contingency should take title in fee simple. *R. R. v. Carpenter,* 165 N. C., 465.

The contention of the plaintiff rests upon the misconception that the use of the word "reverter" is in its technical sense, but this loses sight of the fact that the context is explicit that in the event the land should

cease to be used as an encampment by the State, "then and in that event the title shall be divested and revert and vest in the Board of Aldermen of the City of Wilmington for the purpose of a public park for the citizens' use and pleasure in fee simple." This shows no intent that there should be a reverter in any event to the grantors, but directs where the title shall go in the event the State should cease to use the property. There is no express trust and no evidence of an oral trust beyond the shadowy suggestion that the grantors might have asked a higher price if it had been sold for any other purpose. Besides, if there had been evidence or an oral trust in favor of the grantors, it would have been void, because in contradiction of the express terms of the conveyance in fee simple, and there is no allegation of a mutual mistake in drafting the paper.

In *Gaylord v. Gaylord,* our leading case on this subject (150 N. C., 222), is a very clear and able opinion by *Mr. Justice Hoke,* and holds that the "seventh section of the English Statute of Frauds, which forbids the creation of parol trusts or confidences in land, etc., unless manifested and approved by some writing, has not been enacted here, but such trust cannot be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title of lands and giving clear indication on the face of the instrument that such title was intended to pass. The doctrine of engrafting by parol a trust upon lands conveyed by deed is subordinated to a well-recognized principle of law, that such trust cannot be established by the parties in favor of a grantor in a deed when the effect will be to contradict or change by contemporaneous stipulations and agreements, resting in parol, a written contract clearly and fully expressed." This proposition is elaborated and clearly supported by numerous authorities cited *ib.,* at pp. 226 *et seq.* It is summed up by this statement on p. 226: "This doctrine of a trust or use resulting to a grantor, when there was no consideration paid, was a rule of the common law, incident chiefly to conveyances of feoffment, and never obtained when there was a contrary declaration made by the grantor at the time of the conveyance, either oral or written, and in the rare instances where the doctrine is applicable to written instruments it is never allowed to prevail when there is a contrary intent clearly expressed in a written deed."

This case is supported not only by the precedents quoted therein, but has been often quoted, and is the settled law since. *Jones v. Jones,* 164 N. C., 322; *Campbell v. Sigmon,* 170 N. C., 351, in which last it is said: "Indeed, if, notwithstanding the solemn recitals and covenants in a deed, a grantor could show a parol trust in himself, it would virtually do away with the statute of frauds and would be a most prolific source of litigation. No grantee could rely upon the covenants in his deed. It is

true that the recital of the amount of the consideration, or of its receipt, can be contradicted in an action to recover the purchase money, but that is because it is no part of the conveyance." *Barbee v. Barbee,* 108 N. C., 581, and citations thereto in the Anno. Ed.

Gaylord v. Gaylord has also been cited and approved by *Allen, J.,* in *Walters v. Walters,* 171 N. C., 313, saying that "a parol trust cannot be engrafted in favor of the grantor upon a deed conveying the absolute title to the grantee." This last case was cited and approved in *Walters v. Walters,* 172 N. C., 330, and in *Swain v. Goodman,* 183 N. C., 534. The authorities to the same effect as *Gaylord v. Gaylord* will be found fully collected in the notes to 39 L. R. A. (N. S.), at pp. 905, 912, and 916.

As to the language of a deed, it has been held that a provision in a deed of land to a county that it is to be used "as and for county high-school grounds and premises, does not create a condition subsequent which will entitle the grantor to reënter if the county attempts to sell the property." *Fitzgerald v. Murdoc County,* 164 Cal., 493; 44 L. R. A. (N. S.), 1229. To same purport, *McElroy v. Hoke,* 153 Ky., 108; 44 L. R. A., 1220, and notes thereto.

In *School Committee v. Kesler,* 67 N. C., 443, it was contended that where the conveyance had this qualification, "as long as the system of common schools shall be continued at that place, or as long as it shall not be applied to any other purpose except for schools of any kind," that this was a "base or qualified fee so long as the then existing system of public schools should be in force, and that the estate terminated, by its own limitations, when the system of common schools was changed and a new system was adopted." Even that proposition, if correct, would not be valid here, for the condition is that when the State ceased to use this property it should be divested and pass to the city of Wilmington, whose citizens had furnished the money for the purchase of the property, but even in that case *Pearson, C. J.,* held that "a base or qualified fee has never been in use or in force in this State or recognized by its laws, and a condition or qualification in a deed conveying an estate to a school committee 'as long as the system of common schools shall be continued,' etc., is contrary to public policy, repugnant and inconsistent with the nature of the grant, and, therefore, void." In that opinion, *Chief Justice Pearson* further says: "There has been but one instance of a 'base or qualified fee' in this State. That is the case of the Cherokee tribe of Indians in the western part of the State. The tribe was permitted to hold the land so long as it continued to occupy the territory," and the *Chief Justice* added: "It would be something new under the sun if the addition of a few unnecessary words in a deed of Tobias Kesler to a school committee, for a quarter of an acre of land, of the value of $1,

can have the legal effect to revive this obsolete estate, which has never been 'in force or in use' in this State or recognized by its laws." This case has been often cited since. See citations thereto in the Anno. Ed.

To repeat, the language of the deed is that, in the event of the land ceasing to be used as a permanent encampment for the white troops of the State, "then and in that event the title shall be divested and revert to and vest in the Board of Aldermen of the City of Wilmington, for the purpose of a public park for the citizens' use and pleasure, in fee simple." Manifestly, the words there used not only negative a reverter to the grantors or their heirs, but convey the clearly intended idea that in such contingency the city was to take an unconditional, absolute estate in fee, free from all contingencies and possibilities, in full recognition of the words, "in fee simple." *Church v. Bragaw*, 144 N. C., 133.

The court below erred in its conclusion of law that the plaintiff was entitled to ownership or any interest whatever in the land sued for.

The words in the deed, that on the happening of the condition subsequent of the abandonment of the property by the State as an encampment ground, the property "shall immediately become divested and revert to and vest in the Board of Aldermen of the City of Wilmington, for the purpose of a public park for the citizens' use and pleasure, in fee simple," was not a trust imposed on the city for that purpose, but an absolute conveyance in fee simple, as if the city had bought it direct from the grantors for that purpose, and, therefore, the act of the Legislature was amply sufficient to authorize the city to sell and convey the property, free of any limitations or trust. "The legislative power, unless restricted by the Constitution, is absolute as to control over the property of municipal corporations held by them for a public use." *Potter v. Collis*, 156 N. Y., 15; 59 L. R. A., 407. The Legislature has power to authorize the discontinuance of parks and sale of park property, the fee of which is in the city, when no private property is taken. *East Chicago Co. v. City of East Chicago*, 85 N. E., 783.

"It has been held that, although title to the land within a city forming a public park is vested in a city, the control of the public park belongs primarily to the State. Such parks are held, not for the sole use of the people of a particular city, but for the use of the general public, which the Legislature represents. By virtue of its control over the public parks, the Legislature possesses the power to authorize the city to devote it to a use which is inconsistent with park purposes, so long as such inconsistent use is some other and higher public purpose which will render its enjoyment by the public more extended and general." (In that case the Legislature, in authorizing the sale of the property, specified how the proceeds should be applied.) 1 Dillon Municipal Corporations, 5th Ed., sec. 117; 19 R. C. L., 763.

Upon these facts, certainly, it is immaterial whether or not the grantors, moved by a patriotic purpose, sold the 103 acres to a committee of their fellow-citizens at a price less, or more, than what could have been obtained from others. The purchase was made at a stipulated price, duly acknowledged as paid in full for the property expected to be used by the State, and if it should cease to be so used, then for a reverter, not to the grantors, but for the use of the city, and a subsequent act of the Legislature has authorized the city to make sale of the same and apply the proceeds to other uses.

There was no trust imposed upon the conveyance in favor of the grantors, nor was there any condition subsequent in their favor.

The inevitable conclusion is that, under the terms of the deed of 1889, the original grantors were divested of all title or interest, and that the defendant, the city of Wilmington, under the facts found by the referee, as modified by the judge, holds an estate in fee simple, subject only to the power of the Legislature to authorize the sale, or other disposition of the property, in the event that the city still continues to hold the property, subject to the use mentioned in the deed of 1889.

Reversed.

STATE v. R. P. OLIVER.

(Filed 24 October, 1923.)

1. **Courts—Criminal Law—Jurisdiction—Pleas—Abatement.**

Under our statute, a criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by plea in abatement. C. S., sec. 4606.

2. **Same—Waiver.**

While the court's jurisdiction of the subject-matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late.

PLEA IN ABATEMENT, heard by *Cranmer, J.*, at July Term, 1923, of NEW HANOVER.

The defendant was indicted for false pretense, in that he represented to the Morris Fertilizer Company that he was the owner of the farm on which he lived in Sampson County, and that it was free from incumbrances, whereas the farm was owned by another and was incumbered to the amount of $9,000, and that by means thereof he obtained certain sacks of fertilizer from the company, to its loss. The order of the court

recites the defendant's execution in New Hanover County of a contract to handle fertilizers in 1920 as the company's agent; that this contract was lost, and that the company mailed to the defendant another contract, which he signed in Sampson County on 9 February, 1920, and then mailed to the company at Wilmington.

The indictment was found at the June Term, 1923, of the Superior Court of New Hanover, and thereafter, at the same term, the defendant moved to continue the case. His motion was allowed, and the case was set for trial on a certain day of the July term. On the day set for trial the defendant, without giving previous notice, filed a plea in abatement, on the ground of improper venue, contending that, under the contract, the fertilizer was received in Sampson, and the crime, if any, was committed there.

The plea was overruled, and the defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Nathan Cole and Leon G. Stevens for defendant.

ADAMS, J. At common law, crimes of a local character could be prosecuted only in the jurisdiction in which they were committed, and the venue was laid in such county or district. It was ordinarily the duty of the prosecution to show that the offense was committed in the county in which the indictment was returned; otherwise, the defendant was entitled to an acquittal. 1 Archbold's Cr. Pr. & Pld., sec. 211; *S. v. Carter,* 126 N. C., 1011. But this rule has been changed by statute, and it is now provided that in the prosecution of all offenses it shall be deemed and taken as true that the offense was committed in the county in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement. C. S., sec. 4606; *S. v. Woodard,* 123 N. C., 710; *S. v. Holder,* 133 N. C., 710.

The plea was filed by the defendant, and the question is whether, under the circumstances disclosed by the record, it is available in his behalf. The Court has frequently held that a plea in abatement must be filed in apt time—usually not later than the arraignment. *S. v. Seaborn,* 15 N. C., 311; *S. v. Haywood,* 73 N. C., 437; *S. v. Griffice,* 74 N. C., 317; *S. v. Baldwin,* 80 N. C., 390; *S. v. Watson,* 86 N. C., 624; *S. v. Holder,* 133 N. C., 710.

It does not appear whether, when the defendant made his motion in open court, he was formally arraigned, or whether a plea of not guilty was then entered of record; but in our view of the law the question presented for decision is not necessarily dependent on the time of arraignment.

To sustain the indictment it was essential that the court have jurisdiction both of the subject-matter and of the person of the defendant. Jurisdiction of the offense could neither be waived nor conferred by consent; but as to the court's jurisdiction of the crime no question is raised. With respect to the defendant's person, this rule is less rigid, for irregularities in obtaining jurisdiction of his person may be waived by the defendant. 16 C. J., 174, sec. 225; *ib.*, 176, sec. 231; *ib.*, 412, sec. 747; 8 R. C. L., secs. 23, 55.

A plea in abatement is a dilatory plea; if it is sustained, the trial may be delayed, but the defendant is usually retained in custody to await the return of another indictment. Clark's Cr. Pr., 377; *S. v. Griffice, supra.* This is probably a reason for holding that such plea will not be entertained after an appearance by the defendant and a continuance of the cause. Bishop remarks: "After a general continuance it is too late to plead in abatement." New Cr. Pr., Vol. I, 567, sec. 730 (2); *ib.*, sec. 791 (5). To the same effect is *Davis v. The People,* 192 Ill., 185, in which it is said: "By entering his appearance, and moving to continue the cause, the plaintiff in error acknowledged the jurisdiction of the court, and thereafter it was too late to plead in abatement." Also, in *Gill v. State,* 134 Tenn., 597, the Court observed: "However, it [the plea in abatement] was waived because the defendant allowed one continuance to pass, and only filed his plea at the next term, when the case was called for trial, without giving sufficient reason for the delay." Likewise, in *S. v. Myers,* 78 Tenn. (10 Lea), 717, the plea was stricken out on motion, because it had been filed after a general continuance. See, also, *Hubbard v. State,* 72 Ala., 164; *Verberg v. State,* 137 Ala., 73.

The record shows that, after the indictment had been returned, the defendant appeared in court and made his motion for a general continuance, and the case was thereupon set for trial on a day certain at the next term. The plea was filed on the day set for trial, and was too late. By procuring the order of continuance, and thereby submitting himself to the jurisdiction of the court, the defendant waived his legal right to insist on the plea.

We are not inadvertent to the decision in *S. v. Jackson,* 82 N. C., 566; but in that case it appeared that the indictment was found at the term to which the defendants had been bound, and the cause, *without further action,* was continued. The defendants, so far as the record shows, did not appear in court or move for a continuance or submit to the jurisdiction, and were formally arraigned at the ensuing term.

The judgment of his Honor denying the defendant's plea in abatement is affirmed and the cause is remanded for further proceedings.

Affirmed.

MATTIE B. HORTON v. STANLY HORTON.

(Filed 24 October, 1923.)

Divorce—Abandonment of Wife—Alimony—Appeal and Error—Findings of Fact—Conduct of Husband—Marriage.

The Superior Court judge, in allowing alimony to the wife *pendente lite*, under the provisions of C. S., sec. 1666, must find the essential and issuable facts and set them out in full for the purposes of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient; and where her action is for a divorce *a mensa* on the ground of abandonment, for that she was compelled to leave home by the conduct of her husband, the judge must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient.

CLARK, C. J., dissenting.

CIVIL ACTION, for divorce *a mensa,* etc., heard on motion for an allowance of alimony *pendente lite,* before *Bond, J.,* at April Term, 1923, of DURHAM.

The court granted the application, the judgment entered being as follows:

"This matter coming on to be heard before me, and, after hearing the evidence offered by both sides, and the argument of counsel, the court finds the following facts:

"That the plaintiff and defendant were married to each other, as alleged in the pleading; that thereafter a separation took place, and they are now living separate and apart from each other; that the plaintiff left the home of her husband because of treatment by him which made it so that she could not remain longer in the home; that she has brought suit against the defendant for a divorce from bed and board, and brought the suit in Durham County, while her husband resides in Wake County, as she did before the separation.

"Motion is made by the defendant to order the case removed for trial to the Superior Court of Wake County; that motion is denied, the court finding as a fact, at the time she brought her action she was a resident of Durham County. The court further finds that, although she left her husband's home, she was caused to do so by reason of treatment accorded her and statements made to her by her husband—among others, that if she would leave and get a divorce from him he would bear the expense of same and would pay her a sum of money; that her health was bad, causing her to go to a hospital, where she stayed for a period of time, her husband paying her no attention and refusing to pay bill for same; that her husband owns valuable land and other property, while she has no property.

"It is ordered that the defendant pay to the plaintiff the sum of $50 per month, the first payment to be made on the 5th day of July, 1923, and that the sum of $50 be paid to her by him each thirty days after that date.

"It is further ordered that the defendant pay to the plaintiff's attorney as counsel fees the sum of $150, on or before 15 July, 1923.

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

Defendant excepted and appealed, assigning for error that there was not sufficient finding of facts to justify an award of alimony and counsel fees.

Brogden, Reade & Bryant for plaintiff.
Pou, Bailey & Pou for defendant.

HOKE, J. Our statute (C. S., sec. 1666) provides that alimony *pendente lite* may be allowed to a wife seeking divorce whenever she sets forth in her complaint such facts as will uphold a judgment for relief, and where the judge, on the hearing of the application, shall find these facts to be true, and shall find further that the wife has not sufficient means for her subsistence and to defray the necessary and proper expenses of the suit. Speaking to this question in *Easeley v. Easeley,* 173 N. C., 531, the Court said: "The statute controlling the question (Revisal, sec. 1566) provides that on a hearing of this character alimony should be allowed when plaintiff shall, in her complaint, set forth such facts 'which, upon application for alimony, shall be found by the judge to be true and to entitle her to the relief demanded in the complaint,' and in numerous decisions construing the statute it has been held that the judge must find the essential and issuable facts and set them out in detail, so that this Court can determine from the facts as found whether the order for alimony can be upheld as the correct legal conclusion." Citing *Garsed v. Garsed,* 170 N. C., 672; *Moody v. Moody,* 118 N. C., 926; *Lassiter v. Lassiter,* 92 N. C., 129; *Morris v. Morris,* 89 N. C., 113.

Under the interpretation of the statute approved in these and other like decisions, there are no sufficient findings of facts by the court below to sustain an award of alimony in the cause. True, his Honor, in the judgment, finds, among other things, "That although she left her husband's home, she was caused to do so by reason of treatment accorded her and statements made to her by her husband—among others, that if she would leave and get a divorce from him he would bear the expense of same and pay her a sum of money"; but a careful examination of the statement will disclose that, in so far as it purports to be a finding of abandonment on the part of the husband, it is only a general and inconclusive estimate on the part of his Honor as to the conditions presented,

and the only fact determined is that at one time "he offered to pay for a divorce if she would leave and obtain one." According to defendant's evidence, this was on one occasion only, and in reply to a threat of the wife to leave him; but in any event, standing alone, it is entirely insufficient to justify a separation of a husband and a wife. The further finding as to defendant's refusal to pay the hospital fees at Durham, and his inattention while she was there—this took place after plaintiff had left defendant's home—and although generally pertinent to the inquiry, must take its complexion largely from the correct determination of the principal fact, whether plaintiff was justified in leaving her husband's home. While abandonment is one of the statutory grounds for a divorce from bed and board, and it is true, as plaintiff contends, that if a husband, by continued and persistent cruelty or neglect, forces his wife to leave him or his home, he may well be held guilty of abandonment. *High v. Bailey,* 107 N. C., 71; *Setzer v. Setzer,* 128 N. C., 170. It is equally true that when the wife voluntarily leaves the husband's home without good cause or sufficient excuse, this charge and its consequences may not be imputed to him.

On the record as now presented, we are of opinion that defendant's objection must be sustained, and this will be certified, that the order allowing alimony and counsel fees be set aside without prejudice, and that the matter be further proceeded with as plaintiff may be advised.

Reversed.

CLARK, C. J., dissenting: The facts found by the judge upon a motion for alimony are that, though the wife left her husband's home, "she was caused to do so by reason of the treatment accorded her," and "statements made to her by her husband—among others, that if she would leave and get a divorce from him he would bear the expense of same and would pay her a sum of money; that her health was bad, causing her to go to a hospital, where she stayed for a period of time, her husband paying her no attention and refusing to pay bill for the same; that her husband owns valuable land and other property, while she has no property." The husband admits in his answer the fidelity of his wife, his possession of property, and the utter poverty of the wife.

If it be conceded that the finding that the husband stated to her that if she would leave and get a divorce he would bear the expense and pay her a sum of money was not sufficient ground to base the judgment for alimony, yet the judge finds as a fact that she was "caused to do so (leave her husband's home) by reason of the treatment accorded her." This, upon the face of it, taken in connection with the other findings as to the husband's refusal to pay anything for her necessary expenses while at the hospital, though he is a man of large property, and she has

nothing, should entitle her to the alimony allotted her of $50 per month while the matter is being more fully investigated.

If the finding that she was caused to leave by reason of treatment accorded her by her husband was not full enough, it was the duty of the husband to ask for a finding of more sufficient details. It must be remembered that, under such circumstances, usually, and it is found as a fact in this case, the wife is in entirely destitute circumstances, with no means of support and nowhere to go, and she is not able to bear the expense and delay of appeals to this Court upon such objections, which it was the duty of the husband to have avoided by asking for fuller finding as to the nature of the treatment which had caused her to leave.

This statute is the humane provision for persons in the circumstances of this plaintiff, and it should be construed liberally, not narrowly, to furnish the remedy desired, which is that a destitute wife might have some support and somewhere to go, and some means of employing counsel that her case may be heard, and of obtaining medical treatment, which it was in evidence she acutely needed.

With this wife, as with many others, it must be remembered that she has been occupied with her household duties, under which her health has broken down; that she has received no pay for her services beyond food and clothes, and that when her husband tires of her she has not a cent of money while the husband, out of doors and mixing with the world, has accumulated wealth. Under these circumstances, when the husband tires of the wife and bids her be gone, or treats her so harshly as to make her staying with him unendurable, it would be brutal if the law did not require him to furnish some means that she may lay her grievance before the courts with an allowance for subsistence in the meantime, and the law passed for that purpose should not be construed so technically as to make it impossible or difficult for her to present her case.

To construe this statute strictly so as to require successive appeals to this Court upon technical objections which the husband should have avoided by asking for more complete statement of the details—of which he was already informed—destroys the very object of the statute, which is to give to the sick and destitute wife some means of living while the issue of divorce from bed and board is being investigated.

If this is not done, it leaves it in the power of the husband to prevent her prosecuting the action and to prevent the court from passing upon the merits of the case. She is without remedy if denied that which the law was intended to give her.

The defendant does not aver that his wife has been unfaithful to him in any way, and the sole assignment of error is that the findings of fact are not sufficient in law to sustain the judgment allotting the wife alimony *pendente lite*.

F. P. POWERS, ADMR. OF A. K. POWERS, v. TRAVELERS INSURANCE COMPANY.

(Filed 31 October, 1923.)

1. Insurance, Accident—Policies—Contracts—Interpretation.

While the terms of a policy of accident insurance, when ambiguously expressed, are to be construed more strongly in favor of the insured, this rule cannot apply when, from the wording of the instrument, the clear intent of the parties may be interpreted.

2. Same—Public Policy.

In interpreting a policy of accident insurance, the clear intent of the parties, as expressed in the policy contract, will be given effect, when not in conflict with public policy.

3. Same—Ambiguity.

A policy of accident insurance, relieving the company from liability for the death of the insured caused by "firearms," is not contrary to our public policy, and when clearly expressed in the instrument, is enforceable; nor will a contrary intent be construed from the wording of another provision in the contract relieving the insurer from liability only when the death is intentionally caused, it appearing from the language of the further provisions that they must necessarily be applicable only to certain causes of death therein enumerated.

APPEAL by defendant from *Allen, J.*, at March Term, 1923, of PENDER.

Civil action. The plaintiff's intestate, a resident of Sanford, Florida, purchased the policy in question on 14 June, 1920. He came to his mother's home in Pender County the next day, and was killed on 19 June. Wearing a white suit and a Panama hat, he left the house and walked out in the direction of the barn, between 9 and 10 o'clock at night, and was shot by some one whom he did not recognize. He was carried into the house, and said, "I walked out there. I thought I heard a noise at the barn, and just before I got there some one came out, and before I could speak he threw up his hands and shot me. I don't know who it was, unless it was somebody that took me for a haunt." It is admitted that the sole cause of his death was the gunshot wound.

The following are the material parts of the policy:

"The Travelers Insurance Company, Hartford, Conn., hereby insures the person whose name is written upon the stub of this ticket policy in the possession of the company, bearing even number and date herewith, against bodily injuries effected during the term of this insurance, solely by external, violent, and accidental means, in the manner following, subject to the conditions and limitations herein contained, to wit: a. If such

injuries shall, independently of all other causes, result in death within ninety days from the date of accident, the company will pay $2,500 in lieu of any other indemnity to the executors, administrators or assigns of the insured."

"Additional Provisions: g. This insurance shall not cover disappearance nor injuries of which there is no visible contusion or wound on the exterior of the body of the insured, nor shall it cover accident, injury, disability or death resulting wholly or partly from any of the following, to wit: aeronautics, . . . firearms, fireworks or explosives of any kind, nor shall this insurance cover suicide, sane or insane, or injuries, fatal or nonfatal, inflicted intentionally by the insured or by any other person, sane or insane." . . .

The plaintiff sued to recover $2,500 for the death of the insured, and it was admitted that, if entitled to recover, he is entitled to this amount.

The verdict was as follows:

1. Did plaintiff's intestate come to his death from injury inflicted by the use of firearms? Answer: Yes.

2. Did plaintiff's intestate receive a fatal injury intentionally inflicted by some person unknown, while sane or insane? Answer: No.

The first issue was answered by consent. The defendant moved for judgment upon the verdict. Denied. Exception. Judgment. Exception. Appeal by defendant.

Stevens, Beasley & Stevens for plaintiff.
Rountree & Carr for defendant.

ADAMS, J. The defendant's motion for judgment upon the verdict should have been allowed. The first issue was answered by consent; and the contract insured the intestate against bodily injuries effected solely by external, violent, and accidental means, as therein set out, subject to specific conditions and limitations. Among these limitations is this: that the insurance should not cover death resulting wholly or partly from several designated agencies, one of which is "firearms."

The insured and the defendant had the legal right to enter into the contract, and the parties are bound by its terms. "In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please, upon their obligations, not inconsistent with public policy; and the courts have no right to add anything to their contracts or to take anything from them." 14 R. C. L., 931; *Roech v. Protective Assn.*, 51 L. R. A. (N. S.) (Iowa), 221; *Lewis v. Accident Co.*, 17 L. R. A (N. S.) (Mass.), 714; *Penn v. Ins. Co.*, 158 N. C., 29; *S. c.*, 160 N. C., 400.

In the case last cited *Walker, J.*, said: "The plaintiff and defendant had the legal right to make any contract with each other, not unlawful in itself, both being at arm's-length and in the full possession and enjoyment of their mental faculties. We must decide the case, therefore, not by what we may think would have been a wiser and more discreet contract on the part of the plaintiff, if he could have procured such a one, but by what is written in the contract actually made by them. Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said—what their contract is, and not what it should have been."

It is conceded that the first issue involves a question as to the proper construction of paragraph "g" set out in the statement of the case. The plaintiff contends, first, that the "firearms clause" is modified by the subsequent words, "or injuries, fatal or nonfatal, inflicted intentionally by the insured or by any other person, sane or insane"; so that, the exemption from liability for death by "firearms" should be construed as existing only when the fatal injury is intentionally inflicted. We cannot concur in this construction. By reference to the paragraph referred to, it may be seen that the various instrumentalities of accident or death are classified, and that the provision exempting the defendant from liability for death resulting wholly or partly from firearms includes also "fits," "vertigo," and "sleep-walking" (which preclude the idea of intention), and is independent of the succeeding clause, "nor shall this insurance cover . . . injuries . . . inflicted intentionally."

The plaintiff next insists that if the first position is not tenable, the contract is ambiguous and should be construed so as to resolve every doubt against the insurer and in favor of the insured. If the clause is ambiguous, or if there is uncertainty as to its proper interpretation, it should be construed against the defendant rather than against the insured, on the ground that a written contract should, in case of doubt, be interpreted against the party by whom it was drawn. *Bray v. Ins. Co.*, 139 N. C., 390; *Trust Co. v. Ins. Co.*, 173 N. C., 558. "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. The strict rule of construction does not authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists, nor does it authorize the court to make a new contract for the parties or disregard the evidence as expressed, or to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embody-

ing requirements, compliance with which is made the condition to liability thereon. Neither does the rule prevent the application of the principle that policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties." 14 R. C. L., 931.

The language of the Court in *Penn v. Ins. Co., supra,* is directly in point: "While the rule is thoroughly settled that policies of this and like character are to be construed liberally, and that ambiguous provisions, or those capable of two constructions, should be construed favorably to the insured and most strongly against the insurer, plain, explicit language cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties. Taking the policy in the case at bar by its four corners, it will admit of but one construction."

The policy in question is a "ticket policy," evidently intended to insure against injury or death in limited cases, and to circumscribe the scope of the defendant's liability. It contains the unequivocable provision that the insurance shall not cover "accident, injury, disability, or death resulting wholly or partly from . . . firearms"; and, in the absence of ambiguity, there is no reason for disregarding the plain meaning of the language by which the intention of the parties is expressed. Upon the verdict as returned, judgment will be rendered for the defendant.

Error.

GLADYS WALLACE v. L. M. SQUIRES.

(Filed 31 October, 1923.)

Negligence—Automobiles—Father and Son—Burden of Proof.

Where there is evidence that a father has prohibited his son from driving his automobile except at such times as he had expressly permitted him to do so, but there is further evidence that the son had driven the automobile while riding the family, etc., and occasionally for his own private purposes, the knowledge whether on a certain occasion the son had inflicted the injury while using the car for his own purposes is peculiarly within the knowledge of the father, the defendant in an action to recover damages for such injuries, and the burden of proof is on him.

STACY, J., dissenting in part.

APPEAL by plaintiff from *Bond, J.,* at May Term, 1923, of ALAMANCE.

This was an action to recover damages for serious injury sustained by the plaintiff in an automobile collision near Burlington, 6 November,

1921. The plaintiff, Miss Wallace, and another young lady and two young men, left Raleigh to drive to Greensboro in a Pope-Hartford roadster. On their return from Greensboro, about 1½ miles from Burlington, the defendant's car, driven by his son, going towards Elon College, met and collided with the car in which the plaintiff and her companions were riding, about 7:30 p. m.

The evidence of the plaintiff and witnesses is that the car in which she was riding was on the proper side of the road, which was 16 feet wide, of ample width for two cars to pass; that it was comparatively straight for some distance, and that outside of the paved part of the road there was more than three feet on either side, and this was in good condition. The defendant's son had frequently driven over this road; knew its width and condition. The plaintiff's witnesses testified that they were blinded by the bright headlights of the defendant's car, which was approaching them very rapidly, and just before it reached the car in which the plaintiff was riding, the defendant's car, which was a heavy Hudson touring car, swerved a little towards the plaintiff's car, struck it, turned it around in such way that it turned over, falling on the plaintiff and young Slater, who was driving at the time. Bishop, the other young man, was thrown clear of the car into an adjoining field. The plaintiff received very severe and painful injuries, her pelvic bone being broken in two places. The testimony of the physician gave in detail the extent and nature of her severe injuries, and the remedies he administered, and her suffering at the time and subsequently. These details are omitted, as the judgment is in favor of the defendant, which also renders it unnecessary to consider the assignments of error directed to the ruling of the court, admitting or refusing to admit testimony showing the negligence of the driver, son of the owner of the car, in bringing about the collision.

The jury found in response to the first issue that "the plaintiff was injured by the negligence of Newmer Squires, son of the defendant, L. M. Squires, as alleged in the complaint."

The second issue was as follows: "Was Newmer Squires the agent and servant of the defendant, L. M. Squires, at the time of said injury referred to in the complaint?"

The plaintiff excepted to the second issue as submitted by the court, and assigns that as error, and also excepted to the charge and to refusal of prayer to charge.

The plaintiff had also tendered as issues the following, the rejection of which constituted the eighth assignment of error, to wit:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. Did the plaintiff, by her own negligence, contribute to her injury?

3. What injury, if any, is the plaintiff entitled to recover of the defendant?

Upon the verdict, judgment was rendered in favor of the defendant. Plaintiff appealed.

Carroll & Carroll and Manning & Manning for plaintiff.
Long & Allen and Parker & Long for defendant.

CLARK, C. J. The plaintiff asked the court to charge that "If the jury should find from the evidence that the defendant purchased the car for the use of himself and his family, and that the defendant permitted his sons, including Newmer, to drive the said car, driving himself, his wife or his daughter, and at times permitted the said Newmer to use said car for his own pleasure, and permitted him at times to use it in his business, driving it alone, and said Newmer used it at times without the express permission of his father; that on Sunday, 6 November, 1921, after the defendant had left home, but Mrs. Squires was at home, and other members of the family, the said Newmer went to the open garage, which was unlocked, and the car was unlocked, and drove the machine out, and came to Graham and took Miss Madge Andrews and Mr. and Mrs. Cox to ride, and during the ride the collision occurred, resulting in the injury of the plaintiff, then the jury will answer the second issue 'Yes.'"

The court refused to so charge, but, on the contrary, instructed the jury, at the request of the defendant: "If you should find from the evidence, and by its greater weight, that the defendant, L. M. Squires, owned the Hudson car, and that he used said car to some extent in his business, and used it also as a pleasure car for himself and his family, and at times permitted his son to use said car as a pleasure car, but that said L. M. Squires had forbidden his son to take said car, except on those occasions when his said son should ask and receive permission so to do; and if you should further find from the evidence, and its greater weight, that on the occasion referred to in the complaint in this cause, Newmer Squires, the son of the said L. M. Squires, had taken said car, without obtaining the consent and without the knowledge of his father, the said L. M. Squires, and was using the same, then I charge you to answer the second issue 'No.'"

This instruction goes further than this Court has ever held in undertaking to define the liability of the father for the acts of a minor child. It requires that, before finding the second issue, that the son was the agent or servant of the defendant, that the jury must find that he was

driving the car at that particular time with the knowledge and express consent of his father, and that if they failed to do so, by the greater weight of the evidence, they must find that he was not acting as the agent or servant of the defendant.

In the latest utterance of this Court upon this subject (*Robertson v. Aldridge,* 185 N. C., 392) the law applicable is thus stated by *Hoke, J.,* speaking for a unanimous Court: "True, it is the recognized principle that a parent is not ordinarily responsible for the torts of a minor child, solely by reason of the relationship, and that generally liability will only be imputed on some principle of agency or employment. *Brittingham v. Stadiem,* 151 N. C., 299. Accordingly, it has been directly held with us, in case of injury caused by negligent use of automobiles, that no recovery can be sustained when it is made to appear that the machine was being operated by the minor at the time, for his own convenience or pleasure, contrary to the parent's orders or without authority from the parent, either expressed or implied. *Linville v. Nissen,* 162 N. C., 96; *Bilyeu v. Beck,* 178 N. C., 481. But it is also held in our opinions, by the great weight of authority, that where a parent owns a car for the convenience and pleasure of the family, a minor child, who is a member of the family, using the car at the time for his own purposes, with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect. *Clark v. Sweaney,* 176 N. C., 529; *Griffin v. Russell,* 144 Ga., 275; *Hutchins v. Haffner,* 63 Col., 365; *Stowe v. Morris,* 147 Ky., 386; *McNeal v. McKain,* 33 Okla., 449; *Birch v. Abercrombie,* 74 Wash., 486. And from this it follows, we think, that when it is made to appear that a car owned by a parent for family use is openly and habitually used by a minor child, a member of the family, such conditions will constitute evidence permitting the reasonable inference that the car is being operated by authority of the parent and for the purpose for which it was obtained. *Birch v. Abercrombie, supra; Williams v. May,* 173 N. C., 78; *Taylor v. Stewart,* 172 N. C., 203."

Again quoting from the same opinion, this Court said: "Again, while our decisions hold that automobiles are not to be regarded as inherently dangerous, requiring questions of liability to be determined in that view, it is the rule approved by well-considered authority and recognized in this jurisdiction, that when an owner, parent, or other, entrusts his car to one whom he knows or has every reason to believe is incompetent or reckless and irresponsible to an extent that makes a negligent injury probable, such owner may be held liable, though the doctrine of *respondeat superior* is not presented (*Gardner v. Solomon,* 200 Ala., 115), a

position recognized and approved by this Court in the recent case of *Tyree v. Tudor,* 183 N. C., 340."

It would be too hard a burden to place upon one who was injured by the collision caused by the proximate negligence of the driver of an automobile, bought by the defendant for the family use and driven habitually by his son, to hold that, in order to fix liability upon the owner of the car, the injured person must produce testimony that at the time of the accident in which he was injured the son was driving the car without obtaining the express consent and with the knowledge of his father, as the court has here charged. Those facts are peculiarly within the exclusive knowledge of the defendant and his son; and upon the evidence in this case, in which the son had habitually used the car, driving it for the family or for his own pleasure or business, it was encumbent upon the father to show that the son had no permission at that particular time to drive the car, and it was error to charge the jury that, before they could render a verdict against the defendant, they must find that the son at the time was driving the car with the knowledge and express consent of the father. That requires a finding of an express authority, whereas, upon the facts and circumstances of this case, the jury should have been permitted to find whether, upon all the circumstances, there was an implied consent, from the use in the family and frequency with which the son had driven the car for the family or for his own use and pleasure. A mere statement that the father at some time had forbidden his son to use the car without his express permission was not conclusive evidence that he was not driving with the implied consent which might well have been drawn correctly from the custom that was shown of his frequent use of the car, and did not throw upon plaintiff the burden of proving such express permission by the greater weight of the evidence.

This instruction would enable the father, by the mere statement to his son that he could not drive the car without express permission, though driving the car habitually, to protect himself from liability, when, as a matter of fact, there is ample evidence from which the jury could, and probably should, have drawn the inference that there was an implied consent and authority on the part of the father that he should so use it.

The number and frequency of accidents which occur, entailing death or serious injuries to others from automobiles driven by minors, which could not be done without the consent of the father and owner, forbid that the father should escape liability by merely stating to his son that he could not drive the car without express permission, when it may be he was constantly and repeatedly doing that very thing, as was shown in this case, and necessarily with the knowledge of the owner of the machine.

If it had been shown that the minor was not permitted to drive the machine, and that he had done so entirely without the knowledge of the father, the situation would be different, but here there is evidence of implied consent, which the jury might infer from the habitual driving of the machine for the family and for his own purposes by the son, and no evidence that it was done clandestinely, as in the *Nissen case.*

The public safety forbids that we should go beyond the extreme conditions laid down in the *Nissen case,* 162 N. C., 96, where the car was taken by the minor son against the positive prohibition of the father. In this case there was ample evidence, as above stated, from which the jury was entitled to infer that, notwithstanding any prohibition, as a matter of fact the minor was habitually driving the car for the family or for his own pleasure or business.

Error.

STACY, J., dissenting in part: I think there should be another trial of this cause for error in the charge, but I do not agree with the new doctrine announced in the opinion of the Court that the burden of proof is on the father (defendant) to show a want of authority or permission on the part of his son to drive the car at the time and place in question in order to exculpate the defendant from liability.

The burden of proof is on the plaintiff to show that she was injured by the negligence of the *defendant;* and "when it is made to appear that a car owned by a parent for family use is openly and habitually used by a minor child, a member of the family, such conditions will constitute evidence permitting the reasonable inference that the car is being operated by the authority of the parent and for the purpose for which it was obtained." *Hoke, J.,* in *Robertson v. Aldridge,* 185 N. C., 292. This, I think, is a correct statement of the law. It is as far as we have gone, and, in my judgment, it is as far as we ought to go. No presumption arises from the relation of parent and child by which the former can be held answerable for the wrongs of the latter; and if there be nothing more than relationship to connect a parent with the tort of his minor son, the parent is not liable therefor. *Chandler v. Deaton,* 37 Tex., 406.

The liability of a father for the torts of his minor child, in general, rests only upon the rule of *respondeat superior when the fact of agency is proved,* and no presumption of agency arises from the family relationship. *Kumba v. Gilham,* 103 Wis., 312; *Linville v. Nissen,* 162 N. C., 95, and cases there cited. With all due deference, I think the Court has confused the rule in regard to the burden of proof with strong circumstances tending to show agency. *Schaefer v. Osterbrink,* 67 Wis., 495; 17 Am. & Eng. Ency. of Law, 392.

The rule as to the burden of proof is important and indispensable in the trial of causes. It constitutes a substantial right of the party upon whose adversary the burden rests, and hence it should be carefully guarded and rigidly enforced by the courts. *Hosiery Co. v. Express Co.*, 184 N. C., 480.

EDWARD F. CULLOM ET AL., TRUSTEES IN BANKRUPTCY OF REPUBLIC TRUCK AND AUTO COMPANY, v. THE MERCHANTS BANK AND TRUST COMPANY.

(Filed 31 October, 1923.)

1. Actions—Defenses—Evidence—Issues—Appeal and Error—New Trials.

In an action by the trustee in bankruptcy to recover the value of an automobile alleged to have been taken by the defendant bankrupt, in fraud of the provisions of the Bankrupt Act, the defendant pleaded and offered evidence to show that, holding a registered purchase-money mortgage, it had, preceding a period of six months before petition filed, settled all matters between the bankrupt and itself by taking over the machine: *Held*, error for the trial judge, to the defendant's prejudice, to make his liability depend upon a single issue determinative only as to the question of whether the settlement had been made as alleged by the defendant, relieving the plaintiff of the burden of proof on the issue and depriving defendant of the defense under the duly registered purchase-money mortgage.

2. Appeal and Error—Objections and Exceptions—Actions—Defenses.

And where the defendant has duly moved for judgment as of nonsuit in the county court, and has preserved his exceptions in the Superior Court and excepted to an erroneous charge of the Superior Court judge, and has also preserved these exceptions in the Supreme Court on appeal, the position that he had lost his right by acquiescence is untenable.

3. Appeal and Error—Actions—Defenses—Several Grounds of Defense—New Trials.

Where the allegations of the complaint and the evidence present two material and complete grounds for defense, it is reversible error for the judge, upon the trial, to deprive the defendant of one of them, and make its liability solely depend upon the determination of the other.

CIVIL ACTION tried before his Honor, *Starbuck, J.*, and a jury, at October Term, 1922, of FORSYTH County Court, and heard on appeal to Superior Court before his Honor, *Shaw, J.*, at December Term, 1922.

The action is by the trustees in bankruptcy of the Republic Truck and Auto Company against defendant, to recover the value of an automobile which plaintiffs alleged defendant had acquired of the bankrupt in fraud of the provisions of the bankruptcy acts. On denial of plaintiffs' right as claimed, the jury in the county court rendered the following verdict:

"1. Are the plaintiffs the owners of and entitled to the possession of the automobile described in the complaint? Answer: 'Yes.'

"2. Was said automobile wrongfully taken by the defendant on 5 July, 1921, as alleged? Answer: 'Yes.'

"3. What was the value of the automobile at the time of said wrongful taking? Answer: '$700.'"

Judgment on verdict for plaintiffs. Defendant excepted and appealed, assigning errors. The judgment having been affirmed in the Superior Court, defendant excepted and appealed to this Court, renewing his assignments of error.

Manly, Hendren & Womble for plaintiffs.
J. E. Alexander for defendant.

HOKE, J. Plaintiffs, as stated, alleged and offered evidence tending to show that they were trustees in bankruptcy of the Republic Auto Company, adjudged a bankrupt in August, 1921, and claimed that defendant had acquired and held an automobile belonging to the bankrupt, contrary to the Bankruptcy Act and in fraud of its provisions. Defendant denied, among other averments, that it had so acquired the title to the automobile in question, and by way of further defense alleged that holding a purchase-money mortgage on the automobile acquired by assignment and for full value from the bankrupt, more than six months before the act of bankruptcy, plaintiffs had come to an adjustment with the mortgagor-purchaser by which the latter had surrendered for value any and all claims he had against the machine, and defendant had become and was the full and bona fide owner of the same, and offered evidence in support of these defenses.

On the trial in the county court, as we understand the record, and in departure from the basic averments of the complaint that defendant had acquired in fraud of the provisions of the Bankruptcy Act, the issue of ownership was submitted to the jury on the single question whether the defendant had come to an adjustment with the original purchaser and mortgagor of the machine, and whereby the latter had surrendered any and all claims thereon to defendant as set forth in his additional defense. By this course of procedure the plaintiffs were relieved, and to our minds erroneously relieved, of the burden of establishing their claim as set forth in the complaint, and defendant was in effect deprived of any and all claim on the machine which might arise to him under and by virtue of a duly registered purchase-money mortgage which had been assigned to defendant for value long before any adjudication of bankruptcy of the company.

Appellee does not seriously contend against the commission of prejudicial error in the course pursued unless defendant should be held to have acquiesced in the trial of the issue as presented to the jury, but we do not so interpret the record. On the contrary, defendant seems to have insisted throughout on his objections, and all of them, to the validity of the trial as presented in his exceptions to the refusal to nonsuit, and specifically to the charge as given, and assigning same for error, both in the county and Superior courts and on appeal here.

The case in principle is not unlike one disposed of at the present term of *Cherry v. R. R., ante, 263*, in which the court, in presenting the cause to the jury, restricted plaintiff to a single ground for relief when his allegations and evidence presented two, and the ruling was held for reversible error.

We are of opinion that defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

MARBURY LUMBER COMPANY v. BRIGGS-SHAFFNER COMPANY.

(Filed 31 October, 1923.)

1. Contracts—Arbitration and Award—Evidence—Fraud—Instructions.

Where there was conflicting evidence upon the trial of an action to recover the purchase price of lumber sold and acceptance refused upon the ground that it did not come up to specifications, as to whether the parties had agreed to be bound by the conclusion of an official inspector, it is not error for the judge to charge the jury that, in the absence of fraud in the procuring of the contract, to abide by the inspection, if the jury found that there was such contract, the defendant would be bound by the result, and should the jury so find, they need not consider defendant's testimony that the lumber did not come up to grade or quality called for in the original contract.

2. Appeal and Error—Objections and Exceptions—Verdict—Issues—Immaterial Matter.

Where a determinative fact at issue has been found by the jury, under proper instructions, for appellee, the exceptions of the appellant to the admission of evidence upon a different phase of the case becomes immaterial in the Supreme Court on appeal.

STACY and ADAMS, JJ., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at May Term, 1923, of FORSYTH.

This action was brought upon sale of lumber by the plaintiff to the defendant. When the lumber arrived at defendant's place of business it was refused because alleged not to be up to contract as to grade, size and thickness. It was examined by the plaintiff's salesman and agent

and there is evidence that it was admitted by him that the complaint of the defendant was well founded and that it was within its rights in refusing to accept the lumber.

Some months thereafter a representative of the plaintiff asked to send an official representative to examine the lumber. There was conflicting testimony whether the inspector was to be the judge whether or not the lumber complied with the requirements. The plaintiff alleges in his complaint that there was a contract between the parties by which they agreed to abide by the decisions of the inspector, which was denied by the defendant.

The action was tried in Forsyth County Court in November, 1922, before *Starbuck, J.*, and the jury found upon the issues submitted that the defendant was indebted to the plaintiff $1,470.53, less freight. The evidence having shown that the amount of the freight was $179, judgment was rendered against the defendant for the difference, $1,291.53, and costs, on 25 November, 1922.

The defendant appealed to the Superior Court, and that court, after hearing the argument of the case on appeal and all exceptions sent up from the county court, reversed the judgment below and directed a new trial, from which the plaintiff appealed.

Parrish & Deal and Ratcliff & Hudson for plaintiff.
Swink, Clement & Hutchins and Oscar O. Efird for defendant.

CLARK, C. J. This case was tried in the Superior Court upon exceptions assigned in the appeal from the county court, and judgment was rendered by that court reversing the judgment of the court below.

It was alleged by the plaintiff that there had been an agreement to have the lumber inspected and that both sides abide by the result of that inspection. The plaintiff's cause of action was based solely upon that agreement, which it was alleged was entered into by the parties after the lumber had been refused by the defendant under the contract. This matter of an agreement to accept the result of the inspection was tried out in the county court, and the verdict of the jury sustained that contention.

The defendant in his brief says that the two points in controversy are whether or not the plaintiff and defendant agreed to the inspection and that the parties would be bound by the report of the inspection; and the other point was that even if the jury found as a fact that there was such an agreement, that by fraud or mistake or inadvertence the inspector in making the inspection did not inspect as to size and working.

The plaintiff assigns exceptions of error that the judge of the Superior Court had erred in finding that the judge of the county court had committed error in twenty particulars.

The 17th exception by the plaintiff is that the court erred in finding that the judge of the county court committed error in that he charged the jury as follows: "If you believe a contract was entered into by the plaintiff and defendant by which both agreed to an official inspection of the lumber in question, and that it was understood and agreed by the plaintiff and defendant that each was to abide by the report, and if there is no evidence of any fraud or deceit practiced by the defendant in obtaining said contract and agreement, and if said official inspection was made in accordance with agreement, the defendant, under the terms of its contract, as a matter of law, is bound thereby; and if you should find from the evidence that said contract was entered into as above set out and said inspection was made according to contract, you will not consider the evidence of the other witnesses tending to show that the lumber passed by the inspector did not come up to grade and quality called for by the original contract, you will answer the issue in favor of the plaintiff."

We think that the judge of the Superior Court erred in holding that this charge was erroneous, and this renders it unnecessary to consider the other exceptions, which are based upon the ground that the judge of the lower court committed error in permitting witnesses to testify as to matters which would have been pertinent only in the view that the jury had held that there was no agreement for inspection and report by the inspector.

We are of opinion that on the trial in the county court no errors were committed in the particulars named, and the verdict of the jury and the judgment thereon in the county court should have been sustained and the action of the Superior Court in reversing them should be set aside.

Reversed.

STACY and ADAMS, JJ., dissented.

PAULINE B. ALLEN v. HAZEL SAUNDERS ET ALS.

(Filed 31 October, 1923.)

Husband and Wife—Dower—Estates—Contingent Remainders.

Under a devise to testator's daughter and son, equally, and in the event of either dying without issue, then the whole estate to the other, with ulterior contingent limitations over, upon the death of the son, his widow is entitled to dower in his lands, he having been seized thereof during coverture, with the possibility of a child of the marriage taking by descent. *Pollard v. Slaughter*, 92 N. C., 72, cited and applied.

ALLEN *v.* SAUNDERS.

APPEAL by defendants from *Shaw, J.*, at May Term, 1923, of FORSYTH.

The sole question presented by this appeal is the right of the petitioner, Pauline Bugher Allen, widow of Sydney E. Allen, to dower. Her right thereto depends upon the construction of the will of Laura L. Allen, mother of Sydney E. Allen, who died without issue, leaving the plaintiff his widow.

Paragraph 2 of the will of Laura E. Allen reads as follows: "I devise and bequeath to my children, Annie and Sydney E. Allen, equally the house known as 318 Spruce Street, in the city of Winston-Salem, N. C. In the event of the death of either one of these children, without issue, the survivor shall inherit the deceased one's interest, and should the surviving one die without issue"—the executor was to sell the property and divide the profits equally among the surviving children of the testatrix.

In the special proceeding the clerk ordered the writ to issue to the sheriff commanding him to summon a jury of freeholders to lay off dower to the petitioner. The respondents appealed, and the appeal was placed on the motion docket of the Superior Court, where *Shaw, J.*, affirmed the judgment and order for a jury, and the respondents appealed.

Phin Horton, Jr., for petitioner.
Manly, Hendren & Womble for respondents.

CLARK, C. J. We think this case was settled by that of *Pollard v. Slaughter*, 92 N. C., 72, where the Court held, in a learned opinion by *Ashe, J.*, upon a devise in the same terms, and upon the same facts as in the case at bar, that where there is a devise in fee simple, with an executory devise over, the wife's right to dower attaches on the first estate and is not defeated by its determination on the death of the husband, for the widow is entitled to dower in all lands of which her husband was seized during coverture, and which any child she might bear him could by any possibility take by descent.

We could add nothing to the reasoning of the learned judge in that case. The husband (Sydney E. Allen) held a defeasible fee simple, *Whitfield v. Garris*, 131 N. C., 148; *S. c.*, 134 N. C., 24, and cases cited thereto in Anno. Ed. The right of his wife to dower therein attached by marriage and was not defeated by his decease and determination of the estate. This case has been cited and approved in *Midyette v. Grubbs*, 145 N. C., 91, which states that "other courts of the highest authority have taken the same view," citing *Northcott v. Whipp*, 51 Ky., 65-73.

Affirmed.

JULIUS G. BLAKELY v. LOUISE H. BLAKELY.

(Filed 31 October, 1923.)

1. Divorce—Marriage—Condonation.

Held, in a suit for divorce *a vinculo*, condonation of the wife's adulterous act is the forgiveness of the offense on condition that she will abstain from like offense thereafter, and upon the condition violated, the original offense is revived.

2. Same—Pleadings—Evidence—Burden of Proof—Defenses—Actions.

Where the wife relies upon the condonation of her adulterous conduct in defense to the husband's suit for a divorce *a vinculo*, it is not required that the husband negative the defense of condonation in his complaint, but it is for the wife to allege and prove it, as an affirmative defense.

APPEAL by plaintiff from *Cranmer, J.*, at June Term, 1923, of WAKE.

Civil action for divorce absolute. On issues submitted, the jury rendered the following verdict:

"1. Has plaintiff been a resident of the State of North Carolina for two years next preceding the commencement of this action, as alleged? Answer: 'Yes.'

"2. Were plaintiff and defendant married to each other, as alleged? Answer: 'Yes.'

"3. Did the defendant commit adultery, as alleged in the complaint? Answer: 'No.' "

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

Finlator & Eastman, S. W. Eason and Douglass & Douglass for plaintiff.

Chas. U. Harris for defendant.

HOKE, J. On the trial, plaintiff offered evidence tending to show the alleged adultery of the wife in the year 1921. On objection the evidence was excluded, the court stating that he would not permit any evidence of adultery prior to March, 1922, the date of final separation of the parties, for the reason that plaintiff had not negatived condonation in his complaint, and in our opinion the exception of plaintiff to this ruling must be sustained. Condonation is properly understood to be the forgiveness of an offense on condition that the party will abstain from like offenses thereafter, and if the condition is violated the original offense is revived. *Lassiter v. Lassiter,* 92 N. C., 129. It is very generally regarded as a specific affirmative defense to be alleged and proved by the party insisting upon it and is not required to be negatived by the opposing pleader. *White v. White,* 171 Va., 244; *Odom v. Odom,* 36

Ga., 386; 9 R. C. L., 386. And decision of our own Court, in *Kinney v. Kinney,* 149 N. C., 321; *Steel v. Steel,* 104 N. C., 631-638, and other cases, are in full approval of the general principle. Even when set forth in the pleadings as required, not being in the nature of a counterclause, the allegations would be taken as denied by the plaintiff. C. S., sec. 543.

There is error and plaintiff is entitled to a new trial of the cause.

Reversed.

BOARD OF COMMISSIONERS FOR THE COUNTY OF CUMBERLAND v. C. W. McNEAR & CO.

(Filed 31 October, 1923.)

Statutes—Substantial Compliance—Elections—Municipal Corporations—Schools—Bonds—Taxation.

Township bonds for public school purposes, authorized at an election held 9 May, 1923, under the provisions of C. S., ch. 95, are not invalid, when otherwise regular, on the ground that this section of the Consolidated Statutes was superseded by the prior enactment of chapter 136, Public Laws of 1923, there having been a substantial compliance with the requirements of the statutes on the subject.

CONTROVERSY without action heard by *Sinclair, J.,* at September Term, 1923, of CUMBERLAND.

Judgment for plaintiff. Appeal by defendant.

Dye & Clark for plaintiff.

ADAMS, J. On 12 June, 1923, the plaintiff, after due advertisement, accepted the bid of the National Bank of Fayetteville for $75,000 of bonds to be issued for Pearce's Mill Township School District in said county, bearing interest at the rate of 6 per cent per annum, payable semiannually, and ordered that the bonds be delivered to the bank upon payment of the amount due. The bonds were to be prepared and executed in accordance with a resolution of the plaintiff adopted 19 May, 1923. The bank transferred its bid to the defendant, and the plaintiff furnished the defendant with a certified transcript of all the proceedings relating to the issue of said bonds. The defendant refused to accept and pay for the bonds on the ground that they were invalid because they were authorized at an election held on 9 May, 1923, under the provisions of C. S., ch. 95, which, on 15 April, 1923, was superseded by the Public Laws of 1923, ch. 136, and that the plaintiff was without

authority to order the election which approved the issue of the bonds. The school district is a duly constituted special-tax district, the boundaries of which are coterminous with the boundaries of the township. The petition, order, notice and all the other proceedings relating to the election were in all respects regular, and the election was duly declared carried in favor of the bonds and the levy of a tax for their payment as they became due.

His Honor rendered judgment declaring that the order of election was made pursuant to authority vested in the plaintiff; that the election was legally and properly called, held, and determined; that the bonds when issued will be valid, and that the defendant is bound by its contract of purchase.

We have carefully examined the proceedings relating to the election in connection with the various statutes regulating the issuing of bonds in counties, townships, and school districts set forth in C. S., secs. 5527 and 5676 *et seq.*, and in Public Laws 1923, ch. 136, and from our investigation we are satisfied there has been a substantial compliance with all the statutory requirements, and the defendant's exception is without merit. The judgment of his Honor is

Affirmed.

R. P. TAYLOR ET ALS. v. J. F. MEADOWS ET ALS.

(Filed 31 October, 1923.)

Appeal and Error—Stare Decisis.

Upon this fourth appeal: *Held*, there was no prejudicial error to the appellant in the rulings of law by the trial judge, which is substantially in accordance with the rulings of the decisions heretofore herein rendered by this Court.

APPEAL by defendants from *Bond, J.*, at April Term, 1923, of GRANVILLE.

This is the fourth time that this case, which began 3 April, 1914, has been before the Court. It was here previously, *Taylor v. Meadows*, 169 N. C., 124; 175 N. C., 373; 182 N. C., 266.

On the first appeal it was held error to charge that R. P. Taylor could not recover his share in the disputed lot as one of the heirs at law of his father, Dr. L. C. Taylor, if his wife, who had purchased at a mortgage sale, should fail to recover. On the second trial, the devisees of Dr. Taylor and the heirs of himself and wife, to whom he conveyed a two-thirds interest in the land, were made parties plaintiff and filed

a complaint alleging that they were the owners of the land in dispute if the court should hold that the wife of R. P. Taylor was not the owner thereof.

On this second trial, Connor, J., at first admitted the parol evidence of the defendants as to acts of user, and then, on motion of plaintiffs, excluded the same from the consideration of the jury, who brought in a verdict for the plaintiffs. On appeal, this Court held that there was error in excluding this evidence.

At the third trial, Horton, J., allowed defendants to introduce all their oral testimony, and the jury again brought in a verdict for the plaintiffs. On appeal, this Court held that the judge had unduly emphasized the testimony of the court surveyor and sent the case back for a new trial.

On this fourth trial, nearly every possible proposition of law and of fact having been debated heretofore and on this trial, the jury again brought in a verdict for the plaintiff.

It is admitted by both sides that Dr. L. C. Taylor was the ancestor in blood of all the plaintiffs except Mrs. Betty R. Taylor, who is the wife of his son, and was the ancestor in title of both the plaintiffs and defendants, and that he formerly owned all the lands shown on the map by the court surveyor, Mr. Foster.

The land in controversy is a strip fronting on Williamsboro Street, Oxford, 28 feet wide and 161 1-3 feet long. The defendants in the answer do not deny the allegation in complaint that the annual rental value of the same is $25. Upon the issues submitted the court found that the plaintiffs were entitled to the land in dispute and that the defendant, J. F. Meadows, is in wrongful possession. Judgment accordingly. Appeal by defendant.

A. W. Graham & Son and D. G. Brummitt for plaintiffs.

Hicks & Stem, Royster & Royster, T. T. Hicks & Son and Parham & Lassiter for defendants.

CLARK, C. J. The case was elaborately and most ably argued in this Court, extra time being allowed for its consideration. It is the fourth time that the case has been presented here, and it is stated that it took four days for the trial below on the last occasion alone. There are numerous exceptions and, by very able briefs in addition to the oral argument, every possible contention was presented for our consideration. We do not think, however, that there is any new proposition of law presented whose restatement by the Court would be of service to litigants.

The case having been tried three times before, nearly every question of law and of fact has been heretofore discussed, and the judge seems to have followed carefully the previous rulings of the Court in the matter. Indeed, on this appeal the argument seems to have almost entirely been a debate upon the facts, of which the jury are the proper and appropriate tribunal, and they have for the third time rendered their decision in favor of the plaintiffs. If there were any error of law committed we do not think that it was such as would have affected the verdict.

The jury on this trial had the law fairly and clearly placed before them by the judge in his ruling and in his charge, and every fact bearing upon the case was fully presented and doubtless carefully considered by the jury.

After a full and careful consideration of all the exceptions, upon the whole case, we think that substantial justice has been attained, and in the trial below we find

No error.

LUCY G. HOLTON v. M. O. HOLTON.

(Filed 31 October, 1923.)

1. Estates—Entirety—Husband and Wife—Debtor and Creditor—Homestead—Constitutional Law.

An estate conveyed in entirety in fee to husband and wife is one to which the right of survivorship is applicable, the husband, during the joint estate, having the right of possession and to the rents and profits, though he is not entitled to a homestead therein as against the interest of the wife (C. S., sec. 1667), the title thereto vesting in the one on the death of the other, and not subject to execution for the debts of either during the continuance of the joint estate.

2. Husband and Wife—Estates by Entirety—Title—Alimony—Statutes—Courts—Judgments—Orders.

Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of C. S., sec. 1667, and for her counsel fees by chapter 123, Public Laws of 1921, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue (C. S., sec. 1668) to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee-simple title for the purpose of paying the allowance is erroneous.

CLARK, C. J., concurring.

APPEAL by plaintiff from *Grady, J.*, at chambers, 10 May, 1923, from PAMLICO.

Some of the essential facts are set forth in the complaint of plaintiff, and are as follows:

"1. That she and the defendant, M. O. Holton, were married on 17 May, 1903, and by said marriage there have been born five children, the oldest of which is now 16 years and the youngest about 3 years of age.

"2. That the defendant owns several small tracts of land situate in the counties of Pamlico, Craven and Beaufort, which land will be hereinafter described.

"3. That the defendant, without any just cause or provocation, unlawfully and wrongfully abandoned plaintiff and said children on 1 April, 1922, and plaintiff has heard nothing from said defendant since his abandonment, except that he has departed from the State and when last heard of by plaintiff was living in the State of Georgia.

"4. That plaintiff is unable to cultivate to advantage any of the lands owned by the defendant, and she is greatly in need of support for herself and five minor children.

"5. That the plaintiff has no means of support whatever, and she has been advised, informed, and believes that the land and other property owned by the defendant may be subjected by the court to a lien for the necessary subsistence of herself and five minor children.

"6. That on the 2d day of September, 1922, warrant of attachment was duly issued by the clerk of the Superior Court of Pamlico County, directing and commanding the sheriffs of Pamlico, Craven, and Beaufort counties to attach and safely keep all the property of the said M. O. Holton, or so much thereof as might be sufficient for a reasonable subsistence for plaintiff and her five minor children.

"7. That the said sheriffs have made the following inventories, certificates and returns to the clerk of the Superior Court, Pamlico County, on said attachments:

"Inventory of Land—Pamlico County.

"First Tract—Containing 12 acres, more or less, being the same land conveyed by Barzilla Holton and wife to Miffin O. Holton, 6 April, 1921, recorded in register of deeds' office, Pamlico County, Book, 78, p. 2.

"Second Tract—Being the same land conveyed by Barzilla Holton and wife to Miffin O. Holton, 8 February, 1904, recorded in register of deeds' office, Pamlico County, Book 36, p. 413, containing 75 acres, more or less.

"Third Tract—Being the same land conveyed by C. D. Holton and wife to Miffin O. Holton and Lucy G. Holton, wife of defendant, M. O. Holton, 30 August, 1904, recorded in register of deeds' office, Pamlico County, Book 37, p. 265.

"Craven County.

"Fourth Tract—Being the 21-acre tract conveyed by Brazilla Holton and wife to Miffin O. Holton, 6 April, 1921, recorded in register of deeds' office, Pamlico County, Book 78, p. 1, and register of deeds' office, Craven County, Book 246, p. 2, and being the first tract conveyed in said deed. Excepting from this tract about one acre on the northern end thereof, which is situated in Beaufort County, North Carolina.

"Fifth Tract—Bounded on the north by the county lines of Craven and Beaufort, and on the west by M. O. Holton, being the undivided right, title and interest of defendant, M. O. Holton, in said tract, known as the Tunstall undivided land, owned in common by the defendant, M. O. Holton, and R. C. Holton *et als.*

"Beaufort County.

"Sixth Tract—Containing 1½ acres, more or less, being the same land conveyed by Willis G. Toler and wife to Miffin O. Holton, recorded in register of deeds' office, Beaufort County, Book 201, p. 517.

"8. That four of the defendant's abandoned minor children now need to be in school and are greatly in need of clothing, books, and proper food for the nourishment of their bodies, and many other things; and the plaintiff herself is greatly in need of money with which to buy the necessary comforts for the support of herself and five minor children.

"Wherefore, plaintiff demands judgment that she be allowed such a sum from the date of abandonment of her by the defendant, her husband, to the present date, and for a future allowance per month as she may show to the court to be the necessary subsistence for herself and her five minor children; also, for a necessary allowance, for a reasonable counsel fee, for cost, and any other relief to which she may show herself entitled."

The record shows that summons was issued and warrants of attachment were properly obtained in accordance with law. The court below, at November Term, 1922, rendered judgment, finding that the proceeding was regular. The judgment rendered also says:

"And it appearing to the court that the plaintiff is the wife of defendant, and that the defendant abandoned plaintiff, his said wife, on the 1st day of April, 1922, since which time he has contributed nothing towards the support of his said wife and five minor children, and that

the defendant has fled from the State, and when last heard of by plaintiff was residing in the State of Georgia: It is, therefore, ordered and adjudged by the court that the defendant pay to the plaintiff, per month, $50, from the 1st day of April, 1922, as a necessary subsistence for herself and five minor children, and $100 for expenses and counsel fee.

"It is further ordered and decreed that this judgment, to the extent of monthly payments herein decreed during the life of this decree shall constitute a lien on all the real and personal property of the defendant, and the said defendant is hereby ordered and directed to execute a deed of trust conveying all his interest in lands in Pamlico, Craven, and Beaufort counties to C. D. Holton, trustee for plaintiff, to secure the performance of this decree; and in default of the execution of said deed of trust within ten days from the day, 21 November, 1922, then this decree shall operate as conveyance to said C. D. Holton, trustee, with the power of sale, and shall be the duty of said trustee, after due advertisement under the orders and directions of the court, to sell so much of said lands as may be necessary to satisfy this decree.

"In case of default in the payments herein required to be made by the defendant, then said trustee is hereby authorized and directed to apply either to the resident judge or judge riding the Fifth Judicial District for an order for the sale of the lands hereinafter described, or so much thereof as may appear to the court to be necessary for the payment of this decree to date.

"It is hereby ordered by the court that this judgment shall constitute a lien on the following described tracts of land."

The same are set forth in the complaint, before mentioned, except the fourth tract.

C. D. Holton, trustee, at Fall Term, 1922, of the Superior Court of Pamlico County, before *Calvert, J.*, obtained an order of sale of the "first," "fifth," and "sixth" tracts of land set forth in the complaint before mentioned. The proceeds derived from the sale to be applied in monthly payments of $50 to plaintiff, and counsel fees, in compliance with former judgment. The trustee made sale of the "first tract" and made report as required by the order. The land brought $675, and the sale was confirmed.

C. D. Holton, trustee, filed application before *Grady, J.*, holding court in Pamlico County, at Bayboro, N. C., 10 May, 1923, to sell the land hereinafter set forth. This application sets forth in detail the sale of the "first tract," amount it brought, and the application of the fund, showing that, after paying expenses of sale, attorney's fee, and reasonable subsistence of $50 per month to plaintiff, that on 1 May, 1923, there was only a balance of $10 to be credited on judgment of allowance

to plaintiff of $50 for the month of May, 1923. The application was to sell the land to pay the $50 monthly allowance. In the application and order of sale tendered by C. D. Holton, trustee, to *Grady, J.*, to sign, was to sell the following described land, same being the "second tract," set forth in the complaint, but described by metes and bounds as follows:

"Beginning at a gum standing on the east side of Upper Broad Creek, in or near the mouth of a branch, and runs thence south 60 degrees east 125 poles to a lightwood stump on the east side of Spight's Road (Simon's corner); thence south 64 degree west 126 poles to a gum at the head of a branch; then with said branch to the run of Broad Creek; then up said creek to the beginning; containing about 75 acres of land, being the same land conveyed by Barzilla Holton and wife to Miffin O. Holton and wife, dated 8 February, 1904."

The application for the sale of this tract of land, and the order tendered by plaintiff to the court below to sign, both allege, "being the same land formerly known as the William H. Holton land and the same land conveyed by *Barzilla Holton and wife* to *Miffin O. Holton and wife* (italics ours), dated 8 February, 1904." The complaint indicates that the deed was made to Miffin O. Holton. The present application and order tendered by plaintiff for the court to sign was to sell the land owned by *plaintiff and defendant, husband and wife.*

The court below refused to sign the order to sell this tract of land, and from the refusal of the court plaintiff excepts and appeals to this Court.

Certain creditors, who had attached the lands of defendant after the attachment of plaintiff, objected to the order to sell the before-mentioned tract of land.

Z. V. Rawls for plaintiff.
A. D. Ward for creditors.

CLARKSON, J. From the record we take it that the deed to the land was made to husband and wife, plaintiff and defendant in this cause. The application and order tendered the court so states. The court below, from the application and order tendered, made no error in refusing to sign the order.

"If any husband shall separate himself from his wife and fail to provide her and the children of their marriage with the necessary subsistence, according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court of the

county in which the cause of action arose, to have a reasonable subsistence and counsel fees allotted and paid, or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either, or both. No order for such allowance shall be made unless the husband shall have had five days notice thereof; but if the husband shall have abandoned his wife and left the State, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in section 1661, but shall verify her complaint as prescribed in the case or ordinary civil actions." C. S., ch. 30, sec. 1667; Public Laws 1921, ch. 123. Counsel fees allowed by Public Laws 1921, ch. 123.

"An attachment against the husband's land will lie in favor of the wife, abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract that he support and maintain her, under the statute declaring and enforcing it, and under the order of court and attachment of the husband's land is basis for the publication of summons. The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of his abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband." *Walton v. Walton,* 178 N. C., 73; *White v. White,* 179 N. C., 599; *Anderson v. Anderson,* 183 N. C., 141; *Moore v. Moore,* 185 N. C., 332.

From the facts appearing in this case, the land sought to be sold was deeded to husband and wife. It is well settled in this State that when land is conveyed or devised to a husband and wife, nothing else appearing, they hold by entirety, and, on the death of either, the survivor gets the entire estate in the land." *Turlington v. Lucas,* at this term (*ante,* 283).

Neither the interest of the husband nor that of the wife can be sold under execution, so as to pass away title during their joint lives or as against the survivor after the death of one of them. *Bruce v. Nicholson,* 109 N. C., 204; *Hood v. Mercer,* 150 N. C., 699; *Bank v. McEwen,* 160 N. C., 414; *Turlington v. Lucas, supra.*

The interest and control of the husband during the existence of the joint estate or the joint lives of the two parties is well illustrated in what is known as "the flume case." *Dorsey v. Kirkland,* 177 N. C., 520.

"But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the right of the survivor, yet subject to this limitation, the husband has the right in it, which is incident to his own property. He is entitled during the coverture to the full control and the usufruct of the land to the exclusion of the wife." *West v. R. R.,* 140 N. C., 620.

In the property of the husband, not held as husband and wife by entireties, with the right of survivorship, the husband cannot, under C. S., 1667, claim homestead or personal property exemptions.

In *Anderson v. Anderson,* 183 N. C., 143, *Adams, J.,* says that the allowance made under C. S., 1667, is not such a "debt" as would give the husband the right to claim his homestead or personal-property exemption.

It is settled law in this State that the husband has the right of possession of the entire property and to take all the profits of the estate. The court has the right to assign possession to the wife of a reasonable part of his estate for the support of herself and children, under the statutes of 1868-69, ch. 123, now C. S., 1668, which provides: "In all cases in which the court grants alimony by the assignment of real estate the court has power to issue a writ of possession when necessary, in the judgment of the court, to do so." This statute seems to have been passed with a view to cases of this kind where the husband has abandoned his wife and gone to parts unknown.

In *Crews v. Crews,* 175 N. C., 168 (overruling *Skittletharpe v. Skittletharpe,* 130 N. C., 72), the Court held, in effect, that the judge may direct monthly payments from husband's estate, which includes his income from property and his labor, considering his capacity to work. If the realty held in entireties is the sole property of the husband during his life, the proceeds therefrom can be directed by the court to be paid by him for the subsistence of his wife and children, under C. S., 1667, which provides that "the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband." Real estate held by the

husband by entireties is his real estate, for his life at least, and the income thereof is his earnings from which such allotment can be ordered to be paid. This is not a "debt," in the ordinary sense of the word, as is said by *Adams, J.*, in *Anderson v. Anderson, supra,* but an appropriation or allotment under the police power, which protects the wife and children from indulgence and becoming a charge upon the public when the husband is in actual possession of realty, under whatever title, if by means thereof he receives earnings or income. The possession thus assigned to the wife under C. S., 1668 may be rented out to produce an income, or the court can order the rent, as it shall accrue and become personalty, to be applied to the subsistence of the wife and children. It is the contingency of the wife becoming owner if she becomes the longest liver, which alone would prevent a sale of the property.

Hoke, J., in *McKinnon v. Caulk*, 167 N. C., 411, said: "Our statute having abolished all survivorship in fee-simple estates, except this and estates of trustees without beneficial interest (Revisal, secs. 1579-1580), the owners should thereafter hold as tenants in common. It is not a satisfactory answer to this position that, the right of survivorship having attached at the creation of the estate, it could not be divested by a decree of divorce subsequently granted. The very question presented is, whether this right of survivorship would attach as an inseparable incident or ownership, or was it dependent upon the unity of person between the two? And our conclusion on this question, drawn from the history and nature of the estate, is, we think, in accord with right reason and the great weight of authority," quoting several cases, and especially from *Stelz v. Shreck,* 128 N. Y., 263, where *Peckham, J.* (subsequently of the United States Supreme Court bench), held that, as an absolute divorce terminates the marriage and unity of persons just as completely as death itself, the "natural and logical outcome of such a state of facts (absolute divorce) is that the tenancy by entirety is severed, and, this having taken place, each takes his or her proportionate share as tenant in common without survivorship." The whole subject is fully discussed and disposed of by *Hoke, J.*, in that case (*McKinnon v. Caulk*), which is cited and approved in *Finch v. Cecil,* 170 N. C., 75. In *Freeman v. Belfer,* 173 N. C., 586, *McKinnon v. Caulk* was said to be in accordance with holdings in all other States, except two, upon the point that an absolute divorce dissolved the entireties and made the parties tenants in common. This was cited with approval by *Walker, J.*, in *Moore v. Trust Co.*, 178 N. C., 126, where he says: "A divorce *a vinculo*, as it destroys the unity, will convert the estate by entireties into one in common." See *Turlington v. Lucas, supra.*

As thus modified, the judgment will be affirmed.

Modified and affirmed.

CLARK, C. J., concurring in the opinion of the Court: It may not be improper to call attention, however, to the fact that the estate by entireties was not created in England by any statute, nor has it been enacted by any statute in this State. It was created solely by the holding of the courts of England at a time when there were no lawyers and when the judges were all either priests of the Catholic church or monks and a few laymen. The North Carolina act of 1784, by which we abolished joint tenancy, naturally should have been held to abolish this, which was a joint tenancy. Certainly, the provision in the Constitution of North Carolina providing that married women should hold their property as if single should apply to all cases where property has been given by deed to two persons, for the Constitution forbids any discrimination as to property rights against a wife. It is certainly contrary to the intent of that provision of the Constitution that, as to property given by deed which, if made to any other two persons, would have created a tenancy in common, it should be held, if the parties happen to be man and wife, to be the sole property of the husband, with the sole pernancy of all the profits during his life, with the remainder over to the wife, only, if she be the longest liver; and that otherwise she receives nothing in the property conveyed to her and her husband.

The Court has repeatedly called the attention of the Legislature to the estate by entireties, with the suggestion that it be abolished. The sole effect of its retention, besides the denial of the interest of the wife in the property, is to afford opportunity to parties who may wish to exempt their property from liability for the debts of either husband or wife.

Aside from it being in violation of the spirit and letter of Constitution, Art. X, sec. 6, the estate is invalid, for the reason that it confers an exemption of property thus conveyed to husband and wife against liability for any debt either of the husband or wife, thus giving an unjust and invalid exemption, beyond that which the Constitution gives, of $1,000 in realty and $500 in personalty.

Certainly, as the opinion of the Court says, when the husband has abandoned the wife and left for parts unknown, leaving her and five children destitute and liable to be a charge upon the county, his interest in the property, which is held to be the right to receive the sole profits as long as he lives, should be subjected by decree of the court either to lease or sale, or by the annual appropriation of the profits as they become personalty, to the support of the wife and children whom he has abandoned and left destitute.

The only objection to relief decreed by the court in this case can come from the wife, who has a contingent remainder of the fee, but only

in event she should survive him. This objection cannot be made when the wife, as in this case, is making the application that the property, or at least its profits, be applied to the support of herself and her children. She is assenting in advance as fully as her assent is given to such action when a divorce absolute has been granted.

Remembering that this estate has no statutory sanction, but was created by judicial legislation by judges, in a barbarous age, who were not lawyers, there should be no superstitious sanction attached to its retention, especially in view of the statutory and constitutional provisions which have abolished all discrimination as to property rights against married women. There was also a common-law provision, without statutory recognition, either in England or this country, authorizing husbands to chastise their wives "to make them behave themselves," retained later in this State than perhaps in any other. That was incontinently abolished by this Court when *Judge Settle* said, in *S. v. Oliver,* 70 N. C., 61: "We have advanced from that barbarism." The same should be said of the retention of the survival of this provision, by which the property of the wife is taken from her and given to the husband for his life, and remainder to him in fee if he be the sole survivor.

We had a judicial creation of an estate in an office in *Hoke v. Henderson,* 15 N. C., 1, originating here by decree of probably our ablest Court, but that proved so contrary to the spirit of our institutions and so inconvenient in practice that, though it was quoted and approved more than sixty times by this Court, it was absolutely and incontinently disavowed and destroyed in *Mial v. Ellington,* 134 N. C., 131. There are other instances of similar progress by overruling former decisions not based on statutes. The highest claim made for the common law was that it was flexible, whereas a statute was not and could be changed or abolished by the courts when circumstances required it. It loses all right to this claim if we cannot overrule it as to such an anomaly even when in contradiction to our present legal thought and constitutional provisions as are embodied in this estate, which not only deprives the wife of her half of the property which is guaranteed to her by the Constitution, but exempts it from all liability to the debts of the husband or wife during their joint lives, in defiance of the rights of creditors to subject all property not embraced in the homestead and personal property exemption of the Constitution.

STATE v. G. W. KELLY AND W. S. McDUFFIE.

(Filed 31 October, 1923.)

1. Evidence—Demurrer—Criminal Law.

Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under our statute (C. S., sec. 4643), at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence brings his exception, to the Supreme Court on appeal, upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose.

2. Constitutional Law—Roads and Highways—Counties—Taxation.

It is within the legislative power to prescribe by what method the roads of a county shall be worked and kept in repair—whether by labor, taxation on the property, or by funds raised from license tax, or by a mixture of two or more of these methods, varying in different counties and localities, in accordance with the legally ascertained wishes of the people of each, subject to be changed by subsequent legislation not in violation of constitutional requirements.

3. Statutes—Repeal—Conflicting Terms—Roads and Highways—Counties—Taxation.

Where a later public-local law is in part conflict with a former one, it repeals by necessary implication the parts of the former statute that are in irreconcilable conflict; and where the Legislature has provided a general system of taxation of a county for the support and maintenance of the county highways, the repealing clause applies to conflicting parts of a former statute relating to each of the separate road districts therein.

4. Constitutional Law—Taxation—Bonds—Statutes—Contracts.

Where an earlier public-local law provides for taxation or a bond issue for the maintenance of highway districts within the county, and a later statute is passed providing in addition for the working of the roads for several days out of the year by all able-bodied men between certain ages, or, in lieu thereof, the payment of a certain sum of money, the later law does not impair the obligations of a contract and fall within the inhibition of our Constitution, but tends to increase the value of the road bonds issued under the provisions of the earlier statute.

5. Constitutional Law — Municipal Corporations—Counties—Taxation—Bonds—Local Statutes—Special Statutes.

A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of our Constitution (Art. II, sec. 29), where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc.

6. Constitutional Law — Taxation — Bonds — Elections — Special Tax—Statutes.

Authority may be given by the Legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. Const., Art. V, sec. 6.

7. Constitutional Law—Taxation.

The courts will not declare a statute invalid as unconstitutional unless it clearly appears to be so.

8. Statutes—Taxation—Exemptions—Special Privileges.

An exemption of any particular class of persons from a public duty, in this case, from working on the roads for a certain number of days of a year, or paying a certain sum of money in lieu thereof, will not be allowed by the courts unless clearly granted by statute not in conflict with any constitutional provision.

9. Same—Counties—Roads and Highways.

Where a general statute (C. S., sec. 3750) makes a justice of the peace one of the road supervisors of the county, and by another general statute exempts him from road duty, and a later public-local law relating to a particular county repeals these special privileges by providing an entirely different method for the supervision and management of its highways, and requires all able-bodied men between certain ages to work the roads a designated number of days a year or pay a certain sum in lieu thereof, a justice of the peace or another—a mail carrier in this case—cannot claim to be exempt therefrom when he falls within the general class of persons required to do this public duty, without statutory expressions to that effect.

CRIMINAL ACTION, tried before *Sinclair, J.*, and a jury, at May Term, 1923, of PENDER.

Appeal by defendants.

The facts are set forth in the case on appeal to this Court, and are as follows:

These were two indictments against the above-named defendants for failure to work the public roads in Caswell Township, Pender County, under chapter 322 of the Public-Local Laws of 1921, and tried before his Honor, *Sinclair, J.*, at May Term, 1923. By consent, the two cases were tried together, and for the purpose of this appeal it is admitted that each of the defendants was over the age of eighteen years and under the age of forty-five years; had been duly assigned to work the road in Caswell Township leading from the Battle Ground; were given more than three days notice to work said road on the 24th day of February, 1923, naming the place and hour of meeting, and the tool to be carried; that neither of the above-named defendants appeared and worked the said road on said day and date, nor paid the amount of money set out in the statute, nor did they work six days within the year 1923; the defendants claiming exemption by virtue of chapters 336 and 445 of the Public-Local Laws of 1913; and in addition thereto the said George W. Kelly claimed exemption for the further reason on account of his duties regarding the mail at Rooks; and the said W. S. McDuffie claimed exemption for the further reason that he was acting justice of the peace.

At this point the State rested, and the defendants moved for judgment under the Mason Act. Motion overruled, and defendants excepted.

It is admitted that, under chapters 336 and 445 of the Public-Local Laws of 1913, an election was held in Caswell Township, Pender County, in 1913; that $20,000 worth of bonds were voted and have been sold, and the money arising therefrom has been used on the roads of said township; that the commissioners of said county of Pender have levied a tax to pay the interest on said bonds, and a sinking-fund tax, being a tax on the property in that township, and on the polls, in addition to the general and special county road tax; that the tax was levied first in 1920, and has been levied each year since; that the defendants have paid this tax, which was assessed against them, and that chapters 336 and 445 of the Public-Local Laws were offered in evidence, and it is agreed they need not be copied in the record, but may be referred to from the books.

The defendant George W. Kelly testified as follows: "I am one of the defendants, and handle the mails from the train to the postoffice at Rooks twice a day, and every other day four times a day. I did not go to work the roads because I had to look after the mail and the trains. I did not offer to pay the money, and am not willing to pay it now. I went up and asked for an excuse, because I was working for the government. I put it on the ground that I was exempt. I have a contract for carrying the mail. They pay me a small salary. I was sick last winter with influenza, and my wife carried it then."

It is admitted that the defendant W. S. McDuffie was an acting justice of the peace in and for Caswell Township, in said county, at the time he was notified to work the road.

At the close of all of the evidence, each of the defendants renewed their motion for nonsuit, under the Mason Act. Motion denied, and each of the defendants excepted.

The court below charged the jury as follows:

"The two defendants, G. W. Kelly and W. S. McDuffie, are indicted for failure to work the road. The law presumes they are innocent until the State has satisfied you, beyond a reasonable doubt, that they are guilty of the offense charged. The State has indicted these defendants under this section of the law, which is a special law applying to Pender County, passed by the Legislature, and which it is your duty to go by when it is called to your attention: 'That it shall be the duty of the road commissioner of each township to lay off his township into such sections as he may deem best and expedient for the improvement and maintenance of the public roads of his township. In laying off such sections it shall be sufficient to fix the boundaries thereof in such intelligible way as will enable the public to ascertain the same, and such

sections may be described by referring to the several tracts of lands or farms composing the same. Said road commissioner, after dividing his township into sections, as aforesaid, shall make a report of such divisions to the Board of Commissioners of Pender County, and such report shall be filed of record and shall be *prima facie* evidence of the location of such boundaries and competent as such in the several courts of said county.

" 'The road commissioners of each township shall appoint a road overseer for each road section, and such overseer shall work the roads of his section under the direction of said commissioners, subject, however, to such rules as the Board of Commissioners of Pender County may make for working said roads. Said road overseers, subject to the provisions of this act, shall be vested with all the authority and power now given to road overseers under the general laws of the State. Said road overseers shall be required to devote six days work to his section each road year, and shall keep said roads in good repair, in so far as the labor and funds available under this act shall permit.

" 'Each road overseer shall make a report to the township commissioner within thirty days after his appointment of the number of able-bodied men within the ages of eighteen and forty-five years within his road section, together with the names of each, and all such men in said section shall be required under the provisions of this act to work on the public roads of Pender County six days in each year, and ten hours of good and faithful service shall constitute a day's work: *Provided, however,* that such persons liable to road duty may pay ten dollars per year in lieu of performing road work, payable five dollars on or before the first day of January and five dollars on or before the first day of July of each year: *Provided, however,* that for the year one thousand nine hundred and twenty-one such persons may pay five dollars on or before the fifteenth day of May and five dollars on or before the fifteenth day of October. All persons failing to pay said money on or before said dates shall be deemed to have waived their rights to pay such money in lieu of road work: *Provided, however,* that every person liable to road duty may pay to the overseer, on or before seven o'clock a. m. of the day on which he is summoned to work the sum of two dollars and be relieved from work on such day.'

"The State contends that these two defendants are liable to road duty under that special act of the Legislature of North Carolina. The court charges you that they are liable to render road duty, provided they have been properly summoned and notified to go. The court charges you that, in this court, under this act, it is the duty of every man between eighteen and forty-five years of age, who has been assigned to work the road, to work the road when he has been notified, and the fact that he may have

paid a road tax—a special road tax or a general road tax, authorized by the Legislature—does not exempt him from duty of working the roads, because this act of 1921 requires citizens to work the road, in addition to the tax they ought to pay. The matter of working the roads or paying taxes to build and maintain roads is only a part of that duty which every citizen owes to his government. The government has the right to require us to do our part toward maintaining government and government institutions whenever it devolves equally upon all. The court charges you that the road tax, or special tax, devolves equally upon all citizens, according to his ability to pay or the property he owns, and, therefore, the fact that he pays a road tax is no excuse for not working the road, under this act of 1921. The court charges you that the act of 1921, which I have just read you, applied equally to all citizens, requiring all citizens between the ages of eighteen and forty-five to work the road when duly notified.

"The court charges you that, upon the evidence in this case, the fact that Kelly may have had a contract to carry mail to the depot, backward and forth, does not constitute him an officer of the United States, but is simply a private contract for money, like he might make with anyone else, and you might make.

"The court charges you that a justice of the peace is not exempt from road duty. A justice of the peace is a citizen and owes his duty to the State to bear his burden equally with all other parties, although he occupies and enjoys the distinction of having that position. He owes the same duty that any other person owes.

"It is your duty to take the evidence and say what the truth is. You have no right, if you have any prejudice or private personal opinion whether a man ought to work the road and pay the tax—that is a matter with which you have nothing to do. Whether the law is right, or not, you have nothing to do. You are sworn to go by the law, and if the law requires a man to pay the road tax and work the road, the remedy is to get the Legislature to change the law. You cannot change it in the jury box. Take the case and say how you find it."

The jury returned the verdict of guilty as to both defendants, and the court fined each of the defendants two dollars and the costs. Defendants moved to set aside the verdict and for a new trial. Motion denied. From the judgment of the court the defendants excepted and appealed to this Court.

The defendant, appealing, group their exceptions and assign errors as follows:

"First and second exceptions: The court erred in refusing to grant the defendants' motion for judgment of nonsuit at the close of the State's evidence and at the close of all the evidence."

The other six exceptions are to the charge of the court and not setting aside the verdict and the judgment rendered. These exceptions are not set out in full, as we think all the legal questions involved are raised under the first and second exceptions.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wright & Stevens for defendants.

CLARKSON, J. "When, on the trial of any criminal action in the Superior Court, or in any criminal court, the State has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the Supreme Court. Nothing in this section shall prevent the defendant from introducing evidence after his motion for nonsuit has been overruled, and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may except, and after the jury has rendered its verdict he shall have the benefit of such latter exception on appeal to the Supreme Court. If defendant's motion for judgment of nonsuit be granted, or be sustained on appeal to the Supreme Court, it shall in all cases have the force and effect of a verdict of 'not guilty.'" C. S., sec. 4643, known as the "Mason Act."

We think the defendants' first and second exceptions are the only ones necessary to be considered in determining this case. The questions involved are legal ones, arising on the undisputed facts as appear from the record.

The exceptions to the court's charge, and other exceptions, will be grouped, and we will consider the legal questions under the first and second exceptions of the defendants:

"The court erred in refusing to grant the defendants' motion for judgment of nonsuit at the close of the State's evidence and at the close of all the evidence."

Under our procedure (the Mason Act, *supra*), these were the proper motions for the defendant to make. We are of the opinion that, according to the facts, as appear from the record, the court made no error in refusing the motions and in the charge as given, and in refusing to set aside the verdict, and in the judgment rendered.

We will consider the legal questions. It is for the legislative department to prescribe by what method the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of these methods; and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent legislatures. *S. v. Holloman,* 139 N. C., 648; *S. v. Bullock,* 161 N. C., 225; *S. v. Taylor,* 170 N. C., 695.

Clark, C. J., in *S. v. Sharp,* 125 N. C., 634, says: "It is not a tax, but a duty, like service upon a jury, grand jury, special venire, military service, or as a witness."

Chapters 336 and 445 of the Public-Local Laws of 1913 provided that, upon petition, the county commissioners should order an election in any township in Pender County to determine whether the roads of that township should be improved and should be provided for by a bond issue and taxation, or by taxation, or stay as they were, by public road duty. Section 5 of both of these acts provides: "That the moneys raised under the provisions of this act shall be expended under the supervision and control and upon the orders of the board of county commissioners for the making and maintenance of the public roads in such township; and after the collection of such tax or the sales of such bonds, as the case may be, no person in such township shall be liable to or required to do road duty." Chapter 445 was evidently passed to cure some defect in the first, as they are identical. An election was duly held in Caswell Township, where the defendants reside, under this act, and the bond issue and the tax were carried, the bonds were sold, the tax levied, the road superintendent was elected, and road work begun, etc.

It will be noted that the latter part of section 5 of both acts says: "No person in such township shall be liable to or required to do road duty."

Under chapter 322 of the Public-Local Laws of 1921, section 4 says: "And all such men in said section shall be required, under the provisions of this act, to work on the public roads of Pender County six (6) days in each year," etc. Section 17 of the act says: "All laws and clauses of laws in conflict with this act to such extent are hereby repealed."

It will be seen that part of section 4 of Public-Local Laws, chapter 322, Laws of 1921, is in conflict with the latter part of section 5, chapters 336 and 445, Public-Local Laws of 1913. By this conflict this much of the Laws of 1913 is repealed by law of 1921 and leaves the law of 1921 in full force and effect, which requires and makes it mandatory for all men between the ages mentioned to work on the public roads of Pender County. "Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the

one of earlier date to the extent of the repugnance." *Commissioners v. Henderson,* 163 N. C., 120; *Road Commissioners v. County Commissioners,* at this term (*ante,* 202).

"Between the two acts there must be plain, unavoidable and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." 36 C. L. P., p. 1074.

Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it, for the maxim is *Leges posteriores priores contrarias abrogant* (later laws abrogate prior laws that are contrary to them). *S. v. Woodside,* 31 N. C., 500; Black's Law Dictionary.

The law in Pender County with reference to public highways: See chapters 291 and 486, Public-Local Laws 1915; chapters 192 and 689, Public-Local Laws 1917; chapter 373, Public-Local Laws 1919.

In this confusion of multitudinous public-local laws in Pender County the General Assembly in 1921 came to legislate for the county as a unit, and in the conclusion of the act repealed all laws in conflict therewith. Thus it is, there can be no valid claim that the exemption from road duty in the townships adopting that act can remain in the law in the face of subsequent legislation.

The learned counsel for the defendants contended that "Chapter 322, Public-Local Laws of 1921, is unconstitutional, so far as it attempts to repeal chapters 336 and 445 of the Public-Local Laws of 1913, as impairing the obligation of a contract."

The Laws of 1921, before referred to, did not in any way repeal the former laws, under which the road bonds were issued, sold, etc., but only repealed so much of the law as exempted men from road duty and required all men between certain ages to work on the public roads of Pender County. Instead of impairing the obligation of a contract, it made the obligation stronger by getting more labor to make better roads—an additional security.

"The wisdom and the sense of justice of the framers of the Constitution of the United States are admirably reflected in that provision which prohibits any State from passing any 'law impairing the obligation of contracts.' This restraint upon the States is a permanent guaranty in behalf of the humblest citizen as well as the largest corporation." *Iowa Tel. Co. v. Keokuk,* 226 Fed., 82; 12 C. J., note, p. 987.

"An exemption from taxation does not confer a vested right, and it may, therefore, be modified or repealed by the Legislature, unless it had been granted under such circumstances that its repeal would impair the obligation of a contract." 12 C. J., p. 969, sec. 536.

"No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." State Const., Art. I, sec. 7.

It was contended by defendants' counsel that the Road Act of 1921 for Pender County was unconstitutional.

The Constitution (section 29 of Article II), among other things, provides: "The General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying-out, opening, altering, maintaining or discontinuing of highways, streets, or alleys."

In *Brown v. Commissioners,* 173 N. C., 598, it was held that an act which showed that its primary purpose was to authorize the sale of bonds for road purposes in a single township, and to require the levying of a tax to pay the interest and the principal of the bonds, and appointing road commissioners to control the expenditure of the money and to supervise the work, was not within the prohibition of the foregoing section. The discussion in the opinion seems to limit the prohibition of special legislation only to those matters which, under the general law, could be as well done by local authorities as by the Legislature itself. Where, then, the general authority of a local governmental agency was defective in a particular case, and what is to be done could be done only with the authority of the Legislature, then the prohibition of section 29, above, does not apply. And, again, in a particular case, the bond issue being the direct legislation, the fact that it provides that the proceeds of the bonds are to be used for road purposes will not bring it within the prohibition of the constitutional amendment.

In *Mills v. Commissioners,* 175 N. C., 215, the Court sustained an act which empowered the commissioners of Iredell County to issue bonds, from the proceeds of which bridges were to be built over Catawba River jointly with the county of Catawba. In that case it was declared that the local legislation prohibited in section 29 refers to the building, maintenance and control of specified and designated highways, bridges, etc., and does not prevent legislation authorizing the raising of proper funds by the sale of bonds of the county *or by taxation therein* required for the public good, where the limit of taxation allowable to the county by the Constitution for ordinary State and county purposes may have been reached by the county in question. It is also said in the case that "It is now very well known that the limit of taxation allowable by the Constitution for ordinary State and county purposes has been very generally reached by the different counties in the State, and for any additional demands or unexpected emergency authority to exceed these limits can only be conferred by legislative enactment."

In *Martin County v. Trust Company,* 178 N. C., 26, it was held that a public-local act authorizing two adjoining counties by joint action to build and construct a bridge over a dividing stream as already surveyed and laid out, with an approach thereto in one of the counties, and for the purpose to issue bonds in given proportions, not to exceed the cost

of the work, and to levy a tax to pay interest on the bonds and provide a sinking fund, is not such local, private, or special legislation as is forbidden by the constitutional amendment (section 29), *the necessary part of the act being to authorize a special tax.* The Court, in that case, expressly approved what was said by *Hoke, J.,* in *Mills v. Commissioners, supra:* "It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street, or to establish a bridge or ferry at some specified place. . . . And it was in reference to local, special, and private measures of this character that these amendments were adopted."

These cases were again cited and approved in *Commissioners v. Trust Co.,* 178 N. C., 170, in which case there was a public-local law creating a highway commission for Surry County, for the improvement of public roads, and the issuance of road bonds for that county. They were again approved, with reference to the issuing of bonds for road purposes in the county of Wilkes, in *Commissioners v. Pruden,* 178 N. C., 394, and in *Davis v. Lenoir,* 178 N. C., 668.

In *Commissioners v. Bank,* 181 N. C., 347, they were again approved in regard to the appointment of a highway commission in the county and authorizing them to issue bonds for building roads in the county.

In *Emery v. Commissioners,* 181 N. C., 420, they were again approved in reference to the construction of a State-line bridge.

In *Huneycutt v. Commissioners,* 182 N. C., 319, they were again approved in reference to a statute that abolished two road commissions in the county and gave to another board created by the same act entire control and management of the public roads and bridges in the county for working, repairing, maintaining, altering, and constructing such roads as were then in existence or which might thereafter be built.

In re Harris, 183 N. C., 633, these cases were again cited and approved in reference to the establishment of a recorder's court in Iredell County by amendment to C. S., ch. 27, subch. 4.

Applying the principle established by these cases to the act in question (chapter 322, Public-Local Laws 1921), we find that the act was enacted as a county-wide law, converting what had been theretofore a township system into a county system, with the intent to provide better roads for Pender County. This is apparent, both from the title of the act and that part of section 1 thereof which requires the Board of Commissioners of Pender County to elect a road commissioner for each township in said county for the purpose of carrying out the provisions of this act. The remainder of the act is taken up with defining the duties of the road commissioner for each township, among which duties was the appointment of a road overseer for each road section in his township. It then defines the duties of these road overseers, and also the

duties of those liable for road duty in each and all of the townships of the county. In section 15 of the act the county commissioners are required to levy annually a special tax of 5 cents, with the proceeds of the tax to be used for the maintenance of the public roads of Pender County. One-tenth of the taxes so collected shall be spent annually in each township of said county. These are the general features of this act. Nowhere in it is there any suggestion of the laying-out, opening, altering, maintaining, or discontinuing of particular highways. On the contrary, it is a general county scheme, carrying with it authority to levy a special tax, which could have been levied only by this special authority, when, too, the amended Constitution, in section 6 of Article V declares that this special approval of the General Assembly may be given by either special or general act.

"The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by Article IX, section 3, of this Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property." Chapter 93, section 2, subsection 3, Public Laws, Extra Session 1920; State Const., Art. V, sec. 6.

Returning, however, to section 29 of Article II of the Constitution, the following cases which enforced that provision illustrate, we think, the distinction which sustains the act of 1921. The section prohibits the establishing or changing the lines of school districts by special legislation. This was applied to the creation of a school district, in *Trustees v. Trust Co.,* 181 N. C., 306; *Woosley v. Commissioners,* 182 N. C., 429; *Robinson v. Commissioners,* 182 N. C., 590; *Galloway v. Board of Education,* 184 N. C., 245.

The distinction, however, between laying out and defining a school district, and allowing a bond issue and a special tax in an existing district, is shown in *Paschal v. Johnson,* 183 N. C., 130; *Burney v. Commissioners,* 184 N. C., 274; *Coble v. Commissioners,* 184 N. C., 342; *Roebuck v. Trustees,* 184 N. C., 144.

It was held in *Armstrong v. Commissioners,* 185 N. C., 405, that an act to authorize a county to build a hospital and issue bonds therefor is a special and local act, and prohibited under the prohibition of section 29, above, relating to health, sanitation, and the abatement of nuisances. In that case, *Hoke, J.,* again distinguishes the earlier cases and affirms the ruling therein, largely on the ground that they dealt with what were necessary expenses of the county.

The school-district cases cited herein particularly illustrate the principle enunciated in *Brown v. Commissioners, supra.* The local authority, the county board of education, has ample power, under the general law—indeed, under the Constitution—to lay off and define the boundaries of school districts. Constitution, Art. IX, sec. 3; C. S., sec. 5469.

It may be a matter of interest to illustrate the importance of the decisions of the Court in forwarding the good-roads movement of the State. In *Brown v. Commissioners, supra,* the first case decided under the constitutional amendments, the bonds were used to aid in building two grade roads across the Blue Ridge Mountains into the "Lost Provinces"—the first grade roads in that part of the State. Both roads are of great scenic beauty and untold value to the mountaineers in carrying their produce to market. One leads through the beautiful Linville Gorge, from McDowell County to Avery County, and the other over the Blue Ridge Mountains into Mitchell County. This road goes through Gillespie Gap—the famous gap that the patriots, Sevier, Campbell, and Shelby, marched through with their troops on their way to Kings Mountain in Revolutionary days. It is history that these brave mountaineers and others surrounded Kings Mountain and captured and killed every Britisher and Tory under Colonel Ferguson, the trusted lieutenant of Lord Cornwallis, who was then at Charlotte, N. C. It is said that Ferguson fell from his horse with fifteen wounds and died on the battlefield. The battle was fought on the top of the mountain, on 7 October, 1780, and was one of the battles that did much to turn the tide of the Revolution. The United States Government has erected a monument on the top of the mountain to the American heroes who fought in the battle. The sequel was Yorktown.

The *Mills case, supra,* gave power to rebuild the bridges swept away by the unprecedented flood of July, 1916. The *Martin County case* held the bonds valid that helped build the bridge and approaches, some 3.86 miles, over the Roanoke River and swamp, connecting Martin and Bertie counties and opening up that section of the State. The *Emery case* related to the bridge over the Catawba River, connecting Mecklenburg County with York County, S. C. In all the decisions the importance to the localities could be shown. The culmination of these constructive decisions sustaining the legislative enactments is the present State-wide system of roads taken over and maintained by the State. The caption of this act is "An act to provide for the construction and maintenance of a State system of hard-surfaced and other dependable roads, and connecting by the most practical routes the various county-seats and other principal towns of every county in the State for the development of agriculture, commercial and industrial interests of the State, and to secure benefits of Federal aid therefor, and for other purposes." Public Laws 1921, ch. 2, amended by chapter 160, Public Laws 1923.

"The statute (Laws 1921, ch. 2, sec. 10, subsec. (b), and sec. 7) gives broad discretionary powers to the State Highway Commission in establishing, altering, and changing the route of county roads that are, or are proposed to be, absorbed in the State highway system of public roads; and where the commission, in pursuance of section 7 of the act, have, as required, posted at the courthouse door of a county a map, showing the proposed route and the county roads to be taken, the limitation of sixty days expressed in the statute is upon the time allowed the county to object; and a subsequent change made by the State Highway Commission in the proposed route prior to the time of building the highways is not reviewable by the court, in the absence of an abuse by the commission of the discretionary power conferred on it by the statute." *Road Commission v. Highway Commission,* 185 N. C., 56.

Under the State highway system, the State has taken over 6,050 miles of road, and the Legislature has authorized a bond issue of $65,000,000 to build and construct this State highway system. It is estimated that the State Highway Commission is now maintaining 5,763.20 miles of roads; 1,237.08 miles of hard-surfaced roads have been completed and are now let and under construction; 1,262.11 miles of dependable roads have been completed and are now let and under construction.

For the present fiscal year it is estimated that the State will collect at least $7,000,000 from automobile and gasoline tax (tax on gasoline, 3 cents a gallon). This revenue will be sufficient to pay the interest on the State highway road bonds; the maintenance of the State roads ($300 a mile the average to maintain the State roads before and after they are hard-surfaced and made dependable); the upkeep of the State Highway Commission; a sinking fund to retire the bonds, and surplus over. There is no tax on land. The automobile and gasoline tax carries the entire burden at the present time.

The people of Pender County, through their representatives in the Legislature, elected by them, passed this Road Act of 1921. We think, for the reasons given, the act is valid and not unconstitutional. The courts should be slow to declare an act of the Legislature unconstitutional, unless clearly so.

Walker, J., said, in *S. v. Perley,* 173 N. C., p. 790: "When a statute is assailed as unconstitutional, every presumption of validity should be indulged in its favor, and it should not be declared void except upon the clearest showing that it conflicts with the organic law. The conclusion that it is invalid should be unavoidable, and reached only after removing every reasonable doubt as to its incompatibility with the Constitution. Between the two there should be an irreconcilable conflict."

The Pender County road law, which we are considering, requires all able-bodied men within the ages of eighteen and forty-five to work on

the public roads of Pender County six days in each year ($10 a year can be paid in lieu of road work). There are no exemptions in this road act.

G. W. Kelly, one of the defendants, handled the mail from the train to the postoffice at Rooks twice a day, and every other day four times a day. He was working for the Government. He had a contract for carrying the mail. They paid him a small salary. His wife carried the mail when he was sick with influenza. There are no exemptions in the general road law that extend to these particular defendants. C. S., 3807.

The case cited by defendants (*S. v. Womble,* 112 N. C., 862), does not apply to the facts in this case.

A mail carrier is indictable for carrying a concealed weapon. *S. v. Boone,* 132 N. C., 1107; *Groves v. Barden,* 169 N. C., 12.

C. S., 3806 and 3807, exempts the members of the board of supervisors. C. S., 3750, makes the justices of the peace of each township the board of supervisors.

The Pender County Road Act provides that the board of commissioners shall elect a road commissioner for each township in the county to carry out the provisions of the act. This road commissioner shall appoint a road supervisor, etc. An efficient road system is created for the county. The Pender County Road Act repeals all laws and clauses of laws in conflict with the act. The justices of the peace of each township could not be the board of supervisors under the Pender County Road Act. The provision appointing a road commissioner for each township is in conflict with the general road law and repeals the provision making justices of the peace of each township the board of supervisors in Pender County. *S. v. Woodside, supra; S. v. Perkins,* 141 N. C., 803.

Where an able-bodied male person between eighteen and forty-five years of age resides in this State and pursues a vocation for his income for an indefinite period, he is liable to road duty. *S. v. Johnston,* 118 N. C., 1188.

Section hands employed on railroads at regular wages are not thereby excused from working on public highway of county. *S. v. Cauble,* 70 N. C., 62.

Bar pilots, unless employed on same day, not exempt. *S. v. Craig,* 81 N. C., 588.

Section 8 of the act entitled "An act to provide better roads for Pender County" provides the punishment as follows: "Any person, after having been duly notified, who shall fail to appear at the time and place designated by the overseer, and shall fail and refuse to work, as herein required, on such public roads, shall be guilty of a misdemeanor and

shall be punished by a fine not exceeding fifty dollars ($50) or imprisoned not exceeding thirty (30) days."

The policy of the law is against special privileges or class legislation. All should bear equally the burden of government and perform alike the duties imposed. It is a government of equal rights and opportunities for all. An exemption to a special class or favored few is not looked upon with favor and should never be allowed, unless clearly granted by the legislative branch of our government and not in conflict with any constitutional provision on the subject.

The mail carrier, under the facts in this case, and the justice of the peace are not exempted under the law, and they must perform road duty like all the other male inhabitants of the county. The amount of fine was small, but the principle involved affected the county road system of the entire State.

There is no error in the judgment of the court below imposing a fine of $2 and cost on the defendants.

No error.

W. A. HAIR v. McCONNELL & BROOKS.

(Filed 31 October, 1923.)

Appeal and Error—Instructions—New Trials.

Where bales of cotton are sold under contract allowing the seller to draw on the purchaser in a proportionate part of its market value, and to fix the price within a certain period of time at which the cotton was to be sold, and upon the trial a letter from the purchaser is introduced offering to vary the original contract, if accepted at once, the receipt of the letter and its contents being admitted, but the seller denying his acceptance, an instruction that is materially confusing as to the admission of the receipt of the letter containing the offer and its contents, and that of its acceptance, is prejudicial to the seller, and is reversible error.

APPEAL by defendants from *Devin, J.*, at January Term, 1923, of BLADEN.

Civil action to recover damages for alleged breach of contract in connection with the sale and purchase of a quantity of cotton.

From a verdict and judgment in favor of plaintiff, the defendants appealed, assigning errors.

E. F. McCulloch and McLean, Varser, McLean & Stacy for plaintiff.
Oates & Herring, Robert H. Dye, and Lyon & Johnson for defendants.

STACY, J. On 2 October, 1920, plaintiff and the defendants entered into a contract, whereby plaintiff was to deliver a certain number of

bales of cotton to the defendants and receive 80 per cent of the market price on delivery, with the option and right to fix the price for final settlement of said cotton at any time prior to 1 March, 1921, on the basis of 30 points over the New York market on the day of call.

Pursuant to this agreement, plaintiff delivered to the defendants at Fayetteville, N. C., 100 bales of cotton and received 80 per cent of the then market price. Plaintiff later delivered five additional bales, making 105 bales in all.

It is agreed that on 3 February, 1921, the parties entered into a supplemental contract in regard to the cotton in question, but the exact terms of this supplemental agreement are in dispute. Defendants contend that their letter of said date, addressed to the plaintiff, contains a statement of the understanding between them. This letter is as follows:

"In order to get your call cotton fixed, we will, as a personal favor, turn over receipts for 54 bales on payment of $2,950 instead of $3,195.97, as agreed by your brother. And further agree to carry your other 55 bales for you to 9 cents.

"This is an effort to get the matter fixed this afternoon, and we will not hold it open unless it is agreed to this afternoon and the $2,950 paid not later than tomorrow,"

Plaintiff admits receiving this letter, and has no objection to its contents, but he says that the whole agreement is not incorporated therein. *Terry v. R. R.*, 91 N. C., 236. It was further understood, according to plaintiff's contention, that he was to have until 1 October, 1921, within which to call for a final settlement at 30 points over the New York market. The question of extending this time from 1 March to 1 October is the point of difference between the parties.

As bearing upon this phase of the case, his Honor instructed the jury as follows:

"It appears that thereafter a supplemental or amended contract was entered into, as shown by the letter of 3 February, and admitted by both parties, whereby defendants agreed upon plaintiff's taking up half the cotton, or having his brother to do so, for the sum of $2,950, defendants would carry the contract on, and extend plaintiff's right to call for same or similar cotton, or order it sold on any date at New York market plus 30 points, up to 1 October, 1921, provided the price of the cotton did not decline to or below 9 cents per pound."

Defendants assign this instruction as error, because they say it conveyed to the jury the impression that the plaintiff's contention in regard to the supplemental contract was not denied; whereas, as a matter of fact, the vital question of time extension was in dispute. Plaintiff replies to this by saying that the expression, "and admitted by both par-

ties," employed by his Honor in the above charge, has reference only to the letter of 3 February being admitted by both parties, and not to the contract.

Upon the record as presented, we think the instruction was prejudicial to the defendants' cause, and that a new trial must be awarded.

New trial.

THOMAS WILLIAMS ET ALS. v. DONALD McRACKAN.

(Filed 31 October, 1923.)

1. Venue—Interests in Land—Trusts—Statutes—Removal of Causes.

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue therefor is in the county in which the land is situate, C. S., sec. 463 (1), though it may appear that the alleged trustee has conveyed a part thereof to innocent purchasers by proper deed; and upon motion made by him, the cause brought in another county should be transferred as a matter of right.

2. Same—Courts—Procedure—Appeal and Error.

Under the provisions of ch. 92 (15), Public Laws of 1921, Extra Session, authority is conferred upon the clerk to hear motions for the transfer of a cause to the proper venue, subject to appeal to the judge at the next ensuing term of the Superior Court, from which appeal may be taken to the Supreme Court.

CLARK, C. J., concurring.

CIVIL ACTION heard on appeal from clerk before *Grady, J.*, at September Term, 1923, of NEW HANOVER.

There was motion before clerk of said county for change of venue to the county of Columbus. The clerk having denied the motion, on appeal his Honor ordered the removal as a matter of right on the ground that the action involved the determination of a right or interest in realty. Thereupon plaintiff excepted and appealed.

J. G. McCormick for plaintiffs.
Schulken, Grady & Toon for defendant.

HOKE, J. Our statute, C. S., sec. 463, subsec. 1, provides that actions for recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property, shall be tried in the county in which the subject of the action or some part thereof is situate, subject to the power of the court to change the place of trial in the cases provided by law.

From a perusal of the pleadings in the cause it appears that the action is one to impress a trust in favor of plaintiff on certain lands situate in Columbus County, the legal title to same being in the defendant, a resident of that county. It is true that the complaint alleges that the defendant has sold an indeterminate portion of said lands to innocent third parties and demands an accounting, but it also appears in the pleadings that the remainder of said lands is in possession and control of the defendant, who has the legal title thereto, and that plaintiffs' right, both as to the accounting and against the remaining realty, is dependent upon the establishment of the trust as alleged. This being true, plaintiffs' cause of action clearly involves the determination of an interest in realty, and plaintiffs may not avoid the force and effect of this statutory regulation by merely failing to pray for relief to which their alleged facts, if established, would entitle them. *Vaughan v. Fallin,* 183 N. C., 318; *Wofford v. Hampton,* 173 N. C., 686; *Councill v. Bailey,* 154 N. C., 54.

Under an amendment to the above section enacted in 1921, Extra Session, chapter 92, subsection 15, the power to entertain a motion of this character is conferred upon the clerk, subject to an appeal to the judge at the next ensuing term, the course properly pursued in this instance, and in the exercise of this appellate power, we are of opinion that his Honor has correctly ruled that the cause be removed for trial to the county of Columbus.

Affirmed.

CLARK, C. J., concurs in the views expressed in the opinion of *Hoke, J.,* if we could take jurisdiction on this appeal, but he is of opinion that the action should be dismissed *ex mero motu.*

The complaint alleges that the ancestor, Maria Williams, deceased, "on or about 30 January, 1906, conveyed to the defendant all and singular the lands and property situated in Bolton Township, Columbus County, N. C., of which she was then seized and possessed, and that she retained and held no other lands or property whatever."

And "that the only consideration for said deed or conveyance was an agreement on the part of the defendant, who was then and is now a practicing attorney at law, licensed by the Supreme Court of North Carolina, to represent her in certain litigation in regard to said property, as plaintiffs are advised and believe.

"That thereupon and thereby the said lands and property became clothed and impressed with a trust in favor of and for the use of the plaintiffs as the heirs at law of the grantors in said deed, to wit, Joseph Williams and Maria Williams, as plaintiffs are advised and believe.

"That in disregard of both the trust and confidential relationship existing between him and the grantors in said deed, as well as their lineal descendants, the plaintiffs claiming under them, the defendant has sold and conveyed a portion of said lands to third parties for valuable considerations, and has, on said account, received large sums of money, the exact amount of which is unknown to plaintiffs, and has failed and refused to account therefor, but has appropriated and converted the same to his own use in fraud of plaintiffs' right, as plaintiffs are advised and believe."

This is therefore an attempt to set up a parol trust in favor of the grantor in a deed which was made avowedly, it would seem, to protect the grantor's property in certain litigation. Therefore it should require no citation of authorities, which are numerous, that the action upon the plaintiffs' own showing should be dismissed on either of two counts:

(1) That it is well settled, *ex turpi causa actio non oritur,* the purpose of the deed disposing of all the property of the grantor to a lawyer for the purpose of protecting it from litigation forbids that the courts should enforce a parol trust for that purpose. It certainly can need no citation of authorities to sustain that view. The parties must settle the matter in some other method. The courts will not paddle in dirty water.

(2) It is also equally true that the grantor in a deed as in this case cannot create a parol trust in contradiction of the terms of the deed in his own favor. This has been fully discussed and settled in a very learned and conclusive opinion by *Hoke, J.,* in *Gaylord v. Gaylord,* 150 N. C., 222, which held that "while the seventh section of the English Statute of Frauds, which forbids the creation of parol trusts or confidences of land, etc., unless manifested and proved by some right, has not been enacted here . . . such trusts have a recognized place in our jurisdiction, but they cannot be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title to lands and giving clear indication on the face of the instrument that such a title was intended to pass. The doctrine of engrafting by parol a trust upon lands conveyed by deed is subordinated to a well-recognized principle of law that such a trust cannot be established between the parties in favor of a grantor in a deed, when the effect will be to contradict or change by contemporaneous stipulations and agreements resting in parol the written contract clearly and fully expressed."

The opinion in *Gaylord v. Gaylord* is well reasoned and clearly enunciated, and is not only supported by numerous authorities therein cited but itself has been recognized as a leading case and has been often cited by us since: *Jones v. Jones,* 164 N. C., 322; *Cavenaugh v. Jarman, ib.,*

375; *Campbell v. Sigmon,* 170 N. C., 351; *Walters v. Walters,* 171 N. C., 313; *Walters v. Walters,* 172 N. C., 330 (which cites also additional cases of *Ricks v. Wilson,* 154 N. C., 286, and *Trust Co. v. Sterchie,* 169 N. C., 22); *Allen v. Gooding,* 173 N. C., 96; *Wilson v. Jones,* 176 N. C., 207; *Chilton v. Smith,* 180 N. C., 474; *Swain v. Goodman,* 183 N. C., 534, and it has just been reaffirmed at this term in *Blue v. Wilmington* (*ante,* 321).

There is no principle better sustained in our reports by its innate justice and sound reasoning and its often approval than *Gaylord v. Gaylord, supra.* The same principle seems to be universally recognized elsewhere and many cases can be found in 39 L. R. A. (N. S.), 909, 912, 916.

This alleged verbal trust contemporaneously made with the conveyance is therefore void. It is alleged by the plaintiffs as the very foundation of their action, and being void, the action itself should be dismissed.

As said in *Blue v. Wilmington, supra,* and in other cases, it would lead to innumerable frauds if, when the grantor has made a solemn conveyance of his property, he should be allowed afterwards to allege that therewith he had an oral agreement by which the deed would be contradicted. Upon reason and principle the action, based upon such alleged oral trust, should be dismissed on that ground and also upon the further ground that it was made in fraud of creditors, all the property of the grantor having been conveyed at the same time, to protect the grantor in the deed from litigation.

GABE F. BYRD v. BEN W. SOUTHERLAND.

(Filed 3 October, 1923.)

Appeal and Error—Objections and Exceptions—Rules of Court—Dismissal of Appeal—Instructions—Grouping Exceptions—Briefs.

The rules of practice in the Supreme Court regulating appeals are mandatory upon all appellants alike, and are necessary for the proper and expeditious consideration of the Supreme Court, requiring that evidence excepted to be stated in its exact words, and also requests for instruction refused, with such accuracy of reference to the pages of the record as not to require the Court to search generally through it in order to understand the questions of law involved; and appellant's counsel will be deemed to have waived all exceptions omitted from their grouping thereof, etc., and not properly discussed in their briefs.

APPEAL by defendant from *Calvert, J.,* at March Term, 1923, of SAMPSON.

Stevens & Stevens and Butler & Herring for plaintiff.
A. McL. Graham for defendant.

PER CURIAM. This is an action to recover commission for selling land. The jury responded, giving the plaintiff the amount of commissions asked for. There are 13 assignments of error of which the first is an example:

"1. That his Honor erred in permitting the plaintiff Byrd to testify what he told one Grady West. This assignment covered by first and second exceptions." (R., p. 5.)

There are eight exceptions to evidence, all in this phraseology.

Exception 9 is: "That his Honor erred in refusing defendant's fourth prayer for instructions. This is covered by 21st exception." (R., p. 16.)

There are four other exceptions of exactly the same tenor.

Under the rules of procedure in this Court, which we have often printed in the Reports, it is necessary for the proper consideration of exceptions that they shall state the exact words of the evidence refused that the Court may see and pass upon it without groping through the entire record.

In like manner in the exceptions for refusing prayers for special instruction, the special instruction should be set out that the Court may see if there was error therein, and not be left to find it in the body of the record.

Counsel are presumed to know their own case, and readily know where the exceptions can be found and the extent and tenor of the same. These exceptions must be grouped and set forth in regular order in the list of assignments of error.

In doing this, counsel can omit all unnecessary matters excepted to or which they wish to abandon, leaving the Court to pass only upon those matters which are material. Those which on reflection are not set forth and not brought forward in the assignments of error and in the brief will be deemed to be abandoned.

In this way the scope of our inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of.

The necessity of rules of practice, and our power to prescribe them, and the necessity of our uniformly enforcing these rules so there may be no waste of time (which should otherwise be given to the argument of causes), by discussing whether counsel was excusable in the neglect to observe the regulations, has been repeated by this Court so often that it ought not to be necessary for us to repeat it.

In *Lee v. Baird,* 146 N. C., 361, *Mr. Justice Hoke* fully discussed the rules of practice, stating that the Court had power to prescribe them; that they were mandatory and not directory, and pointing out the necessity of their observance by those who would present their cases on appeal. That case cites many others, and itself is cited by other cases in the annotated edition of that volume, and it was repeated by *Mr. Justice Hoke* in *Thompson v. R. R.* at next term, 147 N. C., 412, and has often been cited since in cases which are grouped also in the annotated edition. There have been other cases citing the above since, though less often owing to the understanding that the Bar has of the necessity of the rule for the dispatch of business and the easier examination of the questions presented for our consideration, and for saving time by not debating the degree to which counsel think they are excusable for not observing the regulations prescribed for hearing appeals.

Not one of these thirteen exceptions throws the slightest light upon the questions upon which we are asked by this appeal to pass, without the Court going through the record, page by page and line by line, to ascertain of what the appellant is complaining.

The reasonableness of the rules, which are for the sole purpose of facilitating the discussion of appeals and the necessity which the Court is under to enforce them impartially in all cases, is generally appreciated, and we are now rarely called upon to pass upon failure to observe these regulations, and when this does occur, the appeal is dismissed without more than reference to the fact.

In this particular case we have, however, carefully examined each of the assignments of error at some expense of time, and find that there is no ground on which error can be asserted.

We trust that our brethren of the Bar, in justice to themselves and as a saving of time, and also out of consideration for the fact that as far as possible the attention of the Court should be given solely to substantial errors alleged to have occurred in the trial, and which are sufficiently and clearly assigned, will not occupy our time or theirs in the discussion of how far counsel may think he is excused in not following the regulations necessary for the orderly presentation of the points evolved as ground of error on the appeal.

The rules have been modified from time to time, as experience has dictated to us or the suggestions of the brethren of the Bar that modification might make the practice on appeal simpler, or facilitate in any way the hearing of causes.

The rules of practice, both of the Supreme and Superior Court, have been carefully reëxamined and all modifications incorporated and are printed in 185 N. C., 785 to 813.

Appeal dismissed.

WALTER M. WEAVER AND MARTHA SEXTON v. M. F. KIRBY, ADMR. OF NANNIE E. KIRBY, AND B. G. FAW, ADMR. WITH WILL ANNEXED OF W. H. PERKINS.

(Filed 7 November, 1923.)

1. **Wills—Devises—Statutes—Title — Trusts — Indefinite Beneficiaries—Powers.**

A devise to the wife of all of the testator's property, real, personal or mixed, with full management and control thereof during her natural life; that she shall enjoy full benefits thereof with power to sell and dispose of it at her discretion, and that it was the testator's will and desire that she shall devise whatever property she has not thus disposed of during her natural life, or the proceeds thereof, to the person or persons who have been the "kindest to us in aiding and comforting us in our old age," whether kinsman or stranger: *Held*, under the provisions of C. S., sec. 4162, the wife acquired a fee-simple title, and there being no definite person or persons in whose favor a trust could be created, upon the death of the wife, intestate, the property or estate descends to her heirs at law, or legal representatives.

2. **Parties—Misjoinder—Demurrer—Appeal and Error.**

It is a misjoinder of parties for plaintiffs to sue in the same action the administrator or personal representative of a deceased person for the separate value of their services rendered to the deceased before his death, and upon their appeal from a ruling sustaining defendants' demurrer, the action will be dismissed without prejudice to their rights.

CIVIL ACTION, heard on demurrer to the complaint, before *Lane, J.*, and by consent, at September Term, 1923, of ALLEGHANY.

The action is to assert the right and claim of plaintiffs to the property of W. H. Perkins, deceased, under and by virtue of his last will and testament, and as the persons who had been "kindest to said devisor and his wife, Nannie E. Perkins, in their old age," etc.; and in setting forth their cause of action the complaint alleged, among other things, the following:

That said W. H. Perkins died in July, 1916, leaving a large estate and making disposition thereof in his last will and testament, as follows:

"In the name of God, Amen: I, W. H. Perkins, of the county of Ashe and State of North Carolina, being of sound mind and memory, but considering the uncertainty of this frail and transitory life, do, therefore, make, ordain, publish and declare this to be my last will and testament.

"First. My executor, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and erect a suitable monument to mark my resting-place, and pay all funeral expenses, together with all my just debts which may come into his hands out of my estate.

"Second. I give and devise to my beloved wife, Nannie E. Perkins, all my property—real, personal, and mixed.

"Third. It is my will and desire that my beloved wife, Nannie E. Perkins, shall have the full management and control of said property her natural life, and that she shall enjoy the benefits of the same, and shall have full power to sell and dispose of the same at her discretion.

"Fourth. It is my will and desire that, in the event my beloved wife, Nannie E. Perkins, does not dispose of said property during her natural life, or in the event she does dispose of it, that at her death she shall devise said property, or proceeds thereof, to the person or persons who have been the kindest to us in aiding and comforting us in our old age, whether such person or persons be kinsman or stranger.

"Fifth. I hereby constitute and appoint my beloved wife, Nannie E. Perkins, my lawful executor, to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

"In witness whereof, I, the said W. H. Perkins, do hereby set my hand and seal, this the 21st day of September, 1904.

"W. H. PERKINS. [Seal]"

That his wife, Nannie E. Perkins, duly qualified as executrix of his will, and, having afterwards intermarried with defendant M. F. Kirby, died, on 24 December, 1922, without having fully administered on said estate and without making disposition of her own property subsequent to her second marriage. That defendant B. G. Faw has duly qualified as administrator, with the will annexed, of said W. H. Perkins, and M. F. Kirby has duly qualified as administrator of Nannie E. Kirby (formerly Mrs. Nannie E. Perkins). That said Nannie E. Perkins executed a will of her estate in favor of W. H. Perkins at same time and in terms substantially similar to his will in her favor, but, same having been revoked by her subsequent marriage (C. S., sec. 4134), same is not set out or further referred to. That a large sum of the estate of W. H. Perkins is now on hand and unadministered, and with no creditors having any claims thereon, and that under the fourth item of said will plaintiffs are entitled to said estate as the persons "who have been kindest to W. H. Perkins and wife in their old age," etc.

The claims of the respective parties under this position being more particularly stated in the complaint, as follows:

"That for several years prior to the death of the said W. H. Perkins he became of feeble health, and at the time of his death was of about the age of seventy-five years, and had retired from the active management of his said business, and had retained the plaintiff, Walter M.

Weaver, and entrusted the management of his business to the said Walter M. Weaver, who, for more than two years prior to the death of the said W. H. Perkins, had devoted a large portion of his time in the management of the business, aiding and comforting the said W. H. Perkins and his said wife, Nannie E. Perkins, and they relied upon him, and no one else, in the management thereof. And at the time of his death, in his last sickness, requested the said Nannie E. Perkins to retain the said Walter M. Weaver in the management and control of all of her business and the business of his estate, in the conduct and management thereof. And that, after the death of the said W. H. Perkins, the said Nannie E. Perkins made repeated request of the said Walter M. Weaver to remain in control and management of her business, and, in compliance with the request of the said W. H. Perkins, and of her own desire, the said Nannie E. Perkins retained and kept in control the said Walter M. Weaver in the management of the business and in aiding and comforting her in her old age, who at the time of her death was of the age of about seventy-five years, and had been in feeble health for some time, unable to attend to business ever since the death of the said W. H. Perkins. And the said Walter M. Weaver devoted his time and attention for a number of years in aiding and comforting the said W. H. Perkins and his said wife, Nannie E. Perkins, with the assurance on the part of both of them that he would be well provided for under their last will and testament.

"That the plaintiff Martha Sexton, now of about the age of forty years, has lived with the said W. H. Perkins and wife, Nannie E. Perkins, and constantly attended and aided and comforted the said W. H. Perkins and his said wife, Nannie E. Perkins, for sixteen years prior to the death of the said Nannie E. Perkins, having entire control and management of their household affairs, attending them in their feeble condition, and comforting and aiding them in their old age and last sickness, with no one else other than the plaintiffs in any way aiding or comforting them, or in any way manifesting an interest in their comfort and welfare, or in the management of their business."

Thereupon plaintiffs demand judgment "That the amount due them under the will of W. H. Perkins be paid over to them, and for other and further relief," etc.

The defendants demur to the complaint, in terms as follows:

"1. That the complaint does not state facts sufficient to constitute a cause of action, for the reason that the facts alleged are not sufficient to base an action upon *quantum meruit,* nor does it state any specific value of the alleged services, nor that plaintiffs had not been compensated in full for the value of all the alleged services rendered.

"2. That by the terms of the will of W. H. Perkins he expressed a desire that his widow, Nannie E. Perkins, 'should devise any property he had devised and bequeathed to her to the person or persons who had been the kindest to us in our old age, whether such person be kinsman or stranger,' thereby investing in her a personal discretion which she never exercised, and which no person except her could exercise, it being her sole and only province to determine who had been kindest to W. H. Perkins and herself in aiding and comforting them in their old age.

"3. That the alleged cause of action of the plaintiff W. H. Weaver is improperly joined with that of plaintiff Martha Sexton. It is not alleged what portion of the property described in the complaint each is entitled to, or the amount either is entitled to recover as between themselves; in fact, the complaint discloses an adverse interest of the plaintiffs themselves, and not a joint interest.

"4. That the will of W. H. Perkins gave his property to Nannie E. Perkins, who survived him, coupled with a trust, desire, or power, which she, it appears, never exercised, and which no one except herself could exercise or know how to exercise, and no court could ascertain or direct, and, therefore, the plaintiffs are not entitled to recover anything on account of the execution of the said will of W. H. Perkins or on account of any facts alleged in their complaint."

There was judgment sustaining demurrer, and plaintiffs except and appeal.

J. B. Councill and Holton & Holton for plaintiffs.

T. C. Bowie and Doughton & Higgins for defendants.

HOKE, J. Our statute provides that when real estate shall be devised to any person, the same shall be held and construed as a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity; and under the terms of this statute, and from a perusal of the terms of the will itself of W. H. Perkins, it is clear that he intended to and did confer upon his wife, Nannie E. Perkins, the absolute ownership in all of his property. C. S., sec. 4162; *Smith v. Creech, ante,* 187; *Fellowes v. Durfey,* 163 N. C., 313; *Bass v. Bass,* 78 N. C., 374; *Newland v. Newland,* 46 N. C., 463.

This being true, the plaintiffs have set forth no valid claim on the estate of W. H. Perkins, not under any devise of the wife, for she has made none in their favor, nor by way of impressing a trust upon the property, by reason of the uncertainty as to the beneficiary, or rather by an entire failure to designate one. *St. James v. Bagley,* 138 N. C.,

384-393, quoting with approval from *Morice v. Bishop,* 10 Vesey, 536; *Bridges v. Pleasants,* 39 N. C., 26; *Hester v. Hester,* 37 N. C., 330; *Tilden v. Green,* 130 N. Y., 29; *Pritchard v. Thompson,* 95 N. Y., 76; *Howard v. Carusi,* 109 U. S., 725; Story's Equity Jurisprudence, 13 Ed., sec. 1070; Bispham Equity, 9 Ed., sec. 65; Gardner on Wills, p. 546.

In the citation to Story, the principle is stated as follows:

"Whenever the objects of the supposed recommendatory trust or power are not certain or definite, whenever the property to which it is attached is not certain or definite, whenever a clear discretion or choice to act or not to act is given, whenever the prior disposition of the property imports absolute and uncontrollable ownership, in all such cases courts of equity will not create a trust in words of this character."

In Bispham the author approves the statement: "That to constitute a valid trust, undoubtedly three circumstances must concur—'sufficient words to raise it, a definite subject, and an ascertained object.'"

And in Gardner on Wills it is said: "As a general rule, whoever is capable of taking and holding the legal title to property under a will may, as beneficiary, receive the equitable title; and as the legal estate can only be conferred upon a definite taker, the beneficiary likewise must be certain and definite." And, further, a trust without a definite beneficiary, who can claim its enforcement, is void.

From these two positions the estate of absolute ownership conferred upon the wife, and the utter failure to designate a beneficiary—and they are both in accord with well-considered authority—it necessarily follows, as stated, that no interest or estate would arise to plaintiffs under the fourth item of the will of W. H. Perkins, but the question is left entirely to the discretion of the wife, to be exercised, or not, as she may determine; and she having failed to act in the matter, the property will go to her heirs and legal representatives. *Bass v. Bass,* 78 N. C., 374; *Alston v. Lea,* 59 N. C., 27; and *Springs v. Springs,* 182 N. C., 484; *Carter v. Strickland,* 165 N. C., 69, and cases cited, are in full support of the position.

A demand for payment of services rendered by these plaintiffs, as in a *quantum meruit,* was not insisted on in the argument before us, and properly so, for in that aspect of the matter, there being a misjoinder, both of parties and causes of action, the demurrer must also be sustained and the action dismissed, without prejudice, however, to the right of the parties separately to prosecute any claim they may have for services rendered. *Shore v. Holt,* 185 N. C., 312; *Roberts v. Mfg. Co.,* 181 N. C., 204.

Demurrer sustained and action dismissed.

E. L. KETCHIE ET ALS. v. J. W. HEDRICK AND COMMISSIONERS OF HIGH POINT.

(Filed 7 November, 1923.)

Constitutional Law — Taxation — Municipal Corporations — Cities and Towns—Chamber of Commerce.

Article VII, section 7, of our State Constitution, restricting the power of the Legislature from allowing counties, cities and towns to contract a debt, pledge its faith or loan its credit, or to levy or collect any tax except for the necessary expense thereof, is with reference to the county, city or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein ascertained by an election duly held for that purpose.

APPEAL by plaintiff from *Shaw, J.*, at chambers, 16 June, 1923, refusing a continuance of the restraining order which had been granted by *Stack, J.*

This action was brought by the plaintiff on behalf of himself and other taxpayers of the city of High Point to test the validity of chapter 268, Private Laws 1923, entitled "An act to aid in the development of the city of High Point," which provides that the "Mayor and City Council of the City of High Point shall annually set apart and appropriate from the fund derived annually from the general taxes in said city an amount of not less than one-thirtieth of one per cent nor more than one-tenth of one per cent upon the assessed valuation of all real and personal property taxable in said city, which fund shall be used and expended under the direction and control of the directors of the Chamber of Commerce of High Point, N. C., under such rules and regulations as they shall prescribe for the purpose of aiding and encouraging the location of manufacturing, industrial, and commercial plants in and near said city, the encouraging of building railroads thereto, and for such other purposes as will, in the discretion of the said directors of the Chamber of Commerce of High Point, increase the population, taxable property, and business prospects of said city."

Upon application of the plaintiff and others, taxpayers of said city, to restrain the defendants, the city government, from levying, collecting, appropriating and disbursing said tax, upon the ground stated in the complaint, that the governing and taxing body of the city of High Point are without authority in law to levy said tax and collect the same and appropriate it to pay expenses of the chamber of commerce for the purposes stated in the act, for the reason that "the Chamber of Commerce of

the said city of High Point is no proper part of the said municipality and no department of the same, for the expenses and maintenance of which taxes can be levied and collected by the authorities of the town," and asked a restraining order and an injunction against the mayor and board of aldermen. A restraining order was issued by *Stack, J.*, on 12 June, 1923, returnable before *Shaw, J.*, on 23 June, who denied the motion for an injunction and dissolved the restraining order. Appeal by plaintiffs.

J. Frank Flowers for plaintiffs.
Peacock & Dalton and King, Sapp & King for defendants.

CLARK, C. J. The question presented is the validity of chapter 268, Private Laws 1923, which authorizes the levy and collection of taxes for the benefit of the chamber of commerce, to be expended at their discretion for the purposes set forth. The plaintiff contends that this is in direct contravention of the Constitution, Art. VII, sec. 7, which reads 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."

The defendants, in their answer, do not even allege that the amount thus to be levied and appropriated and turned over to the directors of the chamber of commerce is for the necessary expenses of the city of High Point, nor that it has been authorized by any vote of the qualified voters therein, nor that there has been any provision for an election to authorize the tax to be submitted to a vote of the people, as was done in *Hudson v. Greensboro*, 185 N. C., 502.

It was not stated what was the amount of money thus sought to be levied and appropriated, though it was alleged in the argument here to be $30,000; but this is immaterial, for if money can be authorized to be appropriated for other than necessary expenses of the city, without a vote of the people, it can be for any amount and for any purpose whatever. The sole question is whether, not being for necessary expenses and not authorized by vote of the people, it can be imposed and collected simply under authority of an act of the Legislature.

If it can be appropriated for other than necessary expenses without a vote of the people for this purpose, it can be appropriated for any purpose whatever that the Legislature may authorize, and we know that in local matters acts for local purposes are passed usually on request of the members for the county in which the municipality is situated.

In *Keith v. Lockhart,* 171 N. C., 455, *Hoke, J.,* in a very clearly expressed and well-considered opinion, conceding that former opinions which had unduly restricted the meaning of necessary expenses of municipalities, had been given a wider construction in the opinion of *Fawcett v. Mount Airy,* 134 N. C., 125, by extending them to embrace furnishing lights and water, owing to the change in the customs and the necessities of the age requisite for those who live in cities, held that it was still requisite that necessary expenses, within the meaning of this act, should mean "the ordinary and usual expenditures reasonably required to enable a county (or other municipality) to properly perform its duties as part of the State government," and quotes *Jones v. Comrs.,* 137 N. C., 579-599, where the Court said: "The term may be said to involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of the public peace, and administration of public justice—expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty." For the same reason, former decisions construing that "necessary expenses" did not include appropriations for education were overruled in *Collie v. Comrs.,* 145 N. C., 171.

In the latter case the extension of appropriations to education had been hampered by another provision of the Constitution restricting the rate of taxation. But all these cases extending the meaning of the words, "necessary expenses," were due to the enlarged scope of governmental expenses, causing a broader vision and a very proper growth in the recognized needs and requirements of municipal government. They were not based upon any idea that "necessary expenses" would take in matters which were not required as necessary governmental expenses. We know of no reason why the expenses and purposes of a nongovernmental body like a chamber of commerce should become necessary expenses of government. Those who compose such bodies are usually business men of standing, character, and influence in their respective communities, and they are actuated by patriotic motives to advance the public good. But they are in no sense governmental. They are neither elected nor appointed by public authority. They exercise no governmental duty; they have heretofore contributed not only their time, but of their means, but they are not required to do so, and have been actuated by motives for the public good. They are neither a charity nor educational.

If chambers of commerce, composed of business men and serving the advancement of the community in financial matters, can be termed governmental simply because they claim to be advancing the public wel-

fare, from their standpoint, and taxation can be levied upon the entire community to advance the ideas that "in their discretion" they deem for the public welfare, we know of no reason why the entire public shall not in like manner be taxed for the benefit of the Rotary clubs, Kiwanis clubs, and Lions clubs, who, also, as well as the chambers of commerce, are composed of many of our best citizens, and who in the same manner are actuated by patriotic motives to advance the public welfare. Then the ladies have their sororities, the Daughters of the Confederacy, and many other admirable societies for the public good; and there will be no reason why there should not also be embraced as subjects for support by taxation the labor unions, who in their sphere are equally patriotic and are endeavoring to advance the best interests of the community as they see it.

The limitation of the Constitution is very wise, and too clear for us to misconceive its meaning. It restricts taxation to necessary governmental purposes, except when a purpose outside that sphere has secured a majority vote of the registered voters authorizing taxation to be levied for such purpose. The Legislature has no power given it by the Constitution to authorize appropriation or a levy of taxes by the authorities of any county, city, or town, except for necessary expenses thereof, "unless authorized by a majority of the registered voters."

If the Legislature could pass beyond this line, there is no subject, and no extent, of taxation which would not be sought for and advocated by its friends. There would be a steady conflict between the friends of the different causes seeking public aid, and there would be an unlimited source of friction between them, and an unlimited amount of taxation resultant by a possible combination between the friends of powerful organizations.

We have the highest respect for the members of the chambers of commerce in our cities and towns, and believe that their motives are to serve the public welfare, just as we have for the other organizations named, but that does not make their support a "necessary expense" of the municipality, and, therefore, the public cannot be taxed under our Constitution for the support of these organizations unless a majority of the registered voters so decide. In like manner, if the cities and towns could be taxed for the support of the chambers of commerce the counties could be taxed for the support of the coöperative associations for the sale of tobacco and cotton, and the farmers union, for those bodies also have at heart the public interest.

Cases cited by defendants' counsel, if in any wise in point, are from other states, which presumably have not the same restrictive provision

in this regard as ours, or they are cases turning upon the question whether the expenditure is for a necessary governmental expense. There is none in our reports which is in conflict with the views we have expressed in this opinion.

The motion for an injunction should be granted, for there is no conflict as to the facts.

Reversed.

THOMAS R. PRATT v. WASHINGTON MILLS.

(Filed 7 November, 1923.)

1. Wills—Interpretation—Intent.

The intent of the testator as gathered from terms employed by him in his will, will control in its interpretation, when not contrary to the settled rules of law.

2. Same—Deeds and Conveyances.

An estate to certain named daughters of the testator, but upon their marriage or death to be divided equally among them, "and descendants": *Held*, construing the will to effectuate the testator's intent, the enjoyment of the ulterior devise and the right to take it was postponed until after the death or marriage of the last surviving daughter, and a purchaser from them before then could not acquire the absolute fee-simple title.

APPEAL by defendant from *Lane, J.*, at September Term, 1923, of FORSYTH.

Civil action for specific performance, submitted on an agreed statement of facts.

Plaintiff, being under contract to convey certain land 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 sufficient to convey a full and complete fee-simple title to the land in question, gave judgment for the plaintiff; whereupon the defendant excepted and appealed.

Graves, Brock & Graves for plaintiff.
Manly, Hendren & Womble for defendant.

STACY, J. On the hearing, the title offered was properly made to depend upon the construction of the following clause in the will of David Kallam:

"I give and bequeath to my daughters, Ann, Jane and Mary, all of my estate, both real and personal, after the death of my wife, and it is my will and desire that the said property be not divided but that they hold and enjoy it in common. And it is my further will and desire that should my son, Irvin Kallam, who is now wounded and a prisoner of war . . . I desire that should he choose to remain with his sisters and assist them in working and managing the farm that he share equally with them in the property, during the natural life of my above-named daughters, and, or during the time they remain single; and I further desire that upon the marriage or death of any of my before-mentioned daughters I give to the remainder of them the use of my said property, and upon the death or marriage of all of my said daughters, I desire that my property be divided equally amongst all of my children and their descendants, they taking *per stirpes* and not *per capita.*"

The precise question upon which the case pivots is whether the "children and their descendants," takers of the ulterior limitation in the above clause, are to be determined as of the date of the death of the testator, or at the death of Mary, the last surviving daughter—none of the daughters ever having married. It is admitted that, if the ultimate takers are to be determined as of the date of the death of the testator, the plaintiff has a good title, having acquired same by purchase, and is entitled to specific performance as decreed by the court below. But if the ultimate takers are to be determined as of the date of the death of Mary, the last surviving daughter of David Kallam, then it is conceded that the plaintiff's title is defective and the judgment below should be reversed.

One of the children of David Kallam living at the time of his death, to wit, Spencer Kallam, and from whom plaintiff purchased in 1899, died, leaving children, prior to the death of Mary Kallam in 1917. The children of Spencer Kallam, or rather their grantees, now claim an interest in said property.

We think it is clear, from the language of the will, that not only the enjoyment of the ulterior devise, but also the right to take it was intended to be postponed until after the death or marriage of the last surviving single daughter. *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.

It will be observed that the limitation in question is not to the "heirs," or even "children," simpliciter, of the testator, but upon the contingency

named, the property is to be divided "equally amongst all of my children and their descendants," with the further provision that "they," meaning children and their descendants, shall take *per stirpes* and not *per capita.* From this, we think it manifest that the takers of the ulterior devise were not to be determined until the falling in of the remainder interest of the three daughters named in the will. *Ziegler v. Love,* 185 N. C., 40; *Witty v. Witty,* 184 N. C., p. 381; *Rees v. Williams,* 165 N. C., 201; *Kirkman v. Smith,* 175 N. C., 579.

There is nothing in *Baugham v. Trust Co.,* 181 N. C., 406, or *Goode v. Hearne,* 180 N. C., 475, which militates against our present position, for while the general rule of construction is stated to be that a bequest or devise by way of remainder to the heirs, next of kin or other relatives 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. Note, however, it is a rule of construction, and not a rule of law like the rule in *Shelley's case,* for instance. *Hampton v. Griggs,* 184 N. C., p. 16.

"The true principle, which runs through all the cases, is to ascertain the intent of the testator, gathered from the will itself and all its provisions, and to give the instrument an interpretation which will effectuate that intent." *Smith, C. J.,* in *Buchanan v. Buchanan,* 99 N. C., p. 317.

From the facts agreed, we think it was error to hold that the deed tendered was sufficient to convey a full and complete fee-simple title to the property in question. The children of Spencer Kallam derive their interest by purchase under the will, direct from the testator, and not by descent. *Whitfield v. Garris,* 134 N. C., 24; *Sessoms v. Sessoms,* 144 N. C., 122.

Error.

GEORGE LIKAS ET AL. v. ELLA M. LACKEY ET AL.

(Filed 7 November, 1923.)

1. Appeal and Error—Objections and Exceptions—Courts—Verdict Set Aside—Presumptions.

Where the trial judge sets aside a verdict without stating his grounds therefor, upon exception on appeal he will be presumed to have done so as a conclusion of law, from which an appeal immediately lies.

2. Same—Burden of Proof.

An exception to the order of the court setting aside a verdict is alone insufficient to have the matter reversed on appeal, the presumption being that the order was correct in law, and the burden upon appellant to show error.

3. Same—Trials—Pending Appeal—New Trials.

Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellant's exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to our statutes (C. S., sec. 655), and a new trial will be ordered on appeal.

CLARK, C. J., dissenting.

CIVIL ACTION tried before *Devin, J.*, and a jury at March Term, 1923, of CUMBERLAND.

The parties signed a paper-writing purporting to be a lease from the defendants to the plaintiffs for a storehouse in Hamlet. The plaintiffs brought suit to recover damages for the defendants' breach of the contract in failing to give possession of the property. The material facts are stated in the opinion.

Cook & Cook and W. C. Downing for plaintiffs.
Dye & Clark for defendants.

ADAMS, J. The case was first tried at the February term and resulted in a verdict for the defendants. Without assigning any reason at the time, the court of its own motion set aside the verdict, and the defendants excepted and appealed. The case on appeal was duly served, and there was no exception or counterstatement. At the March term the case was again called for trial, and the defendants objected to proceeding on the ground that their appeal was pending; whereupon his Honor held that the appeal was dilatory and did not constitute a sufficient cause for continuance. To this ruling the defendants noted an exception and the case was tried the second time, resulting in a verdict for the plaintiffs. The defendants again excepted and appealed.

When the first verdict was returned, the following entry was made: "The court of its own motion sets the verdict aside in the above."

In several decisions it has been held that a judge in setting aside a verdict should assign his reason for doing so, and if no reason be given, his action will be ascribed, not to discretion, but to a conclusion of law from which an immediate appeal may be taken. *Abernethy v. Yount,*

138 N. C., 338; *Jarrett v. Trunk Co.*, 142 N. C., 466; *Drewry v. Davis*, 151 N. C., 295. In the statement of the case on the second appeal, his Honor assigned the exercise of discretion as the ground upon which the first verdict was vacated, and if this entry had been made a part of the original order his Honor would have been justified in disregarding the first appeal; but the second trial occurred after the first appeal had been taken and while it was pending, and the subsequent entry as to the court's discretion, made after the adjournment of the February term, could not deprive the defendants of their right to test in the appellate court the validity of the order as it was originally made setting aside the first verdict.

There were two trials, and there are two statements of case on appeal. In the first statement the only assignment of error is the action of the court in vacating the first verdict. The exception cannot be sustained because, as held in *Drewry v. Davis, supra*, it was incumbent upon the appellants to show error in the order, the presumption being in favor of its validity. *Powers v. Wilmington*, 177 N. C., 361. The record of the first trial was not sent up as a part of the case on appeal; it does not appear whether the defendants excepted to the admission or rejection of evidence or to any of the instructions to the jury or to anything that occurred during the trial. The defendants' assignment of error is not sufficient to rebut the presumption that the order was correct or to show that his Honor was in error. In *Drewry v. Davis, supra*, it is said: "In those cases where the rule applies, both parties have the right to appeal—the one to sustain the ruling and, if not sustained, to have the court pass upon any exceptions taken by him during the trial and duly assigned as error; the other to convince this Court of the error of the trial judge. This course was followed in *Cole v. Laws*, 104 N. C., 651, and *Metal Co. v. R. R.*, 145 N. C., 293." In *Abernethy v. Yount, supra*, exceptions to the introduction of evidence appeared in the case on appeal, and it was suggested that if other exceptions were taken at the trial the appellant should have put them in the record.

But there is sufficient reason for granting a new trial. When the case was called at the March term the defendants excepted to the court's ruling that the first appeal was dilatory and that the case should be tried unless there was other cause for a continuance. This exception, we think, is meritorious. It is supported by the principle stated in *Pruett v. Power Co.*, 167 N. C., 598. There the defendant appealed to the Supreme Court from an order denying its petition to remove the case to the Federal Court on the ground of diversity of citizenship. Pending the appeal, the cause was tried in the Superior Court, the defendant retaining its rights under the petition. On appeal the order

denying the motion for removal was affirmed, but on appeal from the final judgment it was held that the lower court was without power to hear and determine the issues arising on the pleadings pending the appeal, and that the verdict and judgment should be set aside. This decision is controlling in the instant case. When the defendants appealed from the order setting aside the verdict and granting a new trial, further proceedings should have been stayed until the appeal was determined. C. S., sec. 655.

It is true the first appeal was not docketed in the Supreme Court at the time of the second trial, but the statement was served on 17 March, and two days later, on the first day of the next term, his Honor made the ruling of which the defendants complained. It seems the second trial took place before the time had expired for perfecting the appeal in the appellate court, and under these circumstances laches can hardly be imputed to the defendants.

The verdict and judgment entered of record at the second trial are set aside and a new trial is awarded.

New trial.

CLARK, C. J., dissenting: Up to and including the case of *Bird v. Bradburn,* 131 N. C., 490, it was held uniformly, in all our opinions, that "where the trial judge sets aside the verdict without giving a reason, if no reason is given, it is presumed that a new trial was granted as a matter of discretion, and the appeal will be dismissed." *Braid v. Lukins,* 95 N. C., 123; *S. v. Braddy,* 104 N. C., 737, quoting other cases, and this case itself has been cited with approval. See citations in the Annotated Edition.

In *Abernethy v. Yount,* 138 N. C., 338, the Court for the first time, by a division of three to two, held that when the judgment is set aside without any statement by the judge, it was an error for which a new trial would be granted. This was not only a departure from the uniform decisions of the courts down to that time, which are cited in the dissenting opinion in profusion by the two dissenting judges, who added (p. 346), as a matter of reason as well as of precedent, the following: "The presumption always is in favor of the correctness of the trial below, and he who alleges error must assign and show error. This is elementary. If this new trial was granted as a matter of discretion, there could be no error. If it was granted for error in law which the judge thought he had committed, it would be a reviewable question to decide whether or not there was error committed by him. If it does not appear upon which ground the court put its action, and appellant's counsel did not ask that it should be stated, it will be presumed that

there was no error, and that the judge did what he had a right to do and granted a new trial in his discretion. Besides, if the new trial was granted for error in law, committed by the judge, it is absolutely necessary that the judge find the facts; otherwise, it cannot be seen whether he did or did not in fact commit error of law. To reverse the judgment without such finding is to order a final judgment below when not appealing—he had no chance to file exceptions. He has had no showing on this appeal—no day in court. When the judge puts his ruling upon the ground that he committed an error of law he finds the facts, and the alleged error of law is presented. This has been the case in every instance where an appeal has been taken because the judge below granted a new trial upon a matter of law." The reasons in full and citations of the uniform decisions are stated by the two dissenting judges in that case, 138 N. C., 346-350. On the other hand, in no case which has come up to the Court since has *Abernethy v. Yount* been squarely approved on this point, though cited on other points. In that case the defendant, appellee, was so satisfied that the uniform precedents of this Court and others would be followed that he was not even represented by counsel, and his side was not presented or argued.

Not only have the rulings of the Court since that time not been directly approved, but in this present case, when the new trial was granted by Judge Devin and came before the same judge at the next term when the case was called, he found as a fact that while on the record at the first trial he assigned as grounds for setting aside the verdict that he did so "on his own motion," he finds as a fact that he set it aside as a matter of discretion and to make the record speak the truth, it was eminently proper he should correct the record.

It follows, therefore, that if the grounds of his ruling had been asked for when the first verdict was set aside or any exception taken he would have stated that it was done as a matter of discretion. There was properly, therefore, an absolute new trial at the second term, and no wrong was done. Neither side should have taken any advantage from anything that was done at the former trial.

But to impute to him that he set aside the former verdict as a matter of law, when the same judge finds as a fact that it was not so set aside, puts the appellee in the present case at a disadvantage which he should not bear. The record states that when the first verdict was returned the following entry was made: "The court of its own motion sets the verdict aside in the above case." The judge also finds on this trial that as a matter of fact the verdict was set aside in the first case in his discretion. The record in the first trial was not sent up as a part of the case on appeal, but the defendants did not except to the admission or rejection of evidence or to any instructions to the jury or to anything

that occurred during the trial. As the majority opinion in this case states the defendants' assignment of error is not sufficient to rebut the presumption that the order was correct or to show that his Honor was in error.

Under all the precedents, other than the opinion by a divided Court in *Abernethy v. Yount* and the two or three cases that have partially followed it, the first attempted appeal was a nullity, for none lay from setting aside a verdict unless it was stated to have been done "for error of law."

Under *Abernethy v. Yount,* if the verdict was set aside, without stating it was done in the discretion of the judge, it was appealable unless no facts are found, in which case it is not, and that is the case here, and it is in the same condition exactly as if it were stated to be set aside "in the discretion of the court." So what is the difference?

Even under *Abernethy v. Yount,* the first appeal in this case was a nullity, for the judge who tried both cases finds, as a fact, that he set it aside "in his discretion"; and, besides, he had power, considered only as trial judge in the second trial, to "correct the record to speak the truth" or to find the facts, as he does, of what occurred on the first trial.

And even the majority opinion in this case holds that the setting aside of the verdict in the first case must be sustained; so, in any event and from every point of view, there was no verdict standing to prevent the second trial, and the judge was correct in so holding.

The exceptions on the second trial, which are before us, therefore, should be considered and decided. Technicalities no longer should interfere with the trial of cases on their merits to the increase of useless costs and unnecessary delays.

J. R. MONTGOMERY v. C. A. RING.

(Filed 7 November, 1923.)

1. Contracts—Writing—Ambiguity—Courts—Questions for Jury—Trials.

While the meaning of a written contract is ordinarily interpreted as a matter of law, this rule is not applicable in case of ambiguity, and under the evidence an issue of fact is presented.

2. Same—Evidence.

Where the plaintiff contracted with the defendant for ten per cent to be paid him for the supervision of the building of the latter's house, if the cost of its erection should not exceed a certain sum, and there is evidence that with the ten per cent added the cost exceeded that sum, and conflicting evidence as to whether the owner added extras with this result, and

upon a counterclaim alleging that plaintiff damaged the defendant by his carelessness and the unworkmanlike manner in which he performed his services, issues of fact in these two respects are raised for the determination of the jury.

APPEAL by defendant from *Stack, J.*, at May Term, 1923, of GUILFORD.

The court directed a verdict in favor of the plaintiff for the amount found by the jury, including the 10 per cent upon the cost and the charge for the changes and additions, and that the defendant recover nothing on his counterclaim.

T. W. Albertson for plaintiff.
Thos. J. Gold and Andrew Joyner, Jr., for defendant.

CLARK, C. J. This is an action for breach of contract as to the construction of a dwelling house. The contract made 22 May, 1920, provided in detail for the construction of a dwelling house with full specifications, the plaintiff agreeing to supervise the building of the house for the defendant and "receive 10 per cent of the cost for his services, provided the total cost did not exceed the cost of $5,670, but was to receive nothing if the house exceeded that sum." The "total cost" of the house, if there is added thereto the commission of 10 per cent, would exceed the stipulated price of $5,670, but if the 10 per cent was not estimated as a part of the cost it would not exceed that sum. There were changes and additions made, alleged to have been by consent of the defendant, at an expense of $786.32, which is denied in the answer. The defendant pleaded a counterclaim for alleged careless and unworkmanlike manner in which the work was done of $902, which is denied in the reply.

The court held as a matter of law that the stipulation that the "total cost" should not exceed $5,670 should be construed as not including the 10 per cent, and, further, did not submit to the jury the issue as to the counterclaim. In these two respects we think there was error.

Ordinarily, the construction of a written contract is for the court, but when it is, as in this case, ambiguous, the meaning is a matter to be submitted to the jury. The court also erred in failing to submit to the jury the issue as to the counterclaim. In these two particulars there was

Error.

STATE v. WALTER HOPPER.

(Filed 7 November, 1923.)

1. **Husband and Wife—Abduction—Elopement—Criminal Law—Statutes.**

In order to constitute the offense of abducting or eloping with a married woman, C. S., sec. 4225, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it is shown that the wife had not thus yielded herself to any other man than the defendant.

2. **Same—Innocence or Chastity of Wife—Evidence—Supported Testimony.**

The provision of C. S., sec. 4225, that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character.

3. **Appeal and Error—Objections and Exceptions.**

In order for the Supreme Court to review, on appeal, the question as to whether evidence on the trial had been erroneously admitted, the appellant must show of record that he had duly excepted thereto.

4. **Trials—Court's Discretion—Evidence—Nonsuit.**

Exception that the trial judge did not rule upon appellant's motion as of nonsuit upon the evidence, took a recess for dinner, and before ruling thereon permitted testimony of appellee's witness, is a matter within the sound discretion of the court, and is not reviewable on appeal.

5. **Abduction—Elopement—Evidence—Husband and Wife.**

On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home. *S. v. O'Higgins*, 178 N. C., 709.

6. **Same—Influence.**

Upon the question of the influence of the defendant over the wife of another with whom he is being tried for abducting and eloping, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that she had used her own money for expenses, is not subject to just exception.

7. **Abduction—Elopement—Husband and Wife—Innocence—Chastity—Evidence—Statutes.**

The fact that the wife had voluntarily left her husband falls within the definition of the statute, C. S., sec. 4225, when this results from the unlawful scheming of the man to achieve that end.

CLARK, C. J., concurring.

STATE *v.* HOPPER.

CRIMINAL ACTION. Appeal by defendant from *Lane, J.*, at August Term, 1923, of ROCKINGHAM.

This was a criminal indictment against the defendant. The bill of indictment charges that "With force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did abduct and elope with Mrs. Jesse Gilbert, wife of Jesse Gilbert, she, the said Mrs. Jesse Gilbert, since her marriage having been an innocent and virtuous woman."

The defendant did not introduce any testimony.

The State introduced Jesse Gilbert, husband of prosecutrix, who testified as follows:

"That he and Grace Gilbert were married in 1916; that her maiden name was Grace Brooks and that they were married at Spray; that they lived in Spray up to two or three months before the beginning of this trial; that his home was on Morgan Street in front of the Methodist church, but that he was staying with his mother on Flynt Hill and boarding there at the time of the alleged happening. That he first discovered his wife's absence on 19 January, 1923, when he came home from the mill; that he knows Walter Hopper and that he lived two or three hundred yards away in the same neighborhood where the witness boarded. That Walter Hopper is a married man and has a wife and three children. That Walter Hopper's wife was the witness's cousin; that his wife was gone from the 19th day of January to the 17th day of March, when he caught her; that he caught her in West Durham; that he never saw Walter Hopper any more; he was missing from Spray until the trial (preliminary hearing in Spray); that he did not know where they caught him, but heard they caught him in Danville. Defendant testified that he and his wife lived together up to that time."

Mrs. Grace Gilbert, prosecutrix, testified:

"That she is the wife of Jesse Gilbert; that the defendant and her husband were friends, and that he was at their home real often, and that he over-persuaded her to go away from her husband.

"Q. Tell how often he talked to you about—persuaded you to leave there before you actually went? A. Daily, about ten months.

"That the defendant was taking meals at the same place she and her husband boarded, but stayed at his home at night, and that he begged her to leave with him daily for about ten months, and that before they went he told her to go to Stoneville and get on the train and he would go to Ridgeway and get on the same train (Stoneville being in North Carolina and Ridgeway in Virginia); that this was the train going to Winston-Salem, and that they would go away and get a divorce and be married. That they went to Greensboro and from Greensboro to Birm-

ingham, Ala., and stayed there one night; that they went to different towns in Alabama and lived as man and wife; then I (meaning the prosecuting witness, Grace Gilbert) came back to Durham and the defendant went somewhere else; that he said he was going to Burlington, but he did not go to Burlington and she did not know where he went; that the defendant had opportunities to talk to her while she was keeping house for her husband's mother. That he is about 32 or 33 years old and that she (meaning the prosecuting witness, Grace Gilbert) is 23 years old; that up to the time she was induced to leave her home she was innocent of any man outside her husband, except him; that up to that time no man had had unlawful intercourse with her. That previous to the time the defendant had improper relations with her he had discussed the matter of their leaving together and getting a divorce; that he had nothing to do with her before the discussion."

On cross-examination she said, in part, that she did not remember whether she said in the recorder's court anything about Hopper persuading her away; that she did not leave the State and go to Virginia to keep from testifying; that she went to Lynchburg to work in the overall factory, but came back to attend court; that defendant talked to her and persuaded her for about ten months.

"Q. You deny that Walter Hopper or anybody else had any unlawful relations with you up to the time you left Spray? Answer: I deny any one.

"Q. Then you admit he had unlawful relations with you before he left Spray? Answer: Yes, just a little while.

"Q. How long? Answer: I don't remember how long; just a month or so, I suppose.

"Q. Would it be one month or two months? Answer: Three months. That they left in January, and that she supposed it was in October previous or some time along there when they first had unlawful intercourse."

She admitted that she drew out of the bank $490 of her own money when she left and went to Stoneville. That she paid her railroad fare from Spray to Stoneville, and from Stoneville. That defendant bought the tickets in Greensboro to Birmingham, Ala., and that he borrowed the money from her and promised to pay it back. That she did not know he had no money until they got away from home. That she had been in bathing with him. That he got the bathing suit at the house, hanging on the porch; that his wife was going in bathing with them but she decided not to go in. That his wife was with them at the time.

R. D. Shumate and P. S. Gillie both testified that Mrs. Grace Gilbert's general character was good. The State rests.

Defendant moved to nonsuit under C. S., sec. 4643 (Mason Act).

The court did not rule on the motion; court took recess for dinner. Upon convening of court after dinner, solicitor for the State recalled Jesse Gilbert and examined him; this being allowed by the court in its discretion, to which the defendant excepted.

Jesse Gilbert, for the State, testified:

"Q. What do you know about your wife's chastity and conduct up to the time of this man's invasion of your home?

"Q. Up to the time she went away? Answer: It was all right so far as I know.

"Q. What was the condition of Hopper's wife and family at the time he left? Answer: They were sick in bed.

"Q. Who was sick in bed? Answer: The kids and his wife were sick.

"Q. Do you know whether they had funds or support, or anything to go upon? Answer: I do not know, only except they made up some money. I do not know.

"Q. Did he own their home they were living in? Answer: No, sir, he did not own his home.

"Q. Did his wife have any estate or property? Answer: Had the stuff in the house.

"Q. Did he have anything else? Answer: No, sir.

"Q. State whether or not his wife and children had any means of support other than his labor? No answer."

All these questions were objected to and exceptions taken.

Mrs. Grace Gilbert, recalled by the State, testified:

"Q. Please state if, at the time you say this man persuaded and induced you to leave your home, whether or not he said anything then about your furnishing the money to go on? Answer: He did not." Objection and exception.

Defendant renewed his motion for judgment of nonsuit, which was refused by the court. Objection and exception.

The court charged the jury on the law, as he interpreted it to be, and applicable to the crime charged, and gave the contentions of the State and defendant. The exceptions by the defendant to the charge, material to the decision of this case, are hereafter set out.

The jury returned a verdict of guilty. The solicitor prayed judgment of the court, and the defendant was sentenced to the State's Prison for a period of four years. The defendant excepted and appealed to this Court, and assigned as errors:

First was to the question asked Jesse Gilbert: "You don't know where they caught him?" and allowing him to answer, "I heard they caught him in Danville."

Second was in failing to grant nonsuit when the State rested, and to the court permitting the State, after the court had failed to rule, to put on more testimony, and after the noon recess.

Third was to the court's permitting the witness, Jesse Gilbert, to be recalled and asked the question, "What do you know about your wife's chastity and conduct up to the time of this man's invasion of your home," and allowing him to answer, "It was all right so far as I know."

The next seven were to the testimony of Jesse Gilbert when he was recalled, after the State rested, beginning with the question, "What was the condition of Hopper's wife and family at the time he left."

Eleventh was to the court's permitting Grace Gilbert to be recalled after the State rested and motion made to nonsuit, and being asked the question, "Please state if, at the time you say this man persuaded and induced you to leave your home, whether or not he said anything then about your furnishing the money to go on," and to answer, "He did not."

The other exceptions and assignments of error are to the charge as given by the court, but we will consider only the fourteenth and fifteenth exceptions, which embrace substantially all the other exceptions to the charge that are material:

Fourteenth. "The statute says that if a woman voluntarily leaves her husband for the purpose of going away with another man to indulge in intercourse with him—that the man who leaves and goes away with a woman who has voluntarily left her husband for that purpose is guilty of elopement."

Fifteenth. "Abduction may be accomplished either by force—the woman may be carried away by force against her will—or one may be carried away where she has been induced to go by fraud or deceit or persuasion—be carried away in that way, led away as the term implies, and in furtherance of the scheme of going away to leave her husband and elope—if, while persuading her and trying to induce her to leave, a man accomplishes her seduction, then it is no defense that before leaving he induced her to engage in intercourse with him, if she up to that time, when in furtherance and as a part of a scheme of getting her to leave, or inducing her to leave as it were, induced her to engage in sexual intercourse with him, she would still be an innocent and virtuous woman if she has never known any other man except her husband, and this was accomplished in the scheme he was carrying out of leading her away, abducting her, and the abduction would be referred to the time he had carried on the scheme or enterprise of carrying her away, leading her away, getting her away."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharp and A. W. Dunn for defendant.

CLARKSON, J. The defendant was indicted under the following statute: "If any male person shall abduct or elope with the wife of another he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: *Provided,* that the woman, since her marriage, has been an innocent and virtuous woman: *Provided further,* that no conviction shall be had upon the unsupported testimony of any such married woman." C. S., 4225.

The essential elements of the crime are: (1) If any male person shall abduct or elope with the wife of another. (2) The woman since her marriage has been an innocent and virtuous woman. (3) That no conviction shall be had upon the unsupported testimony of any such married woman.

What is the meaning of abduct or elope? The word "abduct" or "abduction" is from the Latin word *"abduco"*—to lead away.

Shepherd, J., in *S. v. Chisenhall,* 106 N. C., at p. 679, quotes *Ashe, J.,* in *S. v. George,* 93 N. C., 567, as follows: "Our statute is broad and comprehensive in its terms, and embraces *all means* by which the child may be abducted," and further says: "The crime is defined in the statute by the term 'abduction,' which is a term of well-known signification, and means, in law, 'the taking and carrying away of a child, a ward, a wife, etc., either by fraud, *persuasion* or open violence.'" Webster's Dictionary. See *S. v. Burnett,* 142 N. C., 582; *Humphrey v. Pope,* 54 Pac., 847 (122 Cal., 253); *Baumgartner v. Eigenbrot* (100 Md., 508), 60 Atl., 601-3; *Carpenter v. People,* 8 Barb., 606.

The word "elope" Webster defines: "To run away, to escape privately, from the place or station to which one is bound by duty; said especially of a man or woman, either married or unmarried, who runs away with a paramour or sweetheart."

"Elope."—The departure of a married woman from her husband and dwelling with an adulterer, although the courts in many of the earlier cases exclude the conception "adultery" from the meaning of the word. 20 C. J., 402.

"Yet now by the statute, Westminster 2 (a part of the common law of this State), if a woman voluntarily leaves (which the law calls eloping from) her husband and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her." Cooley's Blackstone (3d Ed.), Vol. 1, sec. 130.

"These authorities declare an elopement to be an act of the wife, who voluntarily deserts her husband to go away with and cohabitate with another man." *S. v. O'Higgins,* 178 N. C., 709.

What is the meaning of innocent and virtuous woman? "An innocent and virtuous woman is one who never had illicit intercourse with any man and who is chaste and pure." *S. v. Whitley,* 141 N. C., 826;

S. v. Ferguson, 107 N. C., 841. See cases cited in *S. v. Johnson,* 182 N. C., 888. *Hardin v. Davis,* 183 N. C., 47.

Walker, J., in *S. v. Johnson, supra,* says: "But we may pause here to state that, on the next trial, it will be proper for the court to instruct the jury that if the prosecutrix had committed adultery with the man who afterwards became her husband, even though it was often repeated before marriage, yet if, after she thus fell, she married her lover and was always faithful to him, and ever, after the first act of adultery with him, was innocent and virtuous, that is, had not had sexual intercourse with any man until the defendant seduced her under promise of marriage, if he did such a thing, then that she would be an innocent woman, and if she was also chaste and pure in the sense above defined, she also would be a virtuous woman within the meaning of the statute. An adulteress may reform and become innocent and even virtuous, and if this woman has done so, the statute protects her just as much as if she had never fallen, but had always walked in the straight and narrow way of spotless innocence, virtue, and chastity, not even permitting undue familiarity from any man, and especially the debaucher."

What is the meaning of "Unsupported testimony of any such married woman?" "The virtuous character and conduct of the prosecutrix was proved, so the testimony of the injured was not 'unsupported' but derived confirmation from that of others, as the statute prescribes." *S. v. Horton,* 100 N. C., 448. See *S. v. Moody,* 172 N. C., 967, and cases cited. This supporting evidence may consist of evidence of good character which supports the allegation that the prosecutrix is innocent and virtuous. *S. v. Cooke,* 176 N. C., 735. The burden was on the State to prove the married woman was innocent and virtuous. *S. v. Connor,* 142 N. C., 700.

The first assignment of error was to the question asked Jesse Gilbert, "You don't know where they caught him," and allowing him to answer, "I heard they caught him in Danville." The record shows no exception to this question or answer. This assignment cannot be considered. Rules of Practice in Supreme Court, Rule 21, 185 N. C., 795; *Byrd v. Southerland, per curiam, ante,* 384.

The second assignment of error "was in failing to grant nonsuit when the State rested and to the court permitting the State, after the court had failed to rule, to put on more testimony and after the noon recess." The court below had discretion in the conduct of the case. This Court will not review this discretion under the facts of this case.

"While the necessity for exercising this discretion in any given case is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it except, perhaps, in extreme circumstances, not at all likely to

arise; and it is therefore practically unlimited." *Jarrett v. Trunk Co.*, 142 N. C., 469; *May v. Menzies, ante,* 144.

The third assignment of error was to the court's permitting the witness Jesse Gilbert to be recalled and asked the question, "What do you know about your wife's chastity and conduct up to the time of this man's invasion of your home?" and allowing him to answer, "It was all right, so far as I know." This very point was decided that it was competent in *S. v. O'Higgins, supra.*

The next seven assignments of error were to the testimony of Jesse Gilbert, when he was recalled, after the State rested, beginning with the question, "What was the condition of Hopper's wife and family at the time he left?" This kind of testimony was objected to in *S. v. O'Higgins, supra,* and *Brown, J.,* said: "The evidence that the defendant abandoned his motherless children in order to elope with Mrs. Miller was competent to prove how strong the infatuation was which induced him to leave his own children in a helpless condition in order to elope with another man's wife."

The eleventh assignment of error was to the court's permitting Grace Gilbert to be recalled, after the State rested and motion made to nonsuit, and being asked the question, "Please state if, at the time you say this man persuaded and induced you to leave your home, whether or not he said anything then about your furnishing the money to go on," and to the answer, "He did not."

As already stated, the court below, in its sound discretion, had the power to allow this witness to be recalled and examined. The testimony given was bearing on the abduction, which can be done by fraud, *persuasion,* or open violence. It was for the purpose of showing that, after he had persuaded and induced her to consent to leave, and she had yielded to the "studied, sly, ensnaring art . . . dissembling smooth" of the seducer, that nothing was said to her about her furnishing the money to go away on, and also to contradict any inference that may be drawn from the fact that on cross-examination she testified that she herself had drawn money out of the bank when she left. It was to strengthen the contention of the State that this woman, caught in the "snare of the fowler," was "helpless." "Behold! as the clay is in the potter's hand, so are ye in my hand."

The fourteenth assignment of error is to the charge, as follows: "The statute says that, if a woman voluntarily leaves her husband for the purpose of going away with another man to indulge in intercourse with him, that the man who leaves and goes away with a woman who has voluntarily left her husband for that purpose is guilty of elopement." This charge is a correct statement of the meaning of *elopement* in the statute. This is the meaning given by Blackstone, *supra,* and *S. v. O'Higgins, supra.*

The most serious assignment of error is that part of the fifteenth, in which the court charged: "If, while persuading her and trying to induce her to leave, a man accomplishes her seduction, then it is no defense that, before leaving, he induced her to engage in intercourse with him, if she, up to that time, when in furtherance and as a part of a scheme of getting her to leave, or inducing her to leave, as it were, induced her to engage in sexual intercourse with him, she would still be an innocent and virtuous woman, if she had never known any other man except her husband," etc. The able attorneys for the defendant argued with great force that this intercourse was going on at least three months before her departure; that criminal statutes should be construed strictly, and the prosecutrix would not be an innocent and virtuous woman as contemplated by the statute. We cannot so hold.

The statute was made to protect the home against the lust and passion of evil men, who subtly, slyly and cunningly would creep into the family circle and poison its fountain source—the woman in the home. Can a man, through fraud, persuasion or deceit, go into a home and seduce the wife, who up to that time was an innocent and virtuous woman, and then abduct or elope with her, and, after having despoiled her—"despoiled of innocence, of faith, of bliss"—claim she was not innocent and virtuous? We do not think he could thus escape the wrong done.

It is a maxim of law, recognized and established, that *nullus commodum capere potest de injuria sua propria* (no one can obtain an advantage by his own wrong). Broom's Legal Maxims, (8th Ed.), p. 279.

In *Carpenter v. The People,* 8 Barbour's Supreme Court Reports (N. Y.), p. 603, the statute was, "any unmarried female of previous chaste character"; the evidence was: "It was proved that, after she left home, she had been living, boarding and cohabiting with the defendant; but that was no evidence that she had cohabited or had illicit intercourse with any other person than him. It appeared that the defendant had been in the habit of visiting the said Louisa for a considerable length of time before she left home, as aforesaid, and that, up to the time of her acquaintance and intercourse with the defendant, her reputation for chastity was good." The defendant was convicted, and appealed. The Court, in passing upon the meaning of "an unmarried female of previous chaste character," said: "We think the words referred to do mean actual personal virtue—that the female must be actually chaste and pure in conduct and principle up to the time of the commission of the offense. Not that this must be the case up to the moment of taking her away for the purpose mentioned, but that it must be so up to the commencement of the acts of the party accused—done with the purpose

indicated, and which result in such taking away. The process of inveigling and enticing may be the work of time, and, when commenced, the female must be of chaste character in the sense above defined."

In the case of *South v. State,* 97 Tenn. Reports, p. 496, although the statute does not use the words "innocent and virtuous," the Court, in that case, under a statute which provides that "any person who takes any female from her father, mother, guardian, or other person having legal charge of her, without his or her consent, for the purpose of prostitution or concubinage," etc., says: "The circuit court charged the jury that if they found beyond a reasonable doubt that the girl was living with her parents a chaste and virtuous life toward all others except defendant, and that defendant wilfully took her from her father without his consent, for the purpose of and intending to prostitute her, then he would be guilty, as charged, although it might appear that prior thereto defendant had had sexual intercourse with her. This, we are of opinion, is good law, and in principle is sustained by the case of *Davis v. Young* (90 Tenn., 304), 6 Pickle, 304. The defendant cannot be allowed to take advantage of his acts in seducing the girl to defend himself for enticing or taking her away from her parents and home. It is evident in this case that, no matter what her previous conduct may have been, she had repented, and at the time she went or was carried to defendant's store, she was attempting, under his advice and direction, to leave the country." To same effect is *S. v. Johnson, supra.*

From a careful review of the whole record, we can find no reversible error.

No error.

CLARK, C. J., concurs in every respect in the admirable opinion of the Court by *Mr. Justice Clarkson,* but thinks it will not be amiss to call attention to the fact that these statutes (C. S., 4225) for the crime of "abduction of married women," and C. S., 4339, making punishable "seduction under promise of marriage," alone, in our whole criminal code, retain the archaic provision that "Conviction shall not be had upon the unsupported testimony of the woman." That is, the statute solemnly provides that the jury shall not believe the testimony of the woman, even though it shall carry entire conviction to their minds. This must be an inadvertence which, when called to the attention of the Legislature, will be remedied.

Formerly, no defendant was allowed to testify in his own behalf. Neither were negroes or Jews, and some others; but this brand has been removed in every case, except in these two statutes, in which the jury are, as a matter of law, forbidden to believe a woman unless corroborated, and that under circumstances in which they are peculiarly

helpless; for the very charge is that they have been overcome by the cunning of the defendant, both in abduction and in the seduction.

The defendant is allowed to go upon the stand and give his statement of the transaction, and his denial is entitled in full to whatever credit the jury may see fit to give to his testimony; but when the woman steps upon the stand she faces a jury with the brand of the law that they shall not believe her, however atrocious has been the means used, or however false the statements made to induce her to yield, while the defendant himself is entitled to all the credit that the jury may see fit to give him. Such an unjust discrimination—the sole remnant of archaic legislation and of sex prejudice, to the great advantage of the man—surely will not remain as a blot upon our statute books and upon the even-handed and impartial administration of justice.

R. A. ALLGOOD v. THE HARTFORD FIRE INSURANCE COMPANY, INC.

(Filed 7 November, 1923.)

1. **Evidence—Nonsuit—Trials.**

Upon defendant's motion to nonsuit, the plaintiff's evidence should be construed in the light most favorable to the plaintiff, and any legal evidence introduced at the trial to support his demand is for the jury to pass upon and determine.

2. **Insurance—Policies—Contracts—Ambiguity.**

Ambiguity appearing in the language of the form of a policy of theft insurance of an automobile used by the company, raising a doubt as to its meaning, should be resolved in favor of the insured, giving effect to the intention of the parties, if it can be ascertained under the rules of interpretation, though imperfectly or obscurely expressed.

3. **Same—Automobiles—Locking Device—Evidence—Rule of the Prudent Man—Nonsuit—Questions for Jury—Trials.**

A provision in the policy insuring the owner of an automobile against theft, reading, "The insured undertakes, during the continuance of this policy, to use all diligence and care in maintaining the efficiency of a certain locking device and in locking the automobile when leaving the same unattended," does not deprive the plaintiff of his right to recover for the theft of the automobile by leaving it unlocked under such circumstances as the jury may find that the plaintiff used reasonable care, under the rule of the prudent man, though leaving the machine unlocked for a few minutes at the time of the theft; and a motion as of nonsuit is improvidently sustained.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1923, of CUMBERLAND.

This was a civil action by plaintiff against the defendant to recover the value of an automobile that was stolen. The plaintiff had a policy of "fire and theft insurance" on the car in the defendant company. The paragraphs of the complaint and answer necessary for an understanding of the case are as follows:

Complaint paragraph:

"1. That on the 10th day of February, 1922, the plaintiff was the owner and in possession of a 1922 model six-cylinder Buick roadster automobile, factory or serial number 692901; motor number 737784; that said automobile and equipment at that time was reasonably worth the sum of $1,606.83.

"2. That on the said date of 10 February, 1922, the plaintiff insured the said automobile with the defendant, through its local agent at Fayetteville, N. C. (the Fayetteville Insurance and Realty Company), for the sum of $1,285, the term of said policy beginning at noon on the 10th day of February, 1922, and ending at noon on the 10th day of February, 1923, said policy insuring said car against fire and theft, and that on said date of 10 February, 1922, the defendant issued and delivered to the plaintiff its policy of insurance, No. 10070, thereon in the sum of $1,285, which policy is now in possession of the plaintiff, and will be produced in court at the trial of this case, and is asked to be taken as a part thereof.

"3. That said automobile was stolen from the plaintiff on 30 October, 1922; that at the time said car was stolen it was parked on the premises of the plaintiff, about twenty steps from his house; that plaintiff left said car parked for a very short while, stepped into the house, and returned within about ten minutes after leaving said car, and it had been stolen."

Answer paragraph:

"1. That the allegations of paragraph 1 of the complaint are admitted, except the statement in said paragraph 'that said automobile and equipment at that time was reasonably worth the sum of $1,606.83,' and that as to said allegation the defendants deny the same.

"2. That the allegations of paragraph 2 of the complaint are admitted, and, further answering the said paragraph, the defendant says: That the said policy contained the following stipulation and agreement, to wit: 'In consideration of a reduction of premium, it is warranted by the insured that the automobile insured under this policy will be continuously equipped with a locking device known as Johnson lock (approved by the Underwriter's Laboratories of the National Board of Fire Underwriters, and bearing their label). The insured undertakes, during the currency of this policy, to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when

leaving same unattended.' That in consideration of said agreement on the part of the insured, there was a reduction of the premium on said policy, and the insured, as the defendant is informed and believes, did equip the said car with a locking device, known as Johnson lock, but that on 30 October, 1922, the day reported by the plaintiff that the said automobile was stolen, the said plaintiff wrote, under date of 23 November, 1922, that his car was left in front of his house, and that upon leaving his car he did not lock the same, and the car was unattended, and that at said time, due to the failure of the plaintiff to lock the said car when leaving it unattended, in accordance with the stipulation and agreement contained in said policy, and the provisions thereof hereinbefore quoted, said car was stolen; and if the said car had been locked, it being equipped with a locking device, known as the Johnson device, that it could not have been stolen, but would have been safe from theft at said time, or if the said plaintiff had left the car attended by some person at said time it would not have been stolen.

"3. In answer to the allegations of paragraph 3, the defendant says that it had been informed by the plaintiff that the said automobile was stolen from the plaintiff on 30 October, 1922; that at the time said car was stolen, it was left by the plaintiff in the street, about twenty feet from his house; that the said car was left unlocked and unattended, and in consequence thereof the said car was stolen; and, as hereinbefore stated in this answer, if the plaintiff had complied with his undertaking and agreement, as contained in the policy, and as hereinbefore quoted, and in view of which he was given a reduction in the premium on the insurance on the said car, the said car would not have been stolen; and, except as herein admitted, the allegations of paragraph 3 are untrue and are denied."

The testimony of Dr. R. A. Allgood was as follows: "I am the plaintiff in this action. On 30 October, 1922, I was the owner of a Buick roadster automobile. Had car insured for $1,295. I purchased car on 10 February, 1922, and paid for car and equipment $1,606.83. The car was stolen from me on 30 October, 1922. It was on Tuesday night, about 7 o'clock. I had been on the hill to make a call, and was due at the Lions Club at 7:30. I came by my house for the purpose of shaving. The back-porch light to my house was on. I thought my folks were at home. I went into my back yard. Drove my car into my private driveway, just off the street, which is in the rear of my house. I drove my car up, not entirely up, beyond or behind the house, but just out of McGilvary Street. The car was just inside my driveway. The driveway is up an incline. I parked the car about forty feet from my house. The light from my back porch made it light where the car was. I thought my mother, wife, and the boy that I had employed working

around the house were at home. I went in the house and found that no one was at home. I went in the bath-room to shave. I heard some cars pass by the house, but I am positive if this car of mine, from where I left it, if the motor had been started I could have heard it. I heard no car start. I shaved, and immediately after I shaved I came out. I was not gone from the car exceeding ten minutes. The street runs by the side of my house—is on a hill. My private driveway is on a slant from McGilvary Street. It is on a slant, and a car will roll from my house to Winslow Street, about three blocks away. I was never more than fifty feet from my car, and was not gone exceeding ten minutes. I reported loss of car to the chief of police or the desk sergeant; also reported loss to Mr. Goudy. When I found the car was gone, I telephoned to the office of Dr. McGougan, with whom I practice, for Dr. McGougan's driver to come after me. I could not find the numbers, and called Mr. Goudy to come down, and we found the numbers. Mr. Goudy works for Dr. McGougan and myself. We reported the loss and numbers within thirty minutes after the car had been stolen. I reported the loss to the company and filed the proof of loss. Car and equipment were worth at least $1,200 when stolen."

On cross-examination, Dr. Allgood said, in part: "Have been practicing physician nine years. Have lived in Fayetteville. The car was equipped with what is known as Johnson locking device. I usually locked it, unless I thought there was no danger and it was safe. The car was not locked at the time it was stolen. When I leave the street to drive in my private driveway I have to go up an incline. It was necessary to put on brakes to hold the car where I left it. It was an easy matter for the car to be moved down my driveway without starting the motor. All you would have to do would be to release the brakes, and it would roll into the street and then down the street probably three blocks, without starting the engine. This was a six-cylinder car—the largest model roadster the Buick people make. It was dark when I went home on the evening of 30 October. No member of my family was at home. I thought they were there. I did not give instructions to any one to watch the car while I was in the house, because it was in hearing distance of me. I expected to find the members of my family in the house. After being in the house not exceeding ten minutes I came out. The car had disappeared, and has not been seen or heard of since, as far as I know. Any one walking along the sidewalk by my house could easily observe the car in the driveway where I left it. The driveway is in the rear of the house, or down by the side of the house. A street runs by the side, and the driveway goes in the rear. I live on a corner, with a street on the front of the house and a street on the side. The driveway goes in parallel with the street on the front of the house. I put the car

in the driveway, the rear of the car being only a few feet from the sidewalk. I was not more than fifty feet away from the car at any time. The weather was cool at that time, and the windows were closed. The back door from the rear porch into the kitchen was open—that is the reason I thought some of my family were there. I shaved in the bathroom. The bath-room, with reference to the kitchen door, is just beyond the kitchen; then there is one door which has a curtain between the kitchen and the bath-room. There is not much automobile driving around my house. The street by there is not a main thoroughfare. I heard two or three automobiles pass by my house while I was in there. I am positive that I could have heard the motor of my car start if it had been started where I left it. The brakes on the car could have been released and it would have rolled some distance from the house without having to start the engine."

The plaintiff then offered in evidence insurance policy No. 10070—the Hartford Fire Insurance Company of Hartford, Conn.,—issued to Dr. R. A. Allgood; amount of insurance, $1,285; rate, $2.29; premium, $29.51; perils, insurance against fire and theft. Term of policy begins noon on the 10th day of February, 1922, and ends at noon on the 10th day of February, 1923. Property covered by insurance, 1922, Buick roadster; factory or serial number, 692901; motor number, 737784. Attached to and made a part of this policy is the following:

NEW YORK UNDERWRITERS AGENCY

A. & J. H. Stoddart

Automobile Department Locking-Device Warranty

Private Pleasure Type Cars
Agency at Fayetteville, N. C.

10 February, 1922.

In consideration of a reduction of premium, it is warranted by the insured that the automobile insured under this policy will be continuously equipped with a locking device, known as Johnson lock (approved by the Underwriters' Laboratories of the National Board of Fire Underwriters, and bearing their label).

The insured undertakes, during the currency of this policy, to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when leaving same unattended.

Attached to and forming part of Policy No. A U 10070, Hartford Fire Insurance Company, Hartford, Conn.

FAYETTEVILLE INSURANCE AND REALTY COMPANY,
By Charles V. Sharpe, Agent.

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. Motion was allowed, and plaintiff excepted and appealed to this Court, and assigned as error "That the court erred in allowing the defendant's motion to nonsuit at the close of the plaintiff's evidence, in that there was sufficient evidence to raise issues to be submitted to the jury, and this constitutes the plaintiff's first and only exception."

W. C. Downing for plaintiff.
Manning & Manning for defendant.

CLARKSON, J. The only legal question involved in this case is as to the meaning of the rider on the "fire and theft insurance policy," and if, under all the evidence, taken in a light most favorable to plaintiff, on the motion of nonsuit, there was any evidence to go to the jury.

The court below, on all the evidence, nonsuited the plaintiff. The automobile was continuously equipped with a locking device, known as the Johnson lock. Every provision of the policy was fully complied with, and the only defense the defendant has set up to defeat plaintiff in recovering the value of his automobile is the following clause in the rider to the policy: "The insured undertakes, during the currency of this policy, to use all diligence and care in maintaining the efficiency of said locking device and in locking the automobile when leaving same unattended."

The policy was in full force and effect. The plaintiff, the insured, had used all diligence and care in maintaining the efficiency of the locking device. The only contention that the defendant makes to avoid its liability is, as we construe the language, *that plaintiff did not use all diligence and care in locking the automobile when leaving same unattended.*

The language of the rider is ambiguous and not clear. The rider, on its face, indicates it was a form prepared by defendant. If the defendant intended that the automobile should be locked "when leaving same unattended," it could have said so in plain language. The defendant, no doubt, has men skilled to draw its insurance policies and riders. The rider could have been drawn in simple language, well understood by all; for example, "the insured undertakes, during the currency of this policy, to always lock the automobile when unattended."

"While we should protect the companies against all unjust claims, and enforce all reasonable regulations necessary for their protection, we must not forget that the primary object of all insurance is *to insure.*" *Grabbs v. Ins. Co.*, 125 N. C., 399.

Walker, J., in *Bray v. Ins. Co.*, 139 N. C., at p. 393, says: "If the clause in question is ambiguously worded, so that there is any uncer-

tainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed." See *Guarantee Corporation v. Electric Co.*, 179 N. C., 406; *Underwood v. Ins. Co.*, 185 N. C., 540, and cases cited.

We think a reasonable and righteous interpretation of the rider would mean that the car could be left unattended, but when the owner leaves it unattended he should use "all diligence and care"—that is, all reasonable diligence and care; the pertinent rule being such care as a man of ordinary prudence would exercise under the same or similar circumstances. 9 C. J., p. 1288; *Asbury v. R. R.*, 125 N. C., 568; *Drum v. Miller*, 135 N. C., 208.

Applying the above rule of law to a just interpretation of the language of the rider, we are of the opinion that the court below, under the facts in this case, erred in granting the nonsuit.

The jury, from the facts and circumstances of this case, and the law as we interpret it, should say whether the plaintiff is entitled to recover, or not.

For the reasons given,

Reversed.

MELISSA L. BERRY AND J. H. BERRY, HER HUSBAND, v. THE CITY OF DURHAM.

(Filed 7 November, 1923.)

1. Municipal Corporations—Cities and Towns—Corporate Limits—Ultra Vires Acts.

Ordinarily, a city or town government, without legislative authority, has no power to acquire lands outside of its corporate limits for public purposes, or maintain or improve the same, and it is not responsible in damages for injury to lands of the private owner, done by its agents and employees while engaged in enterprises of this *ultra vires* character, though undertaken for the benefit of the public.

2. Same—Statutes.

Under the provisions of our general statutes, a city or town is given authority to acquire and maintain parks for the use of its citizens beyond its corporate limits, and to provide suitable streets or ways of access thereto for the purpose. C. S., sec. 2787 (1), (2), (11), (12); also secs. 2791, 2792, 2793, 2786.

3. Same—Conflicting Statutes—Local Laws.

The general statutes giving power to cities and towns to acquire parks for its citizens outside of the corporate limits, and provide access for the public thereto, prevail whenever and to the extent there is no irreconcilable repugnancy with special charter provisions on the same subject.

4. Same.

The city of Durham has legislative authority under the provisions of the general statutes to acquire and maintain parks for the public use, outside of its corporate limits, and to acquire and open up adequate and proper ways or streets thereto, and grade and improve the same. (C. S., sec. 2793.)

5. Same—Parks—Access—Streets—Condemnation.

Where a city or town has statutory authority to acquire a park for a public use outside of the corporate limits, it necessarily follows that the right is given to open up and maintain a right of way thereto, by condemnation or in other ways recognized by law.

6. Same—Negligence—Damages.

Where a city or town has been given the statutory power to acquire and maintain a public park beyond its corporate limits, and the necessary ways of access thereto, it is liable for the negligent wrongs and injuries committed by its employees and agents in the course of the work.

7. Constitutional Law—Race Discrimination—Public Parks.

Reasonable regulations may be made as to city parks for the white race, looking to the separation of the races, with the limitation that there shall be equal facilities afforded to both races according to their needs and requirements, without violating the constitutional requirements on the subject of race legislation; and where a city has accepted a dedication of lands for the purpose of a park for the white race, it is within the constitutional bounds for the governing municipal authorities to determine the equality of like places for the colored race; and an exception of race discrimination in this respect is untenable, unless it is made to appear that such authorities had violated the constitutional inhibition.

8. Same—Title—Fee Simple—Repugnancy.

Semble, a city or town that had accepted the dedication of a public park in violation of the constitutional inhibition against race discrimination may disregard the unconstitutional qualification annexed as a condition to the fee simple in the lands.

APPEAL by defendant from *Lyon, J.*, at April Term, 1923, of DURHAM.

Civil action, to recover damages for wrongful injury to property.

There were allegations of complaint setting forth the wrong and injury, and facts in evidence on the part of plaintiff tending to show that in April, 1917, W. G. Vickers proposed to the board of aldermen to donate and convey to the city a small tract of land lying a short distance beyond the corporate limits, for a park and playground purposes for the white people of the city of Durham, on condition that the city add to it 19½ acres of land for said purposes, and open and improve certain

streets—among others, Cobb Street, leading from Vickers Avenue in said city to said park and grounds. That the proposition was formally and fully accepted by the city, the park opened, and thereupon the city, through its agents and employees, entered on the work of grading and improving the said Cobb Street and others, as stipulated, part of same being within the city and part beyond the city limits, as stated. That plaintiffs owned a lot abutting on Cobb Street, just outside the city, and defendants, its agents and employees, in working on the extension of Cobb Street, had wrongfully removed a lot of surface soil from plaintiff's lot for purposes of making an embankment along said street, part of same being within the city, and had otherwise done the work so negligently in the portion of said street immediately in front of plaintiff's lot as to cause extended damage to same.

There was a general denial on the part of defendant of any and all negligence, defendants insisting further that the agents and employees of the city, engaged in the work of improving Cobb Street beyond the city limits, were acting *ultra vires,* and that the city was in no way liable for any injuries they may have caused. And, again, that the city authorities were without power to accept a deed for park purposes for the white people of Durham, there being power to acquire parks, if at all, for all the inhabitants, etc.

On issues submitted, the jury rendered verdict for plaintiff, assessing the damage, judgment on the verdict, and defendant excepted and appealed, assigning for error chiefly that the acts complained of were *ultra vires,* and the city, therefore, in no way responsible—first, because the street in question was beyond the city limits; second, the authorities were without power to accept and maintain a park and playground for the "white people of the city."

Brogden, Reade & Bryant for plaintiff.
S. C. Chambers for defendant.

HOKE, J. Ordinarily, and in the absence of legislative sanction, a city or town government is without power to enter on improvements of this character outside of the corporate limits, and for wrongs done by its agents and employees while engaged in such an enterprise the corporation itself may not be held liable. *Love v. City of Raleigh,* 116 N. C., 296; 7th McQuillan Municipal Corporations, sec. 1824.

In the citation to McQuillan it is said: "The general rule is, that, without legislative grant, the authority of the municipal corporation is confined to its own area; hence its acts and ordinances have no force beyond its corporate limits. Thus, in the absence of such grant, the

municipality cannot open a street, or repair a highway, grade an avenue, or aid in the construction of a plank-road or bridge beyond its boundaries."

And in *Love v. Raleigh, supra,* it is held, among other things: "That if an act complained of lies wholly outside of the general or special powers of a municipal corporation, the corporation is not liable in damages for such act, whether done by its express command or not."

In full recognition of the validity and binding effect of the principles as stated, they cannot avail the appellant in the instant case, for the reason that in our opinion there is ample legislative authority for the present improvement on the part of the city, both as to the acquirement and maintenance of the park in question and the improvement of proper rights of way leading thereto from the city. In C. S., ch. 56, sec. 2787, cities are empowered, among other things:

"Subsection 1. To acquire property in fee simple or a lesser interest or estate therein, by purchase, gift, devise, bequest, appropriation, lease, or lease with privilege to purchase.

"Subsection 2. To sell, lease, hold, manage, and control such property and make all rules and regulations, by ordinance or resolution, which may be required to carry out fully the provisions of any conveyance, deed, or will in relation to any gift or bequest, or the provisions of any lease by which the city may acquire property.

"Subsection 11. To open new streets, change, widen, extend, and close any street that is now or may hereafter be opened, and adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city.

"Subsection 12. To acquire, lay out, establish, and regulate parks within or without the corporate limits of the city for the use of the inhabitants of the same."

Again, in section 2791 of same chapter, the governing authorities are empowered to acquire for the "benefit of the city" any land, right of way, water right, privilege or easement, either within or without the city, which shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, or maintaining or operating any such streets, parks, playgrounds, etc.

In section 2792, power of condemnation is conferred where the property necessary cannot be otherwise acquired. And in section 2793 full authority is given the city government to control, grade, macadamize, cleanse, pave and repair the streets and sidewalks of the city, etc., as they may deem best for the public good, etc.

In section 2786 it is provided that the powers herein conferred shall apply to all cities and towns, whether they have adopted a plan of gov-

ernment or not, and such powers are in addition and not in substitution of existing powers of cities and towns.

Interpreting the section, it has been held that these powers under the general statute shall prevail whenever and to the extent that there is no irreconcilable repugnancy with special charter provisions on the same subject (*Kinston v. R. R.*, 183 N. C., 14), and it will thus be seen that the city of Durham, as stated, has ample legislative authority to acquire and maintain the park, and to acquire and open up adequate and proper ways thereto, and, having acquired such ways, the same becoming streets of the city, these rights of way may be graded and improved as provided by section 2793.

And if it were otherwise—if, as defendant contends, this section (2793) can only be held to apply to streets within the city limits—the right to grade and improve would necessarily follow from the powers conferred in the preceding sections—to acquire and maintain a park, and to acquire, open up, and maintain a right of way thereto. It would be an idle thing to grant the right to maintain a park outside the city limits, and to acquire and maintain a right of way thereto, and deny to the city authorities the power to make the park accessible by proper approaches. It is held in *Dewey v. R. R.*, 142 N. C., 392, and approved in numerous other decisions on the subject, that where a power is given by statute, everything necessary or requisite to attain the end is inferred. And the right of condemnation being also expressly conferred (*Comrs. v. Bonner*, 153 N. C., 70), the power to grade and improve follows as a necessary incident to acquire and open up the right of way.

The city authorities, then, being well within their powers in the grading of the street, the city may be properly held liable for the negligent wrongs and injuries committed by its employees and agents in the course of the work, and this objection of appellant must be overruled. *Leary v. Comrs.*, 172 N. C., 25; *Harper v. Lenoir*, 152 N. C., 723.

Nor can the objection be sustained that the contract is void because the donation in question is for the purpose of maintaining "a public park for the white people of Durham," and not for the inhabitants of the city generally. Even if the purpose to maintain a park for white people should be disapproved as being against public policy or without the powers possessed by the city government, it would seem to be in the nature of a condition subsequent, and might in itself be disregarded and the donation allowed to stand, but in our opinion the stipulation is not void nor does it necessarily invalidate the gift. It is in full accord with our practice and public policy, emphasized and approved by legislation and judicial decision, that reasonable regulations may be made and enforced, looking to a separation of the races, with the limitation that

as to public and *quasi*-public enterprises and undertakings there shall be equal facilities afforded to either of the races according to their needs and requirements.

In the matter of schools, the principle has place in our organic law, the Constitution providing that "the children of the white and the colored races shall be taught in separate schools, but there shall be no discrimination in favor of or to the prejudice of either race." A wise and beneficent provision that has been insistently upheld by the courts, and is working satisfactorily to both races. *Galloway v. Board of Education,* 184 N. C., 245; *Puitt v. Comrs.,* 94 N. C., 709; *Bonitz v. School Trustees,* 154 N. C., 375; *Lowery v. School Trustees,* 140 N. C., 33.

The same principle in this jurisdiction is provided by statute and enforced by judicial decision in the matter of common carriers and agencies for the convenience of the public. *Huff v. R. R.,* 171 N. C., 203; *Westchester v. Miles,* 55 Pa. St., 209; *Hall v. McCuir,* 95 U. S., 485, particularly in the concurring opinion of *Associate Justice Clifford.*

And a like principle should undoubtedly prevail as to public parks, the statute in addition expressly providing, as stated, section 2787, subsection 2, "That cities shall have power to make all rules and regulations by ordinance or resolution required to carry into effect the provisions of any conveyance, deed, etc., by which the city may acquire property."

Considering appellant's objection in view of these authorities and statutory provisions, we see nothing in the record to show that there is any race discrimination wrought by the acceptance of this deed or donation in its present form. So far as appears, the city government may have made ample and adequate provisions for parks and playgrounds for the colored race, and in any event the matter must be left to the sound legal discretion of the governing authorities, to be exercised according to the needs and requirements of either race, and without discrimination between them.

On the question of discrimination, in reference to a proper application of school funds, it was held among other things in *Lowery's case,* 140 N. C., 33: "The two essential principles underlying the establishment and maintenance of the public school system of this State are: First, the two races must be taught in separate schools; and second, there must be no discrimination for or against either race. Keeping them in view, the matter of administration is left to the Legislature and the various officers, boards, etc., appointed for that purpose."

Speaking further to this subject in *Smith v. School Trustees,* 141 N. C., 143-160, and by way of illustration, the Court said:

"And from this it follows that the discretion conferred upon the defendants by the terms of section 12 is by no means an arbitrary one, but the same must be used as directed and required by the Constitution and in the light of the above decision. There are no facts or data given by which the Court may determine whether the contemplated expenditure is or is not an unequal and unlawful disbursement of the school funds. The defendants, in their sworn answer, aver that they have no desire or intent but to administer their trust in accordance with the law of the land, and it is right that we should act upon this statement till the contrary is made to appear by proceedings duly entered.

"This section, as stated, only relates to the disposition of the fund which is in no way involved in this suit. If defendants, contrary to their avowed purpose, shall endeavor to exercise the authority conferred upon them with an 'evil eye and unequal hand,' so as to practically make unjust discrimination between the races in the school facilities afforded, it is open to the parties who may be interested in the question, by proper action, to correct the abuse and enforce compliance with the law."

We were cited by counsel for appellant to the decision of this Court in *S. v. Darnell,* 166 N. C., 300, as an authority in support of its position, but the case in our opinion does not sustain the exception. That was a decision to the effect that a city or town under its right to provide for the general welfare of the municipality, had no power to pass a segregation ordinance affecting the rights of either race to own property in specified localities. The ruling was chiefly made to rest on the facts that the ordinance in question worked substantial interference with rights of private ownership of property, and being of that unusual character, could be sustained, if at all, only by express legislative sanction, and leaving it an open question whether and under what circumstances such an ordinance could be upheld under legislation especially authorizing it. It will thus be seen that the decision, based on an unauthorized interference with private ownership, has no practical bearing on the question presented in the instant case, which concerns chiefly the right under statutory authority of acquiring and regulating public and *quasi*-public facilities so as to make reasonable provision for separation of the races without undue discrimination between them.

We find no error, and the judgment on the verdict is affirmed.

No error.

N. & W. OVERALL COMPANY, A CORPORATION, v. P. C. HOLMES.

(Filed 14 November, 1923.)

Contracts—Vendor and Purchaser—Evidence—Questions for Jury—Appeal and Error—Issues.

It is necessary to a binding contract that the minds of the parties agree upon its terms; and where, in an action between the parties to recover for goods sold to be delivered by common carrier, and the purchaser refused the shipment, which was afterwards destroyed by fire in the carrier's warehouse, there is conflicting evidence as to whether certain shirts were purchased at a less price than demanded by the seller, in an order for overalls and shirts, which comprised the shipment thus destroyed, it is for the jury to determine whether the order was entire for both the shirts and the overalls, and whether the seller had demanded a higher price for the shirts than that agreed upon; and an instruction directing a verdict in the seller's favor is reversible error: *Held further*, the issue, "In what sum is the defendant indebted to the plaintiff?" is a proper one.

APPEAL by defendant from *Cranmer, J.*, at February Term, 1923, of FRANKLIN.

Civil action. This was a suit for $108, price of a lot of overalls and shirts, sold by plaintiff to defendant, and commenced in a justice of the peace court, and on appeal heard anew in the Superior Court.

The plaintiff introduced the original order, alleged to be signed by defendant, for a lot of overalls and shirts, and an itemized verified statement of account, in accordance with the statute. The following is a copy of the order and verified account:

N. & W. OVERALL CO.,
Lynchburg, Va., 10-18-21.

Sold to—P. C. Holmes,
Address—Louisburg, N. C.
Routing—Frt. N. & W. When ship—Dec. 1. No hurry.
Terms—2% off 10 days, 30 days net.

S. B. No.	Case No.	Rating	Ledger	Date Billed
	16-1			
	14-3	W. D.	504	11-28-21

Quantity	Style	Price	Amount
5	109-A	36 to 42 $15.00	$75.00
1	1	15 to 17 11.00	11.00
1	2	15 to 17 11.00	11.00
1	3	15 to 17 11.00	11.00
			$108.00

Hold till December 1st.

Rated W. D. I have found him prompt to meet obligations.

All goods sold f. o. b. factory. All orders subject to approval of office, and not subject to cancellation.

Buyer: P. C. HOLMES.

Salesman: E. S. TAYLOR.

EXHIBIT B.

Nov. 28, 1921.

No. 190-A,	5 doz.	overalls	$15.00	$75.00
1	1 doz.	shirts	11.00	11.00
2	1 doz.	shirts	11.00	11.00
3	1 doz.	shirts	11.00	11.00
		Total		$108.00

Shipped via N. & W. Ry. Co.

The plaintiff rested, and the defendant was introduced as a witness, who testified as follows:

"I remember the occasion when Mr. Taylor, the agent of the N. & W. Overall Company, sold me this bill of goods. The prices agreed upon at that time were $15 a dozen for the overalls and $10 a dozen for the shirts. The agent gave me a duplicate of the order at the time. The paper I have in my hand is the duplicate order given me. (Order introduced, which is in exact words and figures as the order introduced by plaintiff, except the price of the shirts was $10 a dozen instead of $11.)

"The salesman came to my store and sold me the goods; had samples with him. I received a bill for the goods three or four weeks after the salesman was here, and the shirts had been billed at $11 a dozen instead of $10. The N. & W. Overall Company wrote me and asked me to put in a claim for them with the Seaboard Air Line Railway Company, and I sent that bill with the claim. On the bill the shirts were billed at $11 a dozen instead of $10, and when I was notified that the goods were at the depot I went to the depot and refused to accept the goods, because they were billed at $11. I never did accept the goods, and they were afterwards burned in the fire at the depot."

Several letters passed between the parties, and the letter of 3 May, 1922, was sent to plaintiff by defendant, which is as follows:

P. C. HOLMES,

Dealer in General Merchandise, Gas, Oils and Greases.

Louisburg, N. C., May 3, 1922.
R. F. D. 2.

N. & W. OVERALL CO.

DEAR SIR:—The shipment of goods on December 7th refused; did not come up to sample, and I refused on the 8th day of December, and notified you at once, and you elected to allow same to remain on hand over thirty days before fire. I had nothing more to do with them after I refused them, and you trusted to the railroad company to let them remain. They refused to pay the claim.

Yours truly,
P. C. HOLMES.

Defendant further testified: "I think it was on 8 December I was notified that the goods were in the depot. I think it was Mr. Hale, an employee at the depot, that I notified I would not accept the goods. I told him I refused the goods on account of the price being too high. The goods were left at the depot. I never put in any claim with the railroad company until requested to do so by the N. & W. Overall Company. I know that the Overall Company did put in claim before they asked me to put in a claim. I received a letter from the railroad company to that effect after I put in claim at the request of the N. & W. Overall Company. The carbon copy of the order, which I have here, is the one given me by the salesman. I did not make any changes in the order after it was given to me. I just stuck the order on the file, and did not think any more about it until this came up. If it was changed, it was changed by the agent before he gave it to me."

On cross-examination, the defendant said, in part: "When the original order was written, there was a sheet of carbon paper put between, and the carbon copy of order was given to me. There was no question about the first item on the bill, but the shirts should have been $10 instead of $11. I do not think, from the back of the carbon copy, that it was originally $11 and changed to $10. It is not my handwriting on the bottom of the original order. I refused the shipment because the price was made me in the order of $10 a dozen, and the account rendered at $11."

He stated that in his letter of 3 May he meant "price" instead of "sample." It was a mistake if he said goods did not come up to "sample"; he meant "price."

The Seaboard Air Line Company's report of refused and unclaimed freight shows the goods were shipped 30 November, 1921; arrived at

Louisburg 7 December, 1921; defendant was notified 8 December, 1921, and on the same day refused shipment; note made: "Refused; consignee says price too high." The goods were burned in the depot about thirty days after their arrival at Louisburg.

The following issue was submitted to the jury:

"In what sum is the defendant indebted to the plaintiff?"

The court below charged the jury as follows: "One issue is submitted to you, and that is: in what sum is the defendant indebted to the plaintiff? And if you find the facts to be, by the greater weight of the evidence, as testified to by the witness, I instruct you that you will answer the issue $108, with interest from 8 December, 1922."

The jury returned a verdict for $108, with interest from 8 December, 1922.

The defendant excepted and appealed to this Court, and assigned as error the charge as given by the court.

William H. and Thomas W. Ruffin for plaintiff.
William Y. Bickett and W. H. Yarborough for defendant.

CLARKSON, J. The controversy between the parties, as shown by the record, is that the salesman of the plaintiff N. & W. Overall Company, of Lynchburg, Va., claimed he sold the defendant P. C. Holmes, of Louisburg, N. C., a lot of overalls and shirts. The defendant was to pay plaintiff $15 a dozen for the overalls, and claimed he was to pay $10 a dozen for the shirts. It was an entire transaction—one order. The salesman made two copies of the order and turned one over to the defendant, *showing the shirts were to cost $10 per dozen.* The plaintiff shipped the overalls and shirts from Lynchburg, Va., to the defendant at Louisburg, N. C., and mailed the bill to the defendant. The bill, or invoice, sent to the defendant *showed the shirts to be $11 instead of $10 a dozen.* The defendant immediately refused to accept the shipment, and notified both the railroad and the plaintiff, the shipment being refused on account of the price being too high. About thirty days after the arrival of the goods they were burned in the railroad depot at Louisburg.

A contract is "an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Blackstone Com., p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is

not what either thinks, but what both agree." *Prince v. McRae,* 84 N. C., 674, citing *Brunhild v. Freeman,* 77 N. C., 128, and *Pendleton v. Jones,* 82 N. C., 249. See, also, *Bailey v. Rutjes,* 86 N. C., 517; *Lumber Co. v. Lumber Co.,* 137 N. C., 431; *Knitting Mills v. Guaranty Co.,* 137 N. C., 565; *Mfg. Co. v. Assurance Co.,* 161 N. C., 96. This is our interpretation of the definition of a contract.

The plaintiff contends that its salesman, who had the authority to act for it, agreed to sell defendant a lot of shirts at $11 a dozen. The defendant contends that the salesman agreed to sell the shirts at $10 a dozen. There is a conflict between the parties. This is an issue of fact for a jury to determine, upon proper instructions from the court as to the law applicable to the facts. The issue submitted on the former trial is proper—that is, "In what sum is defendant indebted to the plaintiff?" On the hearing, the court below should give the contentions of the parties, and state the law as it applies to the facts in this case. If the jury should find the facts to be, by the greater weight of the evidence, as testified to by plaintiff's witnesses—that the contract for the shirts was $11 a dozen, and the contract for the overalls and shirts was an entire contract, and so made and intended, and the overalls and shirts shipped together—then the answer to the issue should be the price at which the goods were sold; but if the jury should find the facts to be that the salesman of plaintiff offered to sell the shirts to the defendant at $10 a dozen, which defendant agreed to pay, and without the knowledge or consent of the defendant sent the alleged order to the plaintiff (with the order for the overalls), stating the price of the shirts to be $11 a dozen, and the plaintiff accepted the order on these terms, there was no "agreement of two minds," and there was no contract between the parties, and their answer to the issue would be "Nothing." "If the offer is stated in such terms that the offeree understands one price, while the offerer means another, the parties are never *ad idem,* and there is no agreement." 35 C. L. P., p. 62 (IV.)

In this jurisdiction, as was the rule at common law, it is the province of the jury to determine the facts, and that of the trial court to state the law; and where the testimony is conflicting, as it is here, the case presented is one for the jury. *Russell v. R. R.,* 118 N. C., 1098; *Woodland & Co. v. Southgate Packing Co., ante,* 116.

For the reasons given, a new trial is granted.

New trial.

STATE v. J. L. HAWLEY.

(Filed 14 November, 1923.)

1. Criminal Law—Indictment—Statutes.

The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. C. S., secs. 4610, 4625.

2. Same—Perjury.

A bill of indictment is sufficient to constitute the charge of perjury if it is in the words prescribed by C. S., 4615. Though on the trial the State must show beyond a reasonable doubt that the evidence as charged was false, that it was corruptly and wilfully done, and upon a point material to the issue in the case set out in the bill of indictment; an indictment drawn in the form prescribed by the statute is sufficient. *S. v. Cline*, 150 N. C., 854, overruled.

3. Same—Surplusage.

The words, "suit, controversy, or investigation" (C. S., sec. 4615), may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained.

4. Same—Bill of Particulars.

Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars (C. S., sec. 4613) if the indictment is in the form prescribed by C. S., sec. 4615.

STACY, J., dissenting.

APPEAL by State from *Stack, J.*, at October Term, 1923, of RICHMOND.

The indictment was in the following words:

The jurors for the State, upon their oaths, present: That J. L. Hawley, late of the county of Richmond, on the..... day of October, A. D. 1922, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, feloniously, and corruptly commit perjury upon the trial of an action, suit, controversy or investigation pending in the Superior Court of Richmond County, wherein the State of North Carolina was plaintiff and Younger Smith was defendant in a certain affidavit sworn to by the said J. L. Hawley before J. A. McAuly, having competent authority to administer said oath, by falsely asserting on oath (or solemn affirmation), that he, the said J. L. Hawley has not been and is not now a Knight of the Invisible Empire or Knights of the Ku Klux Klan, sometimes known as the Kluckers, knowing the said statement, or

statements, to be false, or being ignorant whether or not said statement was true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

PHILLIPS, *Solicitor.*

And this bill found a true bill.

D. A. PARSONS,
Foreman of the Grand Jury.

The defendant demurred to the indictment and filed the following demurrer and motion to quash:

Now comes the defendant, J. L. Hawley, and demurs to the indictment in the above-entitled criminal action, for that:

1. The said indictment is fatally vague and indefinite, in that it alleges that perjury was committed "upon the trial of an action, suit, controversy, or investigation," without definite statements of the nature of the proceeding in which the alleged perjury was committed.

2. That said indictment does not aver that the alleged false oath was material to any issue or matter under trial or investigation, and does not set forth facts from which the materiality in anywise appears.

3. The said indictment does not charge the commission of a crime of which the court can take cognizance.

Wherefore, defendant moves that the said indictment be quashed and that he be discharged.

H. S. BOGGAN, PARKER, STEWART, MCRAE & BOBBITT,
Attorneys for Defendant.

The motion was allowed, and the bill was quashed. The Solicitor for the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. S. Boggan and Parker, Stewart, McRae & Bobbitt for defendant.

CLARK, C. J. The chief ground upon which the bill was quashed was that it did not in specific terms allege that the facts set out in the bill, about which the false swearing was alleged to have occurred, were "material to the issue" then pending before the court.

Previous to the act of 1889 (ch. 83, now C. S., 4615), the omission of such allegation or of allegations which would show upon their face that the false oath was material, would have been fatal. Since, however, the enactment of that law, the Court has repeatedly, and with one single exception, sustained the bill of indictment, which is in the exact words of the statute.

In *S. v. Peters,* 107 N. C., 876, at p. 884, the Court said: "The authority of the Legislature to prescribe forms of indictment is sus-

tained in *S. v. Moore,* 104 N. C., 743. The form of indictment here authorized points out to the defendant that the offense charged is perjury, the court and the names of the parties to the proceeding in which it is alleged to have been committed, the words alleged to have been sworn, and their falsity. The charge is simplified. But the constituent elements of the offense remain as before. They are included in the allegation, 'did commit perjury,' and it must still be shown in proof that the defendant made oath or affirmation substantially as charged, that the defendant was duly sworn by an officer competent to administer the oath, and in a matter of which he had jurisdiction, and in one of the cases specified in The Code, sec. 1092—*i. e.,* 'in a suit, controversy, matter or cause depending in any of the courts of the State, or in a deposition or affidavit taken pursuant to law, or in an oath or affirmation duly administered of, or concerning, any matter or thing whereof such person is lawfully required to be sworn or affirmed,' that it was in a material matter, and the jury must be further satisfied that such oath or affirmation was wilfully and corruptly false."

The indictment followed the statute and was sustained, without alleging materiality of the oath, in the following cases also, besides *S. v. Peters, supra; S. v. Thompson,* 113 N. C., 638; *S. v. Harris,* 145 N. C., 456; *S. v. Cline,* 146 N. C., 640; *S. v. Hyman,* 164 N. C., 413. In each one of these cases the argument upon which *S. v. Cline,* 150 N. C., 854, was based would have been equally applicable, yet in all of them the Court sustained the bill of indictment, though attacked either by a motion to quash or by motion in arrest of judgment, and none of these cases were cited in *Cline's case* in the 150th.

In the case at bar the defendant was definitely informed of the nature of the crime and would have an opportunity to confront the witnesses, and the State must show that the facts set out in the oath were false and that the false swearing was corrupt and wilful, and that it was upon a point material to the issue in the case set out in the bill of indictment. How, then, could the defendant, Hawley, be deprived of any of his constitutional rights? The courts now disregard these refinements, so as not to permit the defendant to avoid answering a bill of indictment because there are merely technical and formal errors in the bill of indictment. "The refined technicalities of the procedure at common law in both civil and criminal cases have almost entirely, if not quite, been abolished by our statute, C. S., 4610 to 4625." *S. v. Hedgecock,* 185 N. C., 714.

The defendant further attacks the bill of indictment because it alleges that perjury was committed upon the trial of an action, suit, controversy or investigation without definite statements of the nature of the proceeding in which the alleged perjury was committed. The words, "suit,

controversy or investigation," may be eliminated from the bill of indictment as surplusage. *S. v. Piner,* 141 N. C., 760.

In a ruder age, technicalities and what are called "refinements" were considered of more importance than the trial of a case on the merits, whose determination is the object in all modern systems. In indictments for murder it was essential to enumerate many particulars, taking two pages or more of foolscap to allege many circumstances of no value, such as the nature and depth of the wound, the value of the weapon with which it was committed, that the criminal was "moved and instigated by the devil," and the like. Indeed, in a case in this State, on the conviction of a flagrant homicide, where there was no doubt whatever of the guilt of the murderer, judgment on the verdict of guilty was arrested because on a microscopic scrutiny of the indictment it was found that the word "knife," with which the offense was alleged to have been committed by the murderer, left out the letter "k," and many other cases of like nature occurred.

The act of 1811, now C. S., 4623, provides that no bill or warrant shall be quashed for informality. "Every criminal proceeding, by warrant, indictment, information, or impeachment, is sufficient in form for all intents and purposes if it is expressly charged against the defendant in a plain, intelligible and implicit manner, and the same shall not be quashed or judgment thereon stayed by reason of any informality or refinement, if in the bill or proceedings sufficient matter appears to enable the court to proceed to judgment"; and the act of 1889, ch. 83, now C. S., 5615, prescribes a form of bill for perjury which contains the identical words of the bill which was used by the solicitor in this case. Such authority cannot be repealed by an inadvertent decision as has been made in the single case upon which the defendant relies.

In *S. v. Owen,* 5 N. C., 452, judgment was arrested because the judgment had not charged the depth and width of the wound.

Chief Justice Ruffin, in *S. v. Moses,* 13 N. C., 464, says: "The act of 1811, passed the year after *Owen's case* (5 N. C., 452), was decided and, we have reason to believe, was caused by it. It enacted that in all criminal prosecutions in the Superior Courts it shall be sufficient that the indictment contain the charge in a plain, intelligible and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement when there appears to be sufficient in the face of the indictment to induce the court to proceed to judgment," and the great *Chief Justice* added the following memorable words: "This law was certainly designed to uphold the execution of public justice by freeing the courts from those fetters of form, technicality and refinement which do not concern the substance of the charge and the proof to support it. Many of the sages of the law had before called nice objec-

tions of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain nor perspicuous than that which they were constrained to reject. In all indictments, especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance—that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things—the one form, the other precedent." These words have been quoted and approved more than forty times.

This practical comprehension of the demands of the times that a plain statement of the procedure is to be adopted in the administration of justice, rejecting all merely technical objections as to form, has been repeatedly and often affirmed.

A brief form of indictment for murder was enacted in 1887, now C. S., 4614, substituting three lines for the previous cumbersome and absurd form in use, and has been often approved. See citations under that section in the Consolidated Statutes.

In like manner, the specific short form for perjury used in the present instance was enacted in 1889, chapter 83 (a third of a century ago), now C. S., 4615, and has been in constant use ever since and often approved. And the same is true as to many other offenses, and they are all also authorized by the general law in the above-quoted sections—C. S., 4612, 4623, and 4625. Indeed, in *S. v. Kirkman,* 104 N. C., 911, the Court rejected once for all the recital in the Constitution itself, that indictments should conclude "against the peace and dignity of the State."

As a safety valve to prevent any possibility of harm to any defendant by the Doric plainness required in indictments, it is provided that whenever there should be alleged by any defendant ignorance of the particulars of the offense with which he was charged, he can apply to the court to order a bill of particulars. See C. S., 4613, and the numerous cases thereunder in which that practice has been approved.

As to this particular offense of perjury, there is a *verbatim* form of indictment prescribed in C. S., 4615, which the statute specifically says "shall be sufficient" and which has been in constant use ever since. The indictment, in the present case, follows that form *verbatim.* The Court, therefore, is unable, and does not wish indeed, to repeal the statute, and we must hold the case of *S. v. Cline,* 150 N. C., 854, which inadvertently overruled (without mentioning that it did so) the form prescribed by the statute, and the numerous cases which had expressly

approved it, must have been inadvertently adopted in the press of business, and we cannot regard it as authority and overrule it. The statute itself prescribed the form used in this case, and we have many cases in which that form has been expressly approved. There are hundreds of cases which must have followed the form prescribed by the statute.

It is worthy of note that *S. v. Cline,* 146 N. C., 640, was before the Court on an appeal from a judgment quashing the bill, and *Walker, J.,* in a very full opinion, citing the authorities, upheld the indictment which was in the words prescribed by the statute, and reversed the judgment below, sending it back for trial. The identical case of *S. v. Cline* came back, 150 N. C., 854, upon a verdict of guilty, and it is conclusive that the opinion of reversal in that case was an inadvertence, for it contains no reference to the previous opinion in the same case by *Walker, J.,* 146 N. C., 640, nor to the fact that the indictment was in the identical form of the statute. The later case (150 N. C., 854) has never been cited or quoted since, while, as above said, *S. v. Cline,* 146 N. C., 640, cited many cases upholding the form prescribed by the statute, and has itself been cited since in *S. v. Hyman,* 164 N. C., 414, and the statutory form of indictment for perjury has been universally followed throughout the State.

Reversed.

STACY, J., dissenting: The trial judge placed his judgment squarely upon the decision of this Court in *S. v. Cline,* 150 N. C., 854, which contains our latest expression on the subject. In this, I think he was right. That case was well considered. It is in line with the overwhelming weight of authority, and we should be slow to overrule it.

In an indictment for perjury, the materiality of the alleged false oath, to my mind, is not merely a matter of form, but rather an essential element of the offense. It certainly would be necessary for the State to prove it on the hearing in order to make out the charge. Then what becomes of the settled maxim of the law that "proof without allegation is as unavailing as allegation without proof?" *Dixon v. Davis,* 184 N. C., p. 209; *Green v. Biggs,* 167 N. C., p. 422; *McCoy v. R. R.,* 142 N. C., p. 387. Why subject the defendant to the inconvenience of a trial if the State cannot prove the materiality of the alleged false oath and will not allege it? Every essential element of a crime must be charged in the bill of indictment, and any defect in this respect is not subject to be cured by a bill of particulars. C. S., 4613; *S. v. Van Pelt,* 136 N. C., 633. This is not a technicality; it is a matter of substance. I think the present bill is defective. The judgment below should be affirmed and the solicitor allowed to send another bill, if so advised.

PELL A. DAVIS v. J. E. FAULKNER.

(Filed 14 November, 1923.)

Contents—New Promise — Consideration — Statute of Frauds — Debt of Another—Writing—Landlord and Tenant.

Where the owner of lands has executed his note for moneys to be used by his tenant, and agrees with another such owner that he would release his tenant to become the tenant on the other's land for raising a crop thereon, if the latter would pay off or discharge the note held by the bank, and accordingly the tenant makes the change, the promise to become bound to the payment of the note at the bank is a new promise, supported by a sufficient consideration, and does not come within the meaning of the statute of frauds, requiring a signed, etc., writing for one to become bound for the obligation of another.

APPEAL by defendant from *Stack, J.*, at April Term, 1923, of ANSON.

This was an action begun before a justice of the peace and tried before *Stack, J.* No pleadings were filed but it appeared in the evidence that one Henry Brewer was a tenant of the plaintiff Davis during the year 1920. That Brewer executed a chattel mortgage on certain personal property to Davis, who also had a lien upon his crop for advances, to obtain which the plaintiff executed a note to the Bank of Wadesboro in the sum of $162 on which he paid $12 interest and obtained $150 for Brewer. About the end of 1920 the defendant saw Davis and said to him that if he would allow Brewer to move to his place he would take up the note at the bank, and the plaintiff says he told the defendant that if he did take up the note Brewer would go free, and soon after Brewer accordingly moved to defendant's farm. Later he saw defendant and asked him if he had taken up the note, and he said he found there were other liens against the property and he would not pay it. Verdict and judgment for plaintiff. Appeal by defendant.

A. A. Tarlton for plaintiff.
McLendon & Covington for defendant.

CLARK, C. J. The statute of frauds was pleaded and the court charged as follows: "The first issue is, 'Did the defendant promise and agree with the plaintiff that he would pay the note at the Bank of Wadesboro, executed to said bank by Pell Davis, if Pell Davis would consent for Henry Brewer to leave plaintiff's place and become a tenant of the defendant, as alleged in the complaint?' "

The second issue was, "In what amount, if any, is the defendant indebted to the plaintiff?" The court instructed the jury that if they answered the first issue "Yes," then the answer to the second issue would be "$142 with interest."

The court charged the jury as follows: "If you find by the greater weight of the evidence in this case that some time in January, 1920, the defendant promised and agreed with the plaintiff, Pell Davis, that if he would permit his tenant, Henry Brewer, to leave his premises and move to Faulkner's land and become his tenant for the year 1921 on the condition that he would take up his part of that agreement—that he was to relieve Davis from the payment of a debt which he had assumed and get the chattel mortgage himself, if you find by the greater weight of the evidence that was the agreement between the parties, you will answer the first issue 'Yes.'"

The court also charged the jury: "If you are not so satisfied, you will answer the issue 'No.' The burden of proof on that issue being upon the plaintiff to satisfy you by the preponderance of the evidence that that is the way the thing happened, but if the matter is like the defendant claims, that the contract was only that he should be bound to pay it in the event that there was no other mortgage against the property in chattel mortgage, then you will answer the first issue 'No,' because there is no question but that there was a mortgage on part of the property." And thirdly, he charged the jury: "If you find by the greater weight that it occurred like Davis said, and that he let the tenant leave and go off his place, and that was after the agreement with Faulkner that he would take up the note as Davis contends, then you will answer the first issue 'Yes.' If you are not so satisfied by the greater weight of the evidence you will answer the issue 'No.'" There was a good deal of controversy as to the facts, but the jury have found for the plaintiff on both issues that the contract was made as the plaintiff alleged, and that the amount due on the second issue was $142 with interest from the last day of February, 1920.

The statute of frauds, to "prevent frauds and perjuries," wisely provides that one cannot be held upon a verbal agreement to be surety for another, but the contract here alleged, and which the jury have found to be the fact, is that the defendant did not agree to become surety for plaintiff to the bank but that if Davis would let Henry Brewer move from his place to the defendant's farm that he would take up and pay off the debt which Davis owed the bank for money which he had borrowed from the bank upon security of a mortgage given by Davis and a lien on the crop. This was a new promise and undertaking on the part of the defendant to the plaintiff upon a consideration of an advantage to himself of the removal of the tenant from the plaintiff's farm to his.

It was argued that the defendant could not make Brewer move and the plaintiff had no power to retain him, but that is immaterial. There may have been a moral obligation or a sense of duty which would have

prevented a tenant moving from one premises to another, and, at any rate, the defendant, according to the verdict of the jury, thought it would be to his advantage and, as the jury finds, made the promise, and so recorded their verdict. The court charged the jury that "If, as the defendant claims, they found that the agreement of the defendant was that he should be bound to pay only in the event that there was no other mortgage against the property in the chattel mortgage, to answer the first issue 'No,' because there is no question that there was another mortgage on part of the property."

No error.

JOHN R. BRYANT v. THE WELCH FURNITURE COMPANY.

(Filed 14 November, 1923.)

1. Negligence—Damages—Employer and Employee—Safe Appliances—Duty of Employer—Evidence—Simple Tools.

A machine furnished by an employer to his employee for him to do his work in the course of his employment, though simple in its construction and operation, does not relieve him of liability for an injury received by the employee in doing his work with this implement, when the employer knew, or by due inspection or otherwise should have known, of a defect therein, importing serious menace, which caused the injury in suit, without means or opportunity afforded the employee to remedy the defect or condition that proximately caused the injury which occurred without contributory fault on his part.

2. Same—Questions for Jury—Trials.

Where a furniture manufacturing company has furnished its employee a certain implement, called a "case clamp," detached from the power-driven machinery, for the crating of its products for shipment, the operation of which was by the working of a lever from perpendicular in the arc of a circle, pressing down from right angle, and there is evidence tending to show that this machine was old and worn, and defective in part, and would unexpectedly fly upward from right angle instead of downward, as it was designed to do, and serious injury was done to the employee's eye on the occasion complained of, by its flying upward from right angle, and that this undesired movement had been theretofore called to the attention of the company's vice-principal, or should have been known to it upon proper inspection: *Held*, sufficient for the determination of the jury upon the issue of the defendant's actionable negligence.

3. Appeal and Error — Negligence — Indemnity — Evidence — Harmless Error.

While it is ordinarily error in a personal-injury action for damages to introduce evidence, or comment, in the presence of the jury, upon the fact that the defendant held a policy of indemnity against loss for the injury, it is not erroneous for the plaintiff's attorney, in good faith, to cross-examine the defendant's witness, upon a material phase of the case, as to

a conversation he had had with the "insurance agent," without reference to the fact of indemnity, or insinuating it, to defendant's prejudice, and it appears that it could not reasonably have impressed the jury, under the circumstances, to the appellants' prejudice.

APPEAL by defendant from *Shaw, J.*, at August Term, 1923, of GUILFORD.

Civil action. Plaintiff is seeking to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. There were facts in evidence on part of plaintiff tending to show that in January, 1922, as employee of the defendant company, he was engaged in operating a "case clamp," a piece of detached machinery designed to hold newly made furniture in place while being securely nailed, etc. It was in the shape of an oblong, box-like structure, open at one end, into which a newly made piece of furniture is placed, then clamped, from, or with the sides of the machine forced up against the furniture, the motive power being applied and controlled through a lever fixed on the right side as approached. When being used this lever is pulled by the operator from the top towards the bottom of a semi-circle, and when in proper fix, until it reaches the center, has a tendency to fly back towards the top, and after passing the center the pressure is downward, tending to hold it in position. There is a smaller box attached to the side, holding the nails, etc., and when the lever has been pushed down, and the piece of furniture therein securely held, the workman drives the required nails, getting them usually from the little box fastened for the purpose on the outside. That this machine had been long in use, was old and worn, and a piece of the mechanism affecting the movement of the lever had been broken, and there was evidence permitting the inference that, owing to its worn condition and the break as stated, the lever would sometimes after passing the center fly up instead of down, thereby making its movement eccentric and uncertain. Plaintiff said that once or twice before it had done so with him, once striking him on the chin, but causing no serious harm. Two or three other witnesses said that some time back, in working this machine, it flew up after passing the center, and one said that he had called the attention of the superintendent to this unusual and threatening action of the machine. That on the occasion in question plaintiff had placed a piece of furniture in the case clamp, and had pulled the lever below the center and down to its proper position, and as he bent over to get some nails from the small box the lever flew up, striking him in the eye, causing a severe and painful wound and putting the eye entirely out, etc.

There was much evidence on the part of defendant tending to show that the machine was in good order and working properly. That it

was a machine very simple in its operation and by its very structure, after passing the center, the lever was forced downwards instead of up. That no amount of wear could affect this movement, and that the break referred to by plaintiff's witnesses, even if it existed, which all of defendant's witnesses denied, would in no way interfere with this, the usual movement of the machine, though it might render it useless and ineffective for any purpose.

On issues submitted, the jury rendered their verdict that plaintiff was injured by defendant's negligence as claimed; that there was no contributory negligence on part of plaintiff, and assessed the damages $5,000. Judgment on the verdict, and defendant excepted and appealed, assigning errors.

York & York and John A. Barringer for plaintiff.
Peacock & Dalton and King, Sapp & King for defendant.

HOKE, J. It is contended for appellant that the motion for nonsuit should have been allowed for the reason chiefly that the machine in question being simple of structure and operated by plaintiff himself, no negligence can be imputed to defendant company, but in our opinion and on the facts presented the objection cannot be sustained. While the duties incumbent on employers in the exercise of reasonable care, to supply tools and appliances reasonably safe and suitable for the work, are not as exigent in regard to simple tools and appliances as in other cases, they are not relieved of any and all obligation in the matter, and our decisions hold that where a faulty tool has been knowingly supplied by the employer or in violation of the ordinary inspection due in such instances, and the defect is one that imports menace of substantial injuries, there are conditions and instances where liability may attach.

In the recent case of *McKinney v. Adams,* 184 N. C., 562, it was held: "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."

And *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, are cited in support of the position.

In the *McKinney case, supra,* the foreman of defendant, shown to be a vice-principal, as the plaintiff, the employee, was starting out to trim off logs in the woods, gave to such employee an axe with a "switchy, limber" handle, where the employee had neither time nor opportunity to supply or remedy the defect, and in using the axe in the work the employee received a severe injury, and it was held, as stated, that the question of liability was for the jury.

And the same ruling was made in *Rogerson v. Hontz, supra,* the tool being a defective cant hook supplied to employee engaged in loading and unloading logs, and by reason of the defect complained of the hook slipped its hold and severe injuries were received. Speaking to the question presented in that case, the Court said: "On the facts as now presented the evidence tends to show that this cant hook was an implement suitable to the work and which the employer should supply; that while simple in itself, it was designed, by leverage, to give the workman more power; that he was engaged in loading and unloading heavy logs from cars, rough work and where he was frequently liable to be in position that, if the hook slipped its hold or the handle broke, severe injuries were not improbable, and, applying the principles of the cases referred to and others of like import, the issue must be referred to the jury on the question whether the tool was defective; was such defect known to the employer, and was it of a kind which threatened substantial injury in its use."

Accepting the evidence of plaintiff as true, and interpreting the same in the light most favorable to him, the established rule in motions of this character, it appears that this was an old and much-worn machine, with a break in the mechanism; that under the conditions presented there was menace of substantial injury to employee in its use, and under the authorities cited and the principles upon which they rest, the question of liability was for the jury, and defendant's motion for nonsuit was properly overruled.

Defendant excepts further that in the cross-examination of W. T. Powell, president of defendant company, plaintiff was erroneously allowed to put before the jury evidence to the effect that the company held indemnity insurance against this alleged claim. The witness having stated that the machine worked properly and so far as witness knew had only been operated twelve years, in the cross-examination the following questions and answers were allowed and excepted to:

"Mr. C. E. Ridge is our superintendent. That machine was in the Welch Furniture Company when I came there, twelve years ago.

"Q. I ask you if you don't know it had been there 22 years in operation? A. No, sir; it was there when I came there, 12 years ago. I don't know when it was installed.

"Q. I ask you if you didn't tell the insurance man that in the presence of the plaintiff? (Objection by defendant; overruled; exception.) A. I don't remember ever telling him that.

"Q. I am asking you whether you ever told the insurance agent that this machine that the plaintiff was hurt on had been there 22 years in operation? A. I don't remember ever telling the insurance agent anything like that.

"Q. You might have told him? A. I don't remember ever telling him.

"Q. You don't remember whether you did or not? A. I don't remember anything about it."

It has been held in this State that in a trial of this kind the fact that a defendant company charged with negligent injury held a policy of indemnity insurance against such a liability is ordinarily not competent, and when received as an independent circumstance relevant to the issues, it may be held for prejudicial error. And if brought out in the hearing of the jury by general questions asked in bad faith and for the purpose of evasion, it may likewise be held for error. On the contrary, if an attorney has reason to believe that a juror, tendered or on the panel, has pecuniary or business connection naturally enlisting his interest in behalf of such a company, it is both the right and duty of the attorney in the protection of his client's rights to bring out the facts as the basis for a proper challenge, or if in the course of the trial it reasonably appears that a witness has such an interest that it would legally affect the value of his testimony, this may be properly developed, and where such a fact is brought out merely as an incident, on cross-examination or otherwise, it will not always or necessarily constitute reversible error when it appears from a full consideration of the pertinent facts that no prejudicial effect has been wrought. *Holt v. Mfg. Co.*, 177 N. C., 170; *Featherstone v. Cotton Mills*, 159 N. C., 429; *Lytton v. Mfg. Co.*, 157 N. C., 331; *Norris v. Mills*, 154 N. C., 474.

In the present case it is clear that the attorney for plaintiff, having asked the question generally, was endeavoring in good faith to impress the witness with the time and place of an adverse declaration by him, and referred to a conversation with some "insurance man" in the effort to recall the matter to the memory of the witness. In the entire series of cross-questions he never describes or refers to the person in question as the agent of an indemnity company, nor is there anything to show that such an impression was made upon the jury, or that it had in any way affected the results of the trial.

On careful consideration of the record we find no reversible error, and the judgment for plaintiff will be affirmed.

No error.

STATE v. DON BARNHILL.

(Filed 14 November, 1923.)

1. **Appeal and Error—Objections and Exceptions—Evidence—Waiver.**

The appellant waives his exception to the exclusion of evidence when he asks another question covering the same ground, and the answer is admitted without further objection.

2. **Same—Criminal Law—Rules of Court—Instructions.**

Exception to the charge of the court not insisted upon in appellant's brief is deemed abandoned under Rules of Practice in the Supreme Court, Rule 27 (185 N. C., 798), but *held* an instruction in this criminal action as to the meaning of "reasonable doubt" was correct. *S. v. Schoolfield*, 184 N. C., 723, cited and applied.

3. **Same—Contentions.**

Appellant must except to the contentions stated by the court in his instructions at the time they were made; otherwise, it will not be considered on appeal.

4. **Evidence—Instructions—Trials—Interested Witnesses—Credibility of Evidence.**

An instruction that the jury should scrutinize the evidence of defendant in a criminal action, and that of his near relations, tending to show an *alibi* at the time he was charged with the commission of the offense, but should they find this evidence is entitled to be believed, they would "have a right" to accept it, and to give it the same weight as they would give the testimony of a disinterested witness, *is held* not erroneous, though the word "duty" to accept it would be in better form.

APPEAL by defendant from *Sinclair, J.*, and a jury, at May Term, 1923, of PENDER.

Criminal action. Don Barnhill was charged with an assault on R. R. Henry with a deadly weapon, about 10 o'clock at night, on 8 January, 1923, near the barber shop of Hayes Tate, in the town of Atkinson.

R. R. Henry testified that as he left the barber shop one of the Russ boys, Barnhill and Woodcock were at the other corner of the store and as he started in that direction Barnhill said, "Damn him, let him come up here and I will fix him." That he did not go closer; that he went in Russ's store and stayed in there about two minutes and went out and started home. As he stepped out of the light into the darkness he was struck across the nose and knocked down, and as he started toward the light he was struck twice in the back of the head with a stick. That he could not see any one in the dark. He was knocked down, struck, about five minutes after Barnhill made the threat. That he had had trouble with Barnhill; about four years previous Barnhill had cut him in four or five places and was tried and convicted. He (Henry) was drinking. That he heard Barnhill make the threat, did not see him. Did not know who hit him.

Carney Russ, witness for the State, testified: "I saw Barnhill the night Henry was hit, some time after ten o'clock. I saw him before and after he was hit. I saw him about five or ten minutes before he was hit. When I first saw him he was standing in front of the store door. I was standing at the corner of Boney's store with Chancey, Woodcock, Barnhill and Hayes Tate. I saw him about two minutes after he was struck. He came back in the store. I don't know where Barnhill was at the time. I saw him afterwards. He came back there in front of the store and got in a truck. This was Woodcock's truck, I guess. Woodcock was with him. I had a conversation with Barnhill and he said that he 'busted his damn face.' He was talking about Henry. Barnhill then got in the truck and left. This was something like five minutes after Henry told me he had been struck. Barnhill was drinking some. He did not say why he busted his face. I think Barnhill drove the truck away. Woodcock cranked the truck up. Barnhill and Woodcock went off in the truck. At that time I had gone back to the store door. Henry's nose was busted and I think his ear was bleeding. I could not tell how bad he was hurt."

Hayes Tate corroborated the testimony of Henry and Russ in many respects. The above is substantially the testimony of the State.

Don Barnhill, the defendant, testified as follows:

"I went to Atkinson that night with Leslie Woodcock. We went from the home of Bland Wallace, my father-in-law. We went on Leslie Woodcock's truck. He drove it. We got to Atkinson somewhere between seven-thirty and eight o'clock, and we stayed there until close to ten o'clock. I then went home with Leslie Woodcock. We went on the truck. Woodcock drove it back. We got back to Wallace's house at quarter past ten. It was that time when we got in the house. Bland Wallace and his wife and my wife and Leslie Woodcock and Leslie Woodcock's wife were there. At the time I left Atkinson I had not heard anything about Henry having been assaulted. I did not go back to Atkinson any more that night, but stayed at Wallace's the rest of the night. Leslie Woodcock went back to Atkinson to get a package which he had left. He drove the truck back, and got back from Atkinson a few minutes after eleven o'clock. He was gone about an hour. The distance is about two miles. The truck he was driving was a lumber truck, worm driven with slow speed. The first time I heard that Henry had been struck was when Leslie Woodcock came back that night. I did not strike Henry, and did not make any threats against him. I heard the statement of Hayes Tate that he saw me and Leslie Woodcock and some others standing on the corner; that was about nine-thirty o'clock and before Leslie Woodcock and I went home. Hayes Tate passed the corner where we were standing. The truck was stand-

ing in front of Russ's store where we stopped it when we first came. The truck stood there from the time we came until somewhere near ten o'clock, when we left. I never made any statement to Carney Russ that I had struck Henry or that I had busted his face. I did not call him to the truck to me. I didn't make any statement to him asking him not to give me away, or anything like that." He testified that Leslie Woodcock was his brother-in-law.

Leslie Woodcock testified that he was with Barnhill, and corroborated him that Barnhill did not strike Henry and as to the time they left the store, about ten o'clock, and that it would take about fifteen minutes to go to Wallace's house; that after taking Barnhill to the Wallaces' he went back to the store for a package and then, for the first time, heard Henry had been assaulted. He said that he was Barnhill's brother-in-law.

Mrs. Don Barnhill, wife of the defendant, said that her husband got back at 10:15. Bland Wallace and his wife, Janie Wallace, father and mother-in-law of the defendant, all testified to the same effect.

Several witnesses were introduced and testified to the good character of the witnesses for the State and the defendant.

The State, in rebuttal, examined C. M. Chancey, who corroborated the State's witnesses in many respects, and was asked the following questions on cross-examination:

"Q. You remember who was there? A. I remember seeing them. I don't remember what was said. I remember there was drinking.

"Q. You do remember that just before they went in the store that you and Mr. Russ were standing out there talking? A. Yes, sir, I remember Cornie, but I don't remember the words and I don't remember how many.

"Q. Right when the man was hit, if anybody had come there and said they hit him, wouldn't that have made an impression on your mind?"

To the last question there was objection by the State, which was sustained by the court, and the defendant excepted. This was defendant's first exception and assignment of error. Counsel for defendant then asked the witness:

"Q. Do you think your mind was in such a condition that that would not have made an impression on you? A. I guess not. I have told you all I know about it."

There was other evidence not necessary to set forth for the determination of the case.

The court below gave the contentions of the State and defendant and charged the jury. The jury returned a verdict of guilty. The defendant was sentenced by the court and excepted and appealed to this Court.

The following exceptions were taken to the charge of the court, and defendant assigned as errors:

Second. "Reasonable doubt, gentlemen of the jury, don't mean any doubt. You may have a doubt about a matter and at the same time it would not be what the law calls a reasonable doubt. If a jury could acquit in cases, gentlemen of the jury, simply because you could raise imaginary doubts about it, you would never convict and the law could not be enforced. Therefore, the law says the defendant is entitled to the benefit of the doubt, where the doubt is a reasonable doubt, founded on some substantial reason."

Third. "That he is unable to explain it to you, gentlemen of the jury, because he wasn't there and knows nothing about it, and he relies upon what the law calls an alibi; that he wasn't there and therefore can't explain it, but that he isn't guilty because he wasn't there."

Fourth. "Now the defendant contends, gentlemen of the jury, that not only the State has not satisfied you beyond a reasonable doubt that he struck the blow, but that he has offered you evidence which you ought to believe, beyond a reasonable doubt, that he could not have stricken the blow, because he wasn't there."

Fifth. "The court charges you further that it is a rule of law, which you have sworn to observe, that in conflict of evidence, gentlemen of the jury, it is your duty to scrutinize closely the evidence of every defendant in a criminal case before you accept it."

Sixth. "And the law says the close relations have that same temptation. Therefore, it is your duty to scrutinize their evidence before you accept it. But the law says that after having scrutinized their evidence, applied your common sense and reason to it, observed the demeanor of the witnesses on the stand, and considered their interest in the result of the trial, if you find that the evidence is entitled to be believed, that you have a right to accept it and give it the same weight you would that of any disinterested witness."

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Weeks & Cox and C. E. McCullen for defendant.

CLARKSON, J. The witness Chancey was asked, "Right when the man was hit, if anybody had come there and said they hit him, wouldn't that have made an impression on your mind?" The State objected to this question; the court sustained the objection and defendant excepted, and this was the first assignment of error. We think the defendant's exception cannot be sustained; if the court was in error the defendant waived it by the question immediately being put in another form and

answered without objection: "Do you think your mind was in such a condition that that would not have made an impression on you? A. I guess not. I have told you all I know about it."

The second exception to the charge, on reasonable doubt, was not insisted upon in the brief and, as a rule, will not be considered on appeal. Rules of Practice in the Supreme Court, Rule 27, "Briefs," 185 N. C., 798.

The court made no error in defining "reasonable doubt." This has been done in a recent case, *S. v. Schoolfield,* 184 N. C., 723, where *Stacy, J.,* said: "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., 730; 12 Cyc., 625; 16 C. J., 988; 4 Words and Phrases, 155."

Exceptions three and four were to recitals of the court below in regard to the contentions. If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal. The rule is stated in *S. v. Baldwin,* 184 N. C., 791, as follows: "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." See *S. v. Williams,* 185 N. C., 666.

Exceptions five and six are to the rule, as stated by the court, to the scrutiny to be given the testimony of the defendant and his relatives. It will be noted from the evidence to establish an alibi that there was only about fifteen minutes difference as to the time the prosecutor, Henry, was struck in front of Hayes Tate's barber shop and the time that the defendant's relatives testified that he was at Eland Wallace's,

his father-in-law's, home, some two miles from Tate's shop. To corroborate the defendant was his wife and relatives, father and mother-in-law, Bland Wallace and Janie Wallace, and his brother-in-law, Leslie Woodcock. The charge of the court was, in substance, the rule laid down by this Court. The court below laid down the *crucial rule,* "If you find that the evidence is entitled to be believed, *you have a right to accept it and give it the same weight you would that of any disinterested witness.*" The use of the word "duty" would not be amiss, but the nonuse is not error. The above rule has been frequently upheld by this Court.

In *S. v. Williams,* 185 N. C., 666, the following was approved: "Exception 33: In this exception defendants complain for that the court did not go far enough and sufficiently qualify the charge given. This is exactly what the court did do, for, after telling the jury that they should receive the testimony of the defendants and their relatives with caution and scrutiny, the judge used this language: 'If, after such scrutiny, you are satisfied they are telling the truth, it will then be your duty to give it as much credit as you give the testimony of a disinterested witness.' "

In *S. v. Lovelace,* 178 N. C., 769, it is said: "The charge requiring the jury to consider the interest of the defendant and other witnesses, but if satisfied they had told the truth they could give their evidence as much weight as the evidence of other witnesses, is in accordance with our precedents and not prejudicial to the prisoner."

In *S. v. Lance,* 166 N. C., 413, it is said: "As to the instructions as to the testimony of the prisoner himself and of his relatives, testifying in his behalf, cannot be sustained, as the charge was in accordance with *S. v. Fogleman,* 164 N. C., 461; *S. v. Byers,* 100 N. C., 512, and cases cited. The court told the jury that, notwithstanding the personal interest of the defendant and of his relatives, the jury could consider their testimony, and if the jury 'believed them to be credible witnesses, they should give to their testimony the same weight as that of other witnesses.' " See *S. v. Boon,* 82 N. C., 637; *S. v. Holloway,* 117 N. C., 730; *S. v. Collins,* 118 N. C., 1204; *S. v. Lee,* 121 N. C., 546; *S. v. Apple,* 121 N. C., 585; *S. v. McDowell,* 129 N. C., 532; *S. v. Graham,* 133 N. C., 652.

The charge as a whole, as appears from the record, was fair and impartial.

After a careful review of the record, and argument and briefs of the defendant's counsel, we can find

No error.

T. B. GUNTER ET AL. v. TOWN OF SANFORD ET AL.

(Filed 14 November, 1923.)

1. Constitutional Law—Statutes—Courts.

The court will not exercise its high prerogative power to declare a statute unconstitutional when by reasonable construction it will comply with the organic law, every presumption being in favor of its validity; and it will not be construed as repugnant unless its invalidity is "clear, complete and unmistakable," or shown beyond a reasonable doubt.

2. Same—Due Process—Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Taxation.

For the purpose of an assessment by a municipal corporation of land abutting upon its improved streets, it is for the Legislature to determine whether the improvements are of benefit to the lands privately owned.

3. Same.

It is not necessarily required for the "due process" clauses of the constitutions (Federal Constitution, Art. XIV, sec. 1, State Constitution, Art. I, sec. 17) that the total cost of street improvements allowed by statute to be made by a city or town should be referred to a regularly constituted judicial tribunal, and a statutory provision making the determination thereof by the board of aldermen of the town final and conclusive, subject to impeachment only for fraud and collusion, upon due notice previously given the private owners of the land assessed, with the right of appeal, is a valid and constitutional grant of such authority. *Semble*, the right of appeal is not always essential to the "due process" clauses of the State or Federal constitutions.

4. Same—Notice—Appeal and Error.

Where the statute authorizes the board of aldermen of a town to assess the adjoining lands on a street improved, and provides that due notice be given such owners to appear before the board and urge their objections to the proposed assessment, with right of appeal to the Superior Court, and thence to the Supreme Court, it is sufficient notice to such landowners under the "due process" clauses of the State and Federal constitutions.

5. Constitutional Law—Municipal Corporations—Cities and Towns—Government—Taxation—Discretion—Eminent Domain.

The statutory power conferred on the board of aldermen of a town to assess lands of owners abutting on a street improved is usually referred to the right of taxation, and not to that of eminent domain.

6. Same—State Highways.

The private owners of land abutting on an improved street of a town, which is assessed therefor, cannot successfully contend that money furnished by the State Highway Commission for a State highway running through the town should be for their sole benefit, and was unlawfully to be applied for the benefit of all of the taxpayers of the town.

7. Government—Municipal Corporations—Cities and Towns—Streets—State Highways—Agencies.

When a new governmental agency is established by statute, it takes control of the territory and affairs over which it is given authority as a governmental agency of the State to the exclusion of other governmental instrumentalities, and when the board of aldermen of a town, in the exercise of its statutory power, assesses the owners of land adjoining a street improved, the fact that a State highway extends through the corporate limits does not deprive the municipality of its exclusive control over its streets, or relieve it of its duty of improving and keeping them in repair.

THE DEFENDANTS appealed from the order of *Horton, J.*, at chambers, LEE County, June 14, 1923, continuing an injunction until the final hearing.

In 1915 the General Assembly passed an act to amend, revise, and consolidate the charter of the town of Sanford, and this act was amended at the Regular Session of 1921 and again at the Extra Session of the same year. Private Laws 1915, ch. 380; Private Laws 1921, ch. 69; Private Laws, Extra Session 1921, ch. 15.

Under the act last cited the board of aldermen proceeded to improve and pave the streets and sidewalks of the town of Sanford, and prepared assessments against the property of various abutting owners, and caused to be served on the plaintiffs a notice to show cause why the assessments should not be made final; and the plaintiffs thereupon obtained a restraining order which his Honor continued until the final hearing of the cause, with leave to the defendants to assess the cost of the improvements and to apportion the same. Meanwhile the rights of the plaintiffs were preserved by a provision that the assessments should not be enforced until the final determination of the cause.

The following are the material sections of the act:

Section 1 authorizes the board of aldermen to pave the streets and sidewalks and to make other permanent improvements; to assess and to equalize the assessments of all costs and charges of such improvements; to provide for assessing the entire cost of paving, curbing, repaving, draining, etc.; and apportions the costs of the improvements made—one-third against the property abutting on each side of the street and one-third against the municipality.

Section 2 authorizes the board of aldermen before beginning the work to estimate the total cost of the improvement in each district and to apportion the cost on the abutting property.

Section 3 makes the assessments of the estimated costs a lien on the abutting property.

Section 4. That immediately upon the completion of the work in any district created, or section laid out, for permanent street improvement

by said board of aldermen, as herein provided, the town engineer, or other person or committee of the board of aldermen, in charge of such work, shall make a report in writing to said board of aldermen showing the total actual cost of such improvement throughout the entire length of said district, or section, created or laid out, with the number and description of the lots abutting on said streets or portion thereof so improved, together with the number of feet frontage of each of said lots and the owners thereof, and said board of aldermen shall ascertain, determine, and declare the actual cost of such permanent improvements in such district or section, and in order to equalize the assessments on real estate for the purpose of paying therefor, shall take the total cost of such improvement throughout the entire district or section, and shall then prorate the cost thereof and assess the same against the real estate abutting on the street therein, in proportion to the frontage on the street, or portion thereof, so improved, and charge to and assess against the real estate and each lot upon each side of the street upon which said work is done its pro rata share of the cost of such improvement: *Provided, however,* that the total cost of such street improvement in such district or section, as determined and declared by said board of aldermen, shall be final and conclusive, subject only to impeachment for fraud or collusion, with the right of appeal as herein provided. And the charge or assessment made against the abutting property, under the estimated cost of such street improvement work as herein provided, shall be corrected by the addition of the difference between it and the actual cost thereof, or the deduction of such difference, accordingly as the estimated cost thereof may be less or greater than such ascertained actual cost, and as thus corrected shall constitute a lien upon abutting property as herein provided.

Section 5. That the board of aldermen shall cause a written notice to be served on all owners of abutting property affected by improvements, as provided by this act, at least ten days before the final assessments provided for in this act are made, which notice shall command the property owner to appear before the board of aldermen at a time and place stated therein and show cause, if any, why such assessment should not be made, which notice may be served by any policeman or constable of the town of Sanford, or other proper officer, and proved by the return of such officer thereon endorsed. In the event the owner or owners of any such lot or lots herein referred to be an infant, idiot, lunatic or incompetent, then his general guardian, if he has such, shall act for him; if he has none, it shall be the duty of the clerk of the Superior Court of Lee County, North Carolina, to appoint a guardian *ad litem* to act for him. Any person who shall feel aggrieved by the findings or assessments of said board of aldermen with reference to

such permanent improvements shall have the right, within ten days after the findings and assessments by said board of aldermen have been filed with the clerk of the town of Sanford, and not thereafter, to file with said clerk his objections to such findings, and appeal from the decision of said board to the next term of the Superior Court.

Section 6 provides that as soon as the amount assessed against the abutting property is determined in the estimated costs, notice thereof shall be published once a week for two weeks in a newspaper, etc.

Section 15. That the costs of installation of storm sewer, proper drainage facilities, and curbing, in any such district shall constitute a portion of the costs of such street improvement to be assessed under the provisions of this act.

Section 16. That any benefits accruing from the location or construction of the State highways, or from the disbursements of funds therefor by the State Highway Commission, within the corporate limits of the town of Sanford, shall be paid and inure to the benefit of said town of Sanford, and be applied to its portion of cost of any street improvement made hereunder.

Section 20 provides that the powers enumerated in the several acts shall be concurrent with those of the Municipal Finance Act.

From the order continuing the injunction the defendants appealed.

Gavin & Jackson, Hoyle & Hoyle, Seawell & Pittman, and Teague & Teague for the plaintiffs.

Williams & Williams for the defendants.

ADAMS, J. The plaintiffs contest the validity of the acts purporting to authorize the assessments complained of, assigning for their objection several grounds which require examination.

They contend particularly that the act of 1921, Extra Session, is unenforceable because obnoxious to the due process clause of the State and Federal constitutions.

The right of the courts to declare a statute unconstitutional is regarded as a high prerogative which should be exercised with caution and careful attention to probable results. The Legislature is presumed to have observed the limitation of its powers; and if a statute is reasonably open to more than one construction, all doubts will be resolved in favor of sustaining it and reconciling its terms with the fundamental law. Hence a legislative enactment will not be construed as repugnant to the Constitution unless its invalidity is "clear, complete, and unmistakable," or shown beyond a reasonable doubt. *King v. R. R.*, 66 N. C., 277; *Hilliard v. Asheville,* 118 N. C., 845; *Coble v. Comrs.,* 184 N. C., 342.

The Federal Constitution (Art. XIV, sec. 1) provides: "No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and the State Constitution (Art. I, sec. 17), "No person ought to be deprived of his life, liberty, or property but by the law of the land."

It is not inaccurate to say that the courts have not attempted to define with exactness and precision the term "due process of law," but the words are generally understood to refer to the law of the land, and, as expressed by *Mr. Justice Johnson,* to be "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. O'Kelly,* 4 Wheat. (U. S.), 235; 4 Law Ed., 561. See, also, *Twining v. New Jersey,* 211 U. S., 101; 53 Law Ed., 107; *Caldwell v. Wilson,* 121 N. C., 425; *Parish v. Cedar Co.,* 133 N. C., 484, which is not affected on this point by *Board of Education v. Remick,* 160 N. C., 568. Recognizing both the risk of a failure to give a definition which would be at once perspicuous, comprehensive and satisfactory and the wisdom of ascertaining the intent of the phrase by the gradual process of judicial inclusion and exclusion, *Mr. Justice Miller* said: "Whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." *Davidson v. Board of Admrs. of New Orleans,* 96 U. S., 97; 24 Law Ed., 616.

No question is raised as to the power of the Legislature to provide for the improvement of the streets of a municipal corporation or for an assessment against the abutting property benefited by such improvement; and such power, it has been held, is usually referred not to the right of eminent domain, but to the right of taxation. The subject is discussed in *Bauman v. Ross,* 167 U. S., 548, 42 Law Ed., 270, in which *Mr. Justice Gray* said: "The Legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands to be benefited thereby," citing *Davidson v. New Orleans, supra; Hagar v. Reclamation Dist.,* 111 U. S.,

701; 28 Law Ed., 569; *Spencer v. Merchant,* 125 U. S., 345; 31 Law Ed., 763; *Walston v. Nevin,* 128 U. S., 578; 32 Law Ed., 544; *Lent v. Tillson,* 140 U. S., 316; 35 Law Ed., 419; *Illinois C. R. R. Co. v. Decatur,* 147 U. S., 190; 37 Law Ed., 132; *Paulsen v. Portland,* 149 U. S., 30; 37 Law Ed., 637. See, also, *Raleigh v. Peace,* 110 N. C., 32; *Hilliard v. Asheville, supra; Asheville v. Trust Co.,* 143 N. C., 360; *Kinston v. Loftin,* 149 N. C., 255; *Kinston v. Wooten,* 150 N. C., 296; *Tarboro v. Staton,* 156 N. C., 504; *Durham v. Public Service Co.,* 182 N. C., 333; *Kinston v. R. R.,* 183 N. C., 14.

It is also established that the Legislature has the power to determine by the statute imposing the tax what property is benefited by the improvements; and when it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its proper apportionment. *Spencer v. Merchant, supra.* Our own decisions are in accord with this principle. In *Tarboro v. Staton, supra, Mr. Justice Hoke* quotes with approval the following excerpt from *Atlanta v. Hamelin,* 196 Ga., 383: "As to whether he (the owner) was benefited or not is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments the cost of the improvement be so disproportioned to the value of the estate sought to be improved as that the levy of the assessment amounts to a virtual confiscation of the lot-owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax such improvements." And in *Kinston v. R. R., supra,* it is said: "The legislative declaration on the subject is conclusive as to necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse."

The plaintiffs, however, earnestly contest the validity of the first proviso in the fourth section of the act. The proviso is this: the total cost of the street improvement in each district or section of the town as determined and declared by the board of aldermen shall be final and conclusive, subject to impeachment only for fraud or collusion, with the right of appeal.

With respect to this provision, the plaintiffs present the question whether the right of appeal is essential to due process of law. The question has frequently been considered by the courts and answered

in the negative. In *Reets v. Michigan,* 188 U. S., 503; 47 Law Ed., 563, it was objected that a board of registration was given authority to exercise judicial powers without any appeal from its decision, and thereby to determine a legal question which no tribunal other than a regularly organized court could be empowered to decide, and it was held that the Federal Constitution does not forbid a State from granting to a tribunal, whether called a court or a board, the final determination of a legal question. Due process of law, it was said, is not necessarily judicial process, and to due process the right of appeal is not essential.

In *Spring Valley Waterworks v. Scottler,* 110 U. S., 347; 28 Law Ed., 173; 4 Sup. Ct. Rep., 48, where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354, L. Ed., 176 Sup. Ct. Rep., 51) by *Mr. Chief Justice Waite,* giving the opinion of the Court: "Like every other tribunal established by the Legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." See *Spencer v. Merchant,* 125 U. S., 345; 31 L. Ed., 763; 8 Sup. Ct. Rep., 921.

In *Crane v. Hahlo,* 258 U. S., 142; 66 Law Ed., 514, the remedy of a dissatisfied abutting owner was reduced from a general review in a court of general jurisdiction to questions of jurisdiction, fraud, and wilful misconduct. Discussing the effect of the amendment, *Mr. Justice Clark* reached this conclusion: "The amendment of 1918, following an earlier amendment in 1901, gave to the plaintiff in error the right to have the award of the board of assessors reviewed by the board of review of assessments, which her intestate did not have when the viaduct was constructed; and while the amendment of 1918 made the finding of the latter conclusive as to the 'amount of damages sustained,' it retained the right to review in the courts the entire finding whenever lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the board should be asserted. This afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the board did not invade any Federal constitutional right."

From the act of 1921 (Private Laws, Extra Session, ch. 15), in which the method of determining the final assessment is set out, it appears that every abutting owner shall be given an opportunity to be heard and, if aggrieved by the findings or assessments of the board of alder-

men with reference to the permanent improvements, to file his objections thereto with the clerk and to appeal from the decision of the board to the Superior Court in term, with right to file pleadings and have the issues tried and determined. The finding as to benefits is conclusive; the finding as to the total cost of the improvement is conclusive except in case of fraud or collusion. The determination of the total cost is only one step in the process of improvement and, however important, may under the authorities cited be committed to the board of aldermen, subject to impeachment only for the causes stated, especially in view of the right to contest other questions and to have them finally decided on appeal.

The sufficiency of the notice prescribed in the act is sustained by a number of decisions. "It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen v. Anderson,* 95 U. S., 37; 24 Law Ed., 336; *Davidson v. New Orleans, supra; Hagar v. Reclamation District, supra; Spencer v. Merchant, supra; Paulsen v. Portland, supra; Kinston v. Loftin, supra; Kinston v. Wooten, supra; Tarboro v. Staton, supra.*

The act referred to (Private Laws, Extra Session 1921, ch. 15) went into effect 14 December, 1921. On 2 September, 1922, the State Highway Commission and the town of Sanford entered into a contract in which the town agreed to pay the Atlantic Bitulithic Company the cost of constructing a portion of the State highway within the corporate limits of the town along Carthage Street and Hawkins Avenue, and the Highway Commission agreed to advance or pay to and reimburse the town. On the same day a supplemental contract was made by the town and the Atlantic Bitulithic Company in which the town agreed to pay the Atlantic Company the cost of such construction. Upon completion of the work the town paid the Atlantic Company for all the paving and other improvements done on the streets referred to, and the Highway Commission paid the town for that portion of the work for which it had promised reimbursement, and this amount was received by the town and applied as provided in section sixteen of the act.

The plaintiffs assail this section as an unlawful device by which some of the owners of land abutting the State highway are assessed with costs paid by the Highway Commission and by which the funds of the commission are wrongfully diverted and committed to the discretion of the board of aldermen. This position, we think, cannot be maintained.

When a new governmental instrumentality is established, such as a municipal corporation, it takes control of the territory and affairs over

which it is given authority to the exclusion of other local governmental instrumentalities. The fact that a highway extends through the corporate limits of a town or city does not deprive the municipality of its exclusive control over the streets or relieve it of the duty of improving and keeping them in repair. "The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the municipality as soon as it comes into existence under the law." 1 Elliott on Roads and Streets, sec. 505; 2 Cooley on Taxation, 1251.

As we have heretofore indicated, the statutes prescribing the method of improving the streets of the town and regulating assessments against property are referred to the right of taxation, and the exercise of such right is not judicial but entirely legislative. The legislative authority is vested in the General Assembly (Const., Art. II, sec. 1), and counties and municipal corporations, as was said in *Jones v. Comrs.*, 137 N. C., 579, are regarded merely as "agencies of the State for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision"—a principle which has been consistently maintained in the decisions of this Court. *Mills v. Williams*, 33 N. C., 558; *Manly v. Raleigh*, 57 N. C., 370; *McCormac v. Comrs.*, 90 N. C., 441; *Tate v. Comrs.*, 122 N. C., 812; *Jones v. Comrs.*, 143 N. C., 60; *Lutterloh v. Fayetteville*, 149 N. C., 65; *Trustees v. Webb*, 155 N. C., 379. The disposition of the fund as provided in the sixteenth section seems to be equitable. If it be objected that owners of property abutting that part of the street to which the contract of the Highway Commission relates pay their portion of the tax to maintain the State highway in addition to the assessment against their property, it may be said with equal plausibility that the policy advocated by the plaintiffs would apply that portion of the State tax paid by nonabutting owners in exoneration *pro tanto* of the abutting property. If all contribute to the State tax, why should not the fund reimbursing the town be applied for the benefit of all? We find nothing in the Constitution which forbids the Legislature to say for what purposes the money paid the town by the Highway Commission shall be disbursed.

What has been said applies also to the plaintiffs' contention as to the storm sewer, for, as suggested heretofore, the finding by the board that a particular district is benefited is not subject to review in the absence of gross abuse of the privilege. The questions discussed in this connec-

tion are addressed to the legislative discretion and are disposed of by the provisions of section fifteen.

In our opinion the statutes in question do not offend against the State Constitution or the due process clause of the Federal Constitution. On the other hand they afford the plaintiffs adequate means for litigating the matters in controversy before the board of aldermen, and if desired, by appeal from their decision to the Superior Court. We therefore hold that the statutory requirements should be observed and the injunction dissolved. His Honor's judgment continuing the injunction to the final hearing is accordingly reversed. Let this be certified to the end that further proceedings be had according to law.

Reversed.

WILLIAM P. RAGAN ET ALS. v. MARTHA E. RAGAN ET ALS.

(Filed 14 November, 1923.)

Courts—Allowance—Attorney and Client—Attorney's Fees—Partition—Dower.

In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorneys' fees as a part of the costs, there being no statutory provision to that effect (C. S., sec. 1244). The case differentiated from those wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases.

APPEAL by plaintiffs from *Harding, J.*, at April Term, 1923, of GUILFORD.

Civil action. The material facts for the decision of this case are set forth in the case on appeal and are as follows:

"This action was commenced by summons issued by the clerk of the Superior Court of Guilford County, North Carolina, bearing date of 3 June, 1921, and returnable on 13 June, thereafter, and was brought for the partition between the plaintiffs and defendants, other than Martha E. Ragan, as tenants in common of between 700 and 800 acres of land. The said Martha E. Ragan is the widow of Amos Ragan, under whom the parties hereto claim the lands sought to be divided, and as such was entitled to dower.

"Some years prior to the institution of this proceeding Amos Ragan died intestate while a resident of Guilford County, and at the time of his death was seized of numerous tracts of land, aggregating between 700 and 800 acres, which upon his death descended to and vested in

W. P. Ragan and the parties hereto; that thereafter W. P. Ragan died intestate in the county of Guilford, leaving the three plaintiffs as his children and only heirs at law, and as such were entitled to an undivided one-tenth interest in the lands described in the complaint. The defendants answered, claiming that by an agreement between the defendants to this action and the said W. P. Ragan, father of the plaintiffs, that the defendant Martha E. Ragan, widow, was entitled to dower in all of said lands, and in addition thereto was entitled in fee to an undivided one-tenth part thereof. In consequence of the issues of fact raised by the answer, the case was transferred to the Civil Issue Docket of the Guilford Superior Court and came on for hearing before his Honor, James L. Webb, judge presiding, when a consent order was made, judging that the defendant Martha E. Ragan was entitled to dower in said land, and that the petitioners were entitled to a one-tenth interest in said lands in value, including improvements, etc., and without deducting from the value of said lands the dower interest of the defendant Martha E. Ragan, and remanding the case to be proceeded before the clerk of the court; that the assignment of dower to the said Martha E. Ragan was at the instance and request of the defendants, whose shares were affected thereby; that the clerk of the Superior Court of Guilford County appointed commissioners to divide said lands, who in turn, by an arrangement between the attorneys for plaintiffs and defendants, secured Junius A. Johnson as surveyor. Quite a long time was required in making said partition, for that all of some eleven or more tracts of land had to be surveyed, platted, etc., and boundaries and acreage had to be fixed. The commissioners did thereafter make a report, but the surveyor did not comply in one or two small matters with the instructions of the commissioners, and as a result the defendants filed exceptions, whereby the number of acres set apart to the plaintiffs were reduced some three acres; that after this correction had been made to comply with the direction of the commissioners, the defendants filed other and additional exceptions which were heard before the clerk on affidavits and oral argument, and from the action of the clerk confirming the report of the commissioners the defendants appealed to the judge; that these exceptions so filed by the defendant were heard by his Honor, Judge W. F. Harding, then holding the Superior Court of Guilford County, who approved and confirmed the judgment of the clerk in confirming the action of the commissioners; that the case was again remanded to the clerk, who entered judgment and taxed the costs to be paid, one-tenth by the plaintiffs and nine-tenths by the defendants, including the surveyor's bill for $243 and an allowance of $1,250 to J. Allen Austin and King, Sapp & King, attorneys for the petitioners, who instituted and conducted this proceeding from the

beginning, for their services as such attorneys. The defendants again filed exceptions before the clerk to the allowance by the clerk of the surveyor's bill, amounting to $243, and also to the allowance to the attorneys above named as a part of the costs of the action, and from the action of the clerk in making this allowance to the attorneys, and an order for the payment of the sheriff's bill, the defendants again appealed, and the matter came on for hearing before his Honor, W. F. Harding, at the April Term, 1923, of the Guilford Superior Court, when Judge Harding made findings of fact and his conclusions of law thereon, allowing the surveyor's bill, but, feeling that he had no power to make an allowance for the attorneys above named for their services, overruled the clerk, who had allowed their bill, and taxed same as a part of the costs."

The only exception and assignment of error by plaintiffs is to the ruling of the court below as follows: "The court being of the opinion that the item of $1,250 attorneys' fees is no part of the cost to be taxed, sustains the appeal in that respect and adjudges that the attorneys' fees shall not be taxed in the bill of cost for the reason that the court has no legal power to tax it. If it did have the legal power it would do so."

J. Allen Austin and King, Sapp & King for plaintiffs.
R. C. Strudwick and C. C. Barnhart for defendants.

CLARKSON, J. In the case of *Bridges v. Pleasants,* 39 N. C., 26, cited and approved at this term by *Hoke, J.,* in *Weaver v. Kirby, ante,* 387, the facts are that a good man, Stephen Justice, made his will and, after making certain bequests, directed, "After my will is complied with, after the above directions, it is my will that $1,000, if there be so much remaining, be applied to foreign missions and to the poor saints; this to be disposed of and applied as my executor may think the proper objects, according to the scriptures," etc. The plaintiffs filed a bill in equity, under the old practice, against the defendant executor, claiming that they were the testator's next of kin, and that the sum belonged to them as not being effectually given away. Hon. George E. Badger, the brilliant lawyer and statesman of his day, represented the plaintiffs. He argued that the *cy-pres* doctrine did not prevail in this State, as in England, and his clients, the next of kin, were entitled to the fund; that the gift to "foreign missions" and to the "poor saints" were too indefinite, and therefore void. Hon. John Manning, of blessed memory to his law students and all who knew him, in speaking of the *cy-pres* doctrine to his students, said that Mr. Badger argued to this Court that if they should decide against his clients and that the *cy-pres* doctrine did prevail in North Carolina, that he thought

the fund should go to the lawyers, that they were the "poor saints." The Court, by *Ruffin, C. J.*, held that the directions were too indefinite and void. Mr. Badger's clients obtained a decree for $1,000—the "poor saints" got nothing.

In the instant case, the court below was of the opinion that the $1,250 attorneys' fees is no part of the cost to be taxed, and that the court had no legal power to tax it. If it did have the power it would do so. We are of the opinion that the court below committed no error in not allowing the attorneys' fees.

The case of *In re Stone,* 176 N. C., 337, we do not think is applicable to this one. In that case the facts are "that Mrs. Stone, as administratrix, recovered $10,000 for the negligent killing of her husband. A controversy arose between her and her only child as to the division of this fund. In that action E. P. Stone, uncle of Thomas S. Stone, the infant, was appointed next friend by the court to protect the interests of the infant. In order to do so, he employed counsel to appear in the cause, which they successfully prosecuted to this Court, and thence followed it to the Supreme Court of the United States. Under the final judgment they recovered for the infant $6,500." *Brown, J.*, in that case said: "The *prochein ami,* or next friend, is appointed by the court to protect the infant's rights. It is essential that he have the assistance of counsel learned in the law. The infant has no power to contract as to fees, and in most cases is too young to understand such matters. Referring to the duty of the court in respect to infants, in *Tate v. Mott,* 96 N. C., 23, *Judge Merrimon* says: 'The infant is in an important sense under the protection of the court; it is careful of his rights, and will in a proper case interfere in his behalf and take, and direct to be taken, all proper steps in the course of the action for the protection of his rights and interests.' It would be very singular that the courts should assume the duty of seeing that all steps are taken to protect the infant's rights and yet deny to themselves the power to compel the payment of the necessary expenses out of the infant's estate recovered in the cause. While the next friend has the power to employ counsel to prosecute the action, and it is his duty to do so, he cannot make a binding contract for compensation. *Honck v. Bridwell,* 28 Mo. App., 644. The court may fix the attorney's compensation without regard to any contract. 14 Ency. P. and P., 1037, and cases cited; *Cole v. Superior Court,* 63 Cal., 87."

We do not think the cases cited in plaintiffs' brief—*Fortune v. Hunt,* 152 N. C., 715, and *Hinnant v. Wilder,* 122 N. C., 149—are applicable to the facts in this case. Nor do we think that section 1244 of Consolidated Statutes and subsection 7 thereof applicable, which are as follows: "1244. *Costs allowed either party or apportioned in discretion*

of court. Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court." "Subsection 7. All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the chapter entitled Partition." "Costs" or "All costs and expenses" does not include attorneys' fees. Attorneys must make contracts with their clients for their fees. The courts cannot do for them what they have not done for themselves. In the *Stone case, supra,* the infant could not contract, and the court made the allowance.

In *Bank v. Land Co.,* 128 N. C., 194, there was a provision in a note "with all costs of collection including 10 per cent attorneys' fees in case suit is necessary for collection." This was held contrary to public policy and void. *Williams v. Rich,* 117 N. C., 235; *Brisco v. Norris,* 112 N. C., 677; *Tinsley v. Hoskins,* 111 N. C., 340. A stipulation in a deed of trust for attorneys' fee was also held invalid. *Turner v. Boger,* 126 N. C., 302. "Attorneys' fees are not recoverable by successful litigants in this State, as such are not regarded as a part of the court costs." *Midgett v. Vann,* 158 N. C., 128; *Dolan v. Trust Co.,* 139 N. C., 214.

In *Knights of Honor v. Selby,* 153 N. C., 207, *Manning, J.,* says: "We do not think there was any error, however, in the ruling of his Honor, disallowing an attorney's fee to the plaintiff to be paid out of the fund, and ultimately to be taxed against the unsuccessful defendant. We do not think such practice has obtained in this State. In *Gay v. Davis,* 107 N. C., 269, this Court said: 'There is no statutory provision in this State that has been brought to our attention, or within our knowledge, that prescribes or authorizes an allowance of compensation directly to the counsel of commissioners charged with a particular duty by an order of the court, or otherwise, or to counsel of trustees, whatever may be the nature of the trusts wherewith they may be charged. Nor is there any general rule of practice prevailing in courts that permits such allowance to be made. In the absence of statutory provision, the courts, in the exercise of chancery powers, make allowances to commissioners and trustees in appropriate cases, and such allowances are sometimes enlarged so as to embrace reasonable compensation to counsel of such commissioners or trustees, in cases where counsel is necessary to a proper discharge of their duties; but in such cases the courts are careful to see that the services were necessary, that the charges are reasonable and are charged against the proper parties.'" *Byrd v. Casualty Co.,* 184 N. C., 226; *Roe v. Journigan,* 181 N. C., 183; *Shute v. Shute,* 180 N. C., 389.

We find the law against the contention of the plaintiffs. The court below so held, and we can see no error.

Judgment affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF SANFORD ET AL.

(Filed 14 November, 1923.)

Appeal and Error—Record—Facts—Injunction.

Semble, the question of whether the plaintiff railroad company was discriminated against in an assessment made against its property by the board of aldermen of the town of Sanford is apparently adversely determined against it in *Gunter's case, ante*, 452; but the final determination of this appeal is postponed until the pertinent facts therein are made to appear of record; and the order restraining the assessment is reversed.

APPEAL by defendants from *Horton, J.*, at chambers, LEE County, 14 June, 1923, continuing a restraining order to the final hearing.

T. W. Davis, Rose & Rose, and Hoyle & Hoyle for plaintiff.
Williams & Williams for defendants.

ADAMS, J. With one or two exceptions, the questions presented in this appeal are governed by the decision in *Gunter v. Town of Sanford et al., ante*, 452.

Section 12 of chapter 15, Private Laws, Extra Session 1921, is as follows:

"That said board of aldermen is hereby authorized and empowered to assess upon street railways and others using the streets of the said town for the purpose of maintaining tracks thereupon, in any district or section created or laid out hereunder, the total cost of paving between the rails and for a space of eighteen inches on each side thereof, and, in addition thereto, two-thirds of the costs of such improvements made over and across railroad and street crossings in such district to be assessed and collected as herein provided for assessments upon such abutting property, and the railroad tracks and rights of way occupied by tracks lying adjacent to, or abutting on or along the streets of the town of Sanford, or section of streets, in any district created or laid out under this act, for street-improvement work, shall be considered abutting property, and shall be subject to the lien of special assessments as provided for in this act, to the same extent and in the same manner as such assessment may be levied against abutting property on or along the opposite side of such street or streets."

The plaintiff contends that a large proportion of its property is neither adjacent to nor abutting on or along the streets of Sanford, so as to be subject to assessment under this or any other section of the town charter, and, moreover, that the provisions of this section are an unlawful discrimination against the plaintiff. Upon these contentions,

as the pleadings now appear, there is allegation by the plaintiff and denial by the defendants, without a full disclosure of the facts pertinent to the issue joined. The assessment rolls, it is true, refer to the plaintiff as the owner of abutting property; and while we are not prepared to hold or even to suggest or intimate that section 12 is in anywise discriminatory, as contended by the plaintiff, or that the plaintiff's property is not subject to assessment, as insisted by the defendants, we deem it advisable to postpone the final determination of these questions until all the pertinent facts are made to appear in the manner authorized by the acts under which the defendants were proceeding when the restraining order was issued.

The judgment of his Honor, continuing the injunction to the final hearing, is reversed, and this will be certified, to the end that further proceeding be had in accordance with law.

Reversed.

STATE v. R. J. BURGESS.

(Filed 14 November, 1923.)

1. Intoxicating Liquor — Spirituous Liquor — Manufacture — Statutes— Criminal Law—Actions—Joinder—Evidence.

As to the exception to consolidating the separate indictments against the two defendants for the unlawful manufacture of intoxicating liquors, *quere?* And *held*, that the insufficiency of the evidence to convict one of them renders the consideration of the exception unnecessary.

2. Same.

Held, the circumstantial evidence in this case was sufficient to convict one of the defendants for the unlawful manufacture of intoxicating liquor, but the only evidence as to the other, being that a few minor implements were found in the room which he was occupying as a boarder with the sons of the first defendant, and also a wet place upon the floor of the room, were insufficient to sustain a conviction of the other defendant. C. S., sec. 4453.

CLARKSON, J., concurring. CLARK, C. J., concurs in concurring opinion.

APPEAL by defendant from *Stack, J.*, at April Term, 1923, of ANSON.

Criminal prosecution, tried upon an indictment charging the defendant with manufacturing spirituous liquors in violation of C. S., 4453.

From a conviction of attempting to manufacture liquor he appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. A. Tarlton and McLendon & Covington for defendant.

STACY, J. The defendant, R. J. Burgess, while working for a short time on the new school building in Wadesboro, was a boarder at the house of one Tobe Honeycutt. Honeycutt and Burgess were indicted, in separate bills, charged with the unlawful manufacture of spirituous liquors. Over objection, the two cases were consolidated and tried together. We make no present ruling as to the legality or correctness of this consolidation. *S. v. Stephens,* 170 N. C., 745. It is unnecessary to do so. The case turns on a demurrer to the evidence.

There was evidence tending to show the guilt of Honeycutt, but we think the conviction of Burgess for an attempt to manufacture liquor must be reversed, under authority of *S. v. Addor,* 183 N. C., 687.

A few days before Christmas, 1922, two deputy sheriffs of Anson County searched the premises of Honeycutt for evidence of violation of the prohibition law. They found a barrel near the house with some beer in it, a galvanized box under the house with some mud on it; also three one-gallon jugs and a wet sack with the odor of whiskey about them, while a copper still was found in the barn, a short distance away.

The only evidence tending to inculpate Burgess was an oil stove and a copper pipe found in his room and a wet place on the floor of the room occupied by him. But it also appeared that this room was used by Honeycutt's two sons when they were at home, and that they caused the wet spot on the floor. Burgess was not there at the time of the search.

This evidence, we think, was insufficient to warrant a verdict against the defendant, R. J. Burgess, for attempting to manufacture liquor. His demurrer to the evidence, or motion for judgment as of nonsuit, under C. S., 4643, should have been allowed.

Reversed.

CLARKSON, J., concurring: I concur in the opinion solely on the ground that there was no sufficient evidence to go to the jury on all the facts in the case. *S. v. Addor,* 183 N. C., 687, cited in the opinion, is not applicable to the law as it is now written.

The Legislature of North Carolina passed "An act to make the State law conform to the National law in relation to intoxicating liquors." Chapter 1, Public Laws 1923. The sentiment of the people of the State was so overwhelming in favor of this act that in the Senate, out of fifty members, there were only two votes cast against it.

The people of North Carolina, at an election held on 26 May, 1908, voted against "the manufacture and sale of intoxicating liquors." (Act ratified 31 January, 1908.) The majority was 44,196. The old law had many "leaks" in it, and, to meet facts in cases like the *Addor case, supra,* section 4 of the act of 1923, *supra,* was passed. This section reads: "It

shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or receipt, advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this act, or which has been so used, and no property rights shall exist in any such liquor or property."

The facts in the *Addor case, supra,* under the present law, would make one guilty of a breach of the above section.

CLARK, C. J., concurs in concurring opinion.

J. C. HALL v. TOMLINSON CHAIR COMPANY.

(Filed 14 November, 1923.)

1. Courts—Discretion—Issues—Negligence—Assumption of Risks.

The fact that the defense of contributory negligence and assumption of risks was submitted by the trial judge under one issue is not alone erroneous, but a matter within his discretion.

2. Negligence—Contributory Negligence—Assumption of Risks—Burden of Proof—Evidence.

The burden of proof is on the defendant relying upon its plea of contributory negligence and assumption of risks as a defense, and he may not complain on appeal for his failure to establish it by the verdict of the jury on its evidence, on a trial otherwise free from error.

APPEAL by defendant from *Stack, J.,* at May Term, 1923, of DAVIDSON.

Civil action, tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover of defendant? Answer: '$1,000.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed, assigning errors.

Raper & Raper for plaintiff.

Walser & Walser and Z. I. Walser for defendant.

STACY, J. Plaintiff was injured while working at a shaper machine, which, it is alleged, was "old, out of date and not safe and suitable for

the work being done." Defense is interposed chiefly upon the ground that the machine was very simple; that the danger, such as it was, was open and obvious, and that the plaintiff assumed the risk of his injury. There was also a plea of contributory negligence. In fact, the pleas of assumption of risk and contributory negligence were both submitted under the second issue; and this, under authority of *Hicks v. Mfg. Co.*, 138 N. C., p. 333, is a matter which must be left largely to the legal discretion of the presiding judge.

There was ample evidence tending to show negligence on the part of the defendant; and neither the allegation of assumption of risk nor that of contributory negligence was established on the hearing. The burden of proof rests with the defendant on both of these defenses. *Dorsett v. Mfg. Co.*, 131 N. C., p. 261; *Fleming v. R. R.*, 160 N. C., 196.

The record presents no reversible error, and hence the judgment below will be upheld.

No error.

L. J. DUFFY v. CITY OF GREENSBORO.

(Filed 21 November, 1923.)

1. Constitutional Law—School Districts—Local Laws—Statutes.

In conformity with the Municipal Finance Act, a city voted for the issuance of bonds, in a certain amount, for purchasing land and erecting buildings for public-school purposes, and issued half thereof and contracted for the use of the full balance of the bonds: *Held*, a later public-local act that enlarged the city limits and recognized therein the independent existence of a public-school district within the former limits is not contrary to the provisions of our recent amendment to our Constitution, Art. II, sec. 29, as an attempt to establish a school district, or to change the limits of those already established.

2. Same—Taxation—Bonds—Injunction.

Where a city has created debts in view of a bond issue for its public schools, within its corporate limits, under the provisions of the Municipal Finance Act, and thereafter by a local public statute the limits of the city are enlarged, but recognizing the independent school district, within the old limits, and having previously issued part of the bonds, proceed to issue more of them to meet the obligations already incurred before the enactment of the local statute, their proposed action is not contrary to the provisions of our Constitution, Art. VII, sec. 9, as the authority previously conferred imports a liability to taxation; and the further issuance of the bonds may not be enjoined at the suit of a taxpayer.

APPEAL by plaintiff from *Shaw, J.*, 12 October, 1923. From GUILFORD.

Civil action, to enjoin the city of Greensboro from issuing certain school bonds.

From an order and judgment denying the relief sought, plaintiff appeals, assigning errors.

Shuping, Hobbs & Davis for plaintiff.
B. L. Fentress and Cooke & Wyllie for defendant.

STACY, J. The facts upon which the validity or invalidity of the bonds in question must be determined are as follows:

1. In the year 1920 the city of Greensboro duly enacted an ordinance, under the Municipal Finance Act, authorizing the issuance and sale of its bonds in the amount of $1,000,000; the proceeds derived therefrom to be expended in purchasing sites and erecting school buildings thereon for use in connection with the city's public-school system. Said ordinance was ratified at an election held 18 January, 1921, by the vote of a majority of the qualified electors resident within the then city limits of the city of Greensboro.

2. Contracts for the erection of said school buildings and the purchase of sites therefor were made and entered into, as one entire program, in a sum equal to the full amount of the $1,000,000 bond issue. One-half of the total authorized amount of these bonds has already been issued and sold, and the proceeds derived therefrom applied to the purposes aforesaid; and the city council is now attempting to issue and sell the remaining $500,000 of said bonds. The remainder of this issue is the subject-matter of the present litigation.

3. Subsequent to the authorization of said bonds, as aforesaid, the General Assembly of North Carolina, at its regular session, 1923, passed an act entitled "An act to incorporate the city of Greensboro, to define its corporate limits, to repeal the present charter of the present city of Greensboro, except as provided herein, to provide for the control and support of the present Greensboro School District, and for other purposes." This act extended and changed the corporate limits of the city of Greensboro and added a large amount of "new territory" to the "old limits." Said act also provides, among other things, "that the territory embraced in the old city limits is and shall continue to be and remain an independent school district under the name of the 'Greensboro School District,'" etc.; and, further, that "all obligations of said Greensboro School District . . . shall be and remain the indebtedness of said district, and the new territory . . . shall not be liable for any part of the same, and no tax shall ever be levied or collected in said new territory on account of the same."

4. The use of all the school buildings and school sites aforementioned, and which are wholly within the "old limits" of the city of Greensboro, is limited and restricted by the act of 1923 to those inhabitants of the

city residing within the "old limits," and none of the inhabitants of the "new territory" may use the same, except upon payment of a fee as provided by the board of education.

5. The sale of the remaining $500,000 bonds is necessary either for the payment of obligations incurred in the purchase of said sites and the erection of the buildings thereon previous to the act of 1923, or for the payment of notes issued in anticipation of the sale of said bonds.

Upon these, the facts chiefly relevant, plaintiff seeks to enjoin the further issuance of said bonds; and for this position he contends:

1. That the city council cannot issue the bonds in question as obligations of the "Greensboro School District," for the reason that no such school district now exists within the limits of the city of Greensboro; and that if such district does exist it was created by the special act known as the 1923 charter of the city of Greensboro, and is in violation of Article II, section 29, of the State Constitution.

2. That the city council cannot limit the levying of taxes for the payment of said bonds to property situate within the old city limits of Greensboro, such limitation being in violation of Article VII, section 9, of the Constitution, which provides: "All taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

We are convinced that both of these contentions must be resolved in favor of the validity of the bonds and against the plaintiff's position.

In the first place, the Legislature did not undertake, by the special act of 1923, to create a new "Greensboro School District" and confine it to the old limits of the city of Greensboro. It only recognized and retained the district as it then existed and had existed for a number of years. Article II, section 29, of the Constitution provides: "The General Assembly shall not pass any local, private, or special act . . . establishing or changing the lines of school districts," etc. What was done by the Legislature of 1923 in no way offends against this provision. *Roebuck v. Trustees,* 184 N. C., p. 145; *Coble v. Comrs.,* 184 N. C., pp. 351-355; *Burney v. Comrs.,* 184 N. C., p. 277.

We think plaintiff's second contention is equally untenable. *McLeod v. Comrs.,* 148 N. C., p. 85; *Smith v. Trustees,* 141 N. C., 143; *U. S. v. Memphis,* 97 U. S., 284; *Demattos v. New Whatcom,* 4 Wash., 127; *Cleveland v. Heisley,* 41 Ohio St., 670. In levying the tax for the payment of said bonds, the city is doing no more than the bondholders could enforce through a court. The court, therefore, should not, at the instance of a taxpayer, enjoin the voluntary doing of the very act which, in a suit by a creditor, it would order to be done. *Smith v. Comrs.,* 182 N. C., 149, and cases there cited.

The obligations in question have been incurred, the sites purchased and buildings erected thereon, which are wholly within the "old limits" of the city of Greensboro, and they are now being used by the inhabitants of the old limits exclusively. The city is under obligation to provide funds to meet these debts. It can only proceed as authorized by its charter. This, we understand, it proposes to do. We have found no constitutional inhibition against such procedure. *Hammond v. McRae,* 182 N. C., 754. The levying of the proposed tax to provide for the payment of the bonds in question is not forbidden by Article VII, section 9, of the Constitution. It is simply a levy upon all taxable property within the "Greensboro School District" to pay the debts of that district, already incurred. An obligation of this kind imports a liability to taxation, and in the instant case it means that payment can be coerced, and that all the taxable values within the old city limits may be made available on the claim. *Comrs. v. State Treasurer,* 174 N. C., p. 145.

Upon the record, the judgment entered below must be upheld.

Affirmed.

STATE v. HOMER KEE AND GUS MATTHEWS.

(Filed 21 November, 1923.)

1. Evidence—Maps—Illustrations—Witnesses—Attorney and Client—Criminal Law—Robbery.

A witness may illustrate his testimony as to objects and their relative position material to the inquiry, by a map made by another than himself, when he testifies to the accuracy of the map in relation to his evidence, and directly of matters within his own knowledge, and the map is confined to this purpose and excluded as substantive evidence; and an attorney under a like restriction may in like manner illustrate his argument by drawing a diagram on the floor before the jury.

2. Evidence—Indictment—Witnesses—Endorsements—Criminal Law.

Where two bills of indictment have been drawn for the same offense at different terms, and one of them has been ignored by the grand jury, but the other returned "a true bill," it was competent for the State to show by endorsement on the indictment being tried that the names of additional witnesses appeared thereon.

APPEAL by defendant from *Finley, J.,* at April Term, 1923, of GUILFORD.

Criminal action. The first count in the indictment charged the defendants with the larceny of money, the property of the Bank of Sum-

merfield, and the second count with receiving the money knowing it to have been stolen. There was a general verdict of guilty, and from the judgment the defendant Matthews appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Bennett & Porter and E. Garland Brown for the appellant.

ADAMS, J. About eleven o'clock in the forenoon of 29 May, 1922, a young man who was unknown to the occupants entered the business apartment of the Bank of Summerfield, holding in his hand a "blue steel pistol with a six-inch barrel of .38 caliber." After trying in vain to lock the cashier and a director in the vault he retired from the bank with bills amounting to sixteen hundred and fourteen dollars. In November or December he was imprisoned in the jail of Rockingham County and was there identified as the defendant Kee.

Both defendants lived in High Point within a hundred yards of each other and were not unacquainted. About two hours before the larceny occurred they were seen together near Summerfield in an Oldsmobile owned by Matthews. They were then on the Hillsboro road, which at a short distance from the village intersects with the road from Greensboro. After overtaking or meeting two witnesses by whom they were identified, the defendants separated. One got out of the car and went towards Summerfield; the other turned the car around but finally arrived at the same destination by another route. Upon his arrival there Kee tarried a short while near a warehouse and afterwards went to a lumber pile from which he had an unobstructed view of the bank. When he entered the building he went from this pile of lumber and passed by it in making his escape after the larceny was committed. There were several circumstances tending to show that he and Matthews were acting in concert and that the raid on the bank was the result of their criminal conspiracy. There was evidence to the contrary, but the exceptions do not require its recital.

The conduct of the defendants in approaching the village and their whereabouts after arriving there were momentous to the prosecution, and, for the purpose of showing the relative situation of several objects, resort was had to maps or diagrams which were used to illustrate the testimony of certain witnesses. It is argued by the appellant that the opposing attorneys prepared a diagram which was used by a witness during his examination, and that it should have been prepared by the witness himself. But the witness said that he knew where the various objects were situated and that "the map is a pretty fair representation" of them. Moreover, his Honor carefully restricted the testimony to the situation of objects of which the witness had personal knowledge, and

emphasized the ruling that the diagram was not substantive evidence but used only for the purpose of illustration. In the admission of this evidence there was no error. *S. v. Whiteacre,* 98 N. C., 753; *Dobson v. Whisenhant,* 101 N. C., 646; *Burwell v. Sneed,* 104 N. C., 118; *Riddle v. Germanton,* 117 N. C., 388; *Andrews v. Jones,* 122 N. C., 666; *S. v. Harrison,* 145 N. C., 408. In *S. v. Rogers,* 168 N. C., 114, the witness testified that the map used was "approximately correct," and the court said, "It could hardly have been otherwise, being made at the time and merely to illustrate his evidence. This did not render the map incompetent as a part of his testimony, for the defendant doubtless made the most of it by arguing that therefore his whole testimony was only approximately correct."

During his argument one of the attorneys for the prosecution drew a diagram on the floor. The court permitted its use only for the purpose of illustrating the State's contentions as to the location of the premises, and in doing so respected the principle maintained in the decisions which have just been cited. His Honor held expressly that the diagram was not evidence. The objection to this testimony is therefore without merit.

There is one other exception. At different terms two bills of indictment, charging the defendant Matthews with the offense of which he was convicted, were sent to the grand jury. The first was ignored; the second was returned "a true bill." On the cross-examination of a witness for the State the defendant proved the return of the first bill and the discharge of the defendant. The State on the redirect examination was allowed to show, not what took place in the grand jury room or what any member of the grand jury said, but merely that on the second bill were endorsed the names of additional witnesses. We see no sufficient cause for holding that this evidence was incompetent.

The record is free from reversible error. Let this be certified.

No error.

HILL & BROOKS v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 21 November, 1923.)

1. Evidence—Witnesses—Opinion—Facts at Issue—Questions for Jury.

The opinion of a nonexpert witness is generally restricted to proof of facts within his personal knowledge; and this does not permit him to express his opinion concerning matters which the jury are required to decide.

2. Same—Expert Witnesses—Negligence—Carriers—Railroads.

An expert witness may only testify his opinion, within the confines of his professional experience, upon a suppositious statement of facts if found by the jury to exist upon the evidence, and where common carriers are sued for damages caused by their alleged negligence to a shipment of a carload of mules, while *in transitu*, he may not testify that, from their condition after the arrival of the shipment, as he then saw them, the damages were caused by exposure to the weather, or that the mules which had penumonia had been so exposed, these questions being of *facts in issue* for the jury to decide, and incompetent as expert opinion.

APPEAL by defendant S. A. L. Railway Co., from *Harding, J.*, at March Term, 1923, of UNION.

Civil action. There was allegation with evidence that the Louisville and Nashville Railroad Company received a carload of horses and mules to be transported over the lines of the defendants from East St. Louis, Ill., to Oakboro, N. C., and there to be delivered to the plaintiffs; that the animals were in good condition when shipped and bruised and diseased when delivered; and that their damaged condition was caused by the negligence of the defendants.

The defendants excepted to the introduction of the testimony herein stated.

By Dr. Spencer:

"Q. State whether or not you have an opinion satisfactory to yourself, Doctor, as to whether or not the condition of these animals as you saw it was due to the exposure to the weather, the inclemency of the weather? A. Yes, sir.

"Q. What is your opinion? A. I think those that developed pneumonia had been exposed. Possibly others had, too."

By J. D. Love:

"Q. State whether or not in your opinion the condition which you saw these animals in was caused by the treatment—state in what respect you think their condition was caused by the treatment they received? A. By their laying over."

By C. T. Brooks:

"Q. What did the appearance of these horses indicate was the cause of their condition? A. Bad treatment.

"Q. In what respect? A. It seemed to me they had been in an awful bad, nasty place and were awful gaunt, and had no great thing in the way of food and water."

The jury found that the alleged injuries were caused by the negligence of all the defendants except the Seaboard, and assessed the plaintiffs' damages at $1,650. The defendants, except the Seaboard, appealed.

Parker & Craig for the plaintiffs.
Vann & Milliken and John M. Robinson for the defendants.

ADAMS, J. In the law of evidence no principle is more familiar than that which ordinarily excludes the opinion of a nonexpert witness. One who is called to testify is generally restricted to proof of facts within his personal knowledge, and is not permitted to express his opinion concerning matters which the jury are required to decide. *Omne sacramentum debet esse de certa scientia. McKelvey* says, "Upon the question of the existence or nonexistence of any fact in issue, whether a main fact or evidentiary fact, the opinion of a witness as to its existence or nonexistence is inadmissible." Evidence, 172. The principle is abundantly sustained by our decisions. *Mullinax v. Hood,* 174 N. C., 607; *Deppe v. R. R.,* 154 N. C., 523; *Gilliland v. Board of Education,* 141 N. C., 482; *Pump Co. v. R. R.,* 138 N. C., 301; *Cogdell v. R. R.,* 130 N. C., 314.

In *Mule Co. v. R. R.,* 160 N. C., 253, Dr. McMackin, an expert veterinarian, was asked to state his opinion as to the cause of a mule's death, based upon his knowledge and experience and his *post mortem* examination. He answered, "My opinion is that the mule was jammed up in the car." The Court said: "This evidence was improperly admitted. The question required him to testify not only as to the condition of the mule when he examined him, which was proper, but to go further and give his opinion as to the existence of a fact which was almost, if not quite, the equivalent of the one directly involved in the issue. It would have been competent to have asked him if the death of the mule could have been caused by being jammed in the car, or, if the jury should find from the evidence that the mule had been jammed in the car and had received no other injury, could the death, in his opinion, be attributable to the jamming as its cause—that is, was it sufficient of itself to cause the death. A question similar to the one admitted in this case by the court was asked in *Summerlin v. R. R.,* 133 N. C., 551, and excluded by the court, and we sustained the ruling, upon the ground that the witness was called upon to state a fact of which he had no personal or competent knowledge, and not merely the opinion of an expert. The opinion of the witness should be based upon facts admitted or found, or upon his personal knowledge, and not upon the assumption of the fact. The question should, therefore, be hypothetical or rather supposititious, in form, following the precedents as settled by our decisions. *S. v. Bowman,* 78 N. C., 509; *S. v. Cole,* 94 N. C., 958; *S. v. Wilcox,* 132 N. C., 1120, and *Summerlin v. R. R., supra.* The Court, in *Hitchcock v. Burgett,* 38 Mich., 501, held that "a physician cannot be asked his opinion as to the cause of an injury, judging merely

from the condition in which he found the patient, and without any knowledge as to how it took place." See, also, *National Union v. Thomas,* 10 App. Cases (D. C.), 277; *Carpenter v. E. T. Co.,* 71 N. Y., 574; *Van Zandt v. Ins. Co.,* 55 N. Y., 179; *Lumber Co. v. R. R.,* 151 N. C., 217, and cases cited at page 222."

It is clear that the evidence excepted to was admitted through inadvertent disregard of this rule, and that the witnesses were permitted to make known their opinion and judgment on questions which should have been submitted exclusively to the determination of the jury. Other exceptions present serious questions which may not arise again, and we refrain from discussing them. For error in the admission of evidence, the defendants are entitled to a

New trial.

JOHNSON WADE v. HENRY W. GIBSON.

(Filed 21 November, 1923.)

Appeal and Error—Prejudice—New Trials—Evidence—Judgment by Default Set Aside—Affidavit as to Merits.

Where upon cross-examination the defendant admits that a judgment by default had been taken against him, but afterwards set aside, that it was the fault of his attorney and not of his own, whereupon the plaintiff's attorney insinuates that the defendant was laying the blame upon his former attorney, a good man since deceased, it is prejudicial error to the plaintiff for the trial judge to admit the affidavit of the deceased attorney upon which the judgment by default had been set aside, giving his opinion of the merits of the defense, the matter being both irrelevant and not in the form required for the competency of evidence.

APPEAL by plaintiff from *Harding, J.,* at March Term, 1923, of SCOTLAND.

Civil action. The action is to recover a small strip of land alleged to be in the wrongful possession of defendant. There was denial of plaintiff's ownership, and on issues submitted there was a verdict for defendant. Judgment on the verdict, and plaintiff excepted and appealed, assigning errors.

Cox & Dunn for plaintiff.

W. H. Weatherspoon and E. H. Gibson for defendant.

HOKE, J. On the hearing, plaintiff introduced a line of deeds covering the land in controversy, and offered evidence tending to show ownership, and that defendant was in possession of a small part of said land, asserting title to same. Defendant, showing deeds for a lot adjoining

plaintiff's, claimed and sought to establish title to the *locus in quo* by adverse possession, and offered evidence in support of his claim. Evidence in rebuttal by plaintiff. The defendant, a witness in his own behalf, testified to facts tending to show adverse occupation, and on cross-examination said that a judgment by default had been taken against him in the cause and afterwards set aside. That he had employed Mr. G. B. Patterson, now dead, to look after his case, and that Mr. Patterson had told plaintiff he would do so. Thereupon plaintiff's counsel, in the form of a question, said to witness: "And so you are now blaming Mr. Patterson, a good man now dead, for letting judgment be taken against you?" To this the witness made no response. Thereupon defendant was allowed to introduce, over plaintiff's objection, an affidavit of Mr. Patterson explaining why he had failed to attend to defendant's cause in proper time, and containing averment further that, after examination of defendant's deeds and testimony of his possession, affiant is of opinion that defendant has a record title to said lands and has been in the peaceable and quiet possession of same for more than seven years prior to commencement of this action, and has a good and meritorious defense to same.

In our opinion the admission of this affidavit over plaintiff's objection was clearly reversible error. It was not competent on the issue, and if it had been, was not in the form required for its proper reception as evidence. True, his Honor, in admitting the affidavit, said that it would not be considered in the question of title or possession, but only to repel the charge or insinuation that defendant blamed Mr. Patterson, but the affidavit was irrelevant and incompetent for any purpose. And presenting as it did, in defendant's favor, the opinion of his own attorney on the merits of the issue, its admission was inevitably and highly prejudicial and should not have been received in evidence.

For the error indicated there must be a new trial of the issue, and it is so ordered.

Error.

WILLIAM COBLE v. J. J. MEDLEY ET AL.

(Filed 21 November, 1923.)

Execution Against the Person—Assault—Issues—Verdict—Pleadings.

The complaint in an action for damages alleged that the defendant did "unlawfully, wilfully and maliciously" commit an assault upon the plaintiff, with pistols, to his great hurt and injury, and the verdict of the jury established the fact that the assault was wrongful and unlawful, assessed the damages, excluding recovery of punitive damages: *Held*, upon the return of the execution against the defendant's property un-

satisfied, execution against his person could not be issued in the absence of evidence sustained by the verdict, that the assault was wilful and malicious, and the answer to the first issue, that the assault was wrongful and unlawful as "alleged in the complaint," is insufficient for the purpose.

APPEAL by plaintiff from *Harding, J.*, at chambers, July, 1923, from ANSON.

Civil action to recover damages for an alleged wilful, malicious and negligent assault.

Plaintiff filed his complaint, alleging that the defendants did "unlawfully, wilfully and maliciously commit an assault on the plaintiff with pistols," to his great hurt and injury.

Defendants filed answer, alleging that they were acting within what they honestly believed to be their rights and proper self-defense as officers of the law in attempting to arrest and actually arresting the plaintiff.

To this the plaintiff filed a reply alleging that the defendants were grossly negligent in the discharge of their duties, etc.

Upon the issues thus joined, at the October Term, 1921, the jury returned the following verdict:

"1. Did the defendant wrongfully and unlawfully injure the person of the plaintiff as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damages by way of compensation is the plaintiff entitled to recover: Answer: '$300.'

"3. What punitive damages, if any, is the plaintiff entitled to recover? Answer: ....."

Judgment on the verdict in favor of plaintiff. Execution having been issued against the property of the judgment debtors and returned unsatisfied, plaintiff moved before the clerk, on 26 May, 1923, for execution against the person of two of the judgment debtors, to wit, Sid Dabbs and Wade Flake. This motion was disallowed and affirmed on appeal to the judge of the Superior Court at the June Term, 1923. From the order of the Superior Court, disallowing plaintiff's motion, he appeals, assigning same as error.

W. R. Jones, Sykes & Brown, and A. A. Tarlton for plaintiff.
McLendon & Covington for defendants.

STACY, J. There is but one question presented by this appeal: Is the plaintiff, on the instant record, entitled to execution against the person of two of the judgment debtors? We think not.

In the first place, it will be observed, there is no finding by the jury that the assault was committed wilfully or maliciously, but only wrong-

fully and unlawfully. True, the issue uses the expression, "as alleged in the complaint," and the complaint contains an allegation of wilful and malicious injury, but in the reply this is reduced to an allegation of a grossly negligent injury. It would be highly technical to say the issue did not include the allegation of the reply as well as that of the complaint, simply because it closed with the words "as alleged in the complaint." None of the evidence adduced on the hearing appears in the statement of case on appeal, and hence we cannot say whether the allegation of the complaint, as distinguished from that of the reply, has been sustained. It is not specifically included in the issue submitted to the jury; and their failure to award any punitive damages would seem to negative a finding of malice or wanton disregard of the plaintiff's rights. To warrant an execution against the person of the judgment debtor, after plaintiff has exhausted his remedy against the property of the defendant, where the cause of arrest is set out in the complaint (*Peebles v. Foote,* 83 N. C., 102), the same must be sustained by the evidence and established by the verdict. *Oakley v. Lasater,* 172 N. C., 96; *McKinney v. Patterson,* 174 N. C., 483; *Ledford v. Emerson,* 143 N. C., 527.

In the case of *Huntley v. Hasty,* 132 N. C., 279, chiefly relied on by plaintiff, there was not only a cause of arrest set forth in the complaint, but the jury also awarded exemplary damages, as disclosed by the record on file in the clerk's office, though this fact does not appear in the case as reported.

C. S., 768 (1), authorizes an arrest and holding to bail, among other cases, "where the action is for injury to person or character"; and C. S., 673, authorizes an execution against the person of the judgment debtor "if the action is one in which the defendant might have been arrested." In such case the person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of $50. *Fertilizer Co. v. Grubbs,* 114 N. C., 470. The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above $50. C. S., 1631 *et seq.*

In the light of these provisions, the law as applicable to the present case is clearly stated in *Oakley v. Lasater, supra,* as follows:

"In *Dellinger v. Tweed,* 66 N. C., 206, often affirmed since; *Gill v. Edwards,* 87 N. C., 76, and other cases in Anno. Ed., it is held that the homestead and personal property exemption can be asserted against a judgment in an action of tort. We think, therefore, that an execution against the person which would deprive the defendant of his homestead and personal property exemption cannot issue where the judgment is

for an injury sustained by negligence or accident, but only when the injury has been inflicted intentionally, or maliciously; that is, there must be some element of violence, fraud, or criminality. This is the true dividing line between those cases which affirm *Dellinger v. Tweed* and those which seem to depart from it. For instance, in *Moore v. Green,* 73 N. C., 394, the defendant was held in an action for libel. In *Long v. McLean,* 88 N. C., 3, the action was for wrongfully taking and converting personal property. In *Kinney v. Laughenour,* 97 N. C., 325, the action was for seduction. In *Burgwyn v. Hall,* 108 N. C., 489, the action was for false arrest. All these and similar cases come under the express provisions of Revisal, 727 (now C. S., 768), and embrace some element of violence, fraud, or criminality. It is otherwise when the 'injury to property' is committed negligently or accidentally."

Upon the record, plaintiff's motion for execution against the person of the judgment debtor was properly disallowed, as it does not appear from the verdict that the injury was inflicted intentionally or maliciously, or in wanton and reckless disregard of the plaintiff's rights.

Affirmed.

STATE v. J. J. EFIRD.

(Filed 21 November, 1923.)

1. Criminal Law — Felony — Assault — Misdemeanors — Conviction — Sentence—Indictment.

Upon an indictment for a felony, including an assault against the person and supporting evidence, the jury may acquit of the felony, and find the defendant guilty of an assault, and upon the return of the verdict of guilty, the defendant may be sentenced to imprisonment for any term allowed by law for a conviction on an indictment of like character. C. S., sec. 4639.

2. Same—Grand Jury.

An assault on a female by a man, or by a boy over eighteen years old, is a misdemeanor, and the offense charged in the indictment must be presented or found by the grand jury within two years from the time it was committed. C. S., secs. 4215, 4512.

3. Criminal Law—Misdemeanors—Statutes—Limitation of Actions—Motions—Arrest of Judgment—Appeal and Error.

Where there is only evidence that a misdemeanor for which a defendant is being tried is barred by the two-year statute, a motion in arrest of judgment after verdict will not be sustained, it being required that to do so the fact upon which the motion may be sustained appear of record proper, the "case on appeal" not being a part thereof.

STATE *v.* EFIRD.

5. Same—Instructions.

Where there is evidence tending to show that the State has failed of its proof that the misdemeanor charged by the indictment had been committed within the two years, the exception of the defendant may be based upon the refusal of the court to give a proper prayer for instruction upon this evidence, and not by a motion in arrest of judgment after verdict, time not being of the essence of the offense charged.

APPEAL by defendant from *Stack, J.*, at July Term, 1923, of STANLY.

Criminal action. The defendant was indicted for rape. The jury convicted him of an assault on a female, he being over 18 years of age, and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. R. Price and R. L. Smith for defendant.

ADAMS, J. When a person is indicted for rape or for any other felony which includes an assault against the person of another, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of an assault if the evidence warrants such finding; and when such verdict is found, the court has power to imprison the defendant for any term allowed by law in case of conviction on an indictment for an assault of like character. C. S., sec. 4639. An assault on a female person by a man or boy over eighteen years old is punishable as a misdemeanor, and all misdemeanors are to be presented or found by the grand jury within two years from the time they are committed and not afterwards. C. S., secs. 4215, 4512.

There was evidence tending to show that the assault of which defendant was convicted was committed more than two years before the prosecution was instituted; and after the verdict was returned, but before judgment was pronounced, the defendant moved the court to arrest the judgment on the ground that the prosecution was barred by the lapse of time. We think his Honor properly denied the motion.

By "arrest of judgment" is meant the refusal of the court to enter a judgment for some cause apparent upon the record, the "case on appeal" not being a part of the record proper. 1 Archbold's Cr. P. and P., 573; 2 Bishop's New Cr. Pro., sec. 1182; Clark's Cr. Pro., 492; *S. v. Potter,* 61 N. C., 338; *S. v. Matthews,* 142 N. C., 621.

In *S. v. Roberts,* 19 N. C., 541, *Chief Justice Ruffin* said: "Judgment can be arrested only for matter appearing in the record, or for some matter which ought to appear and does not appear in the record. If a bill of indictment be found without evidence, or upon illegal evidence, as, upon the testimony of witnesses not sworn in court, the

accused is not without remedy. Upon the establishment of the fact, the bill may be quashed. *S. v. Cain,* 1 Hawks (8 N. C.), 352. Or the matter may be pleaded in abatement. But the judgment cannot be arrested, for it is no part of the record, properly speaking, to set forth the witnesses examined before the grand jury, or the evidence given by them, more than it is to set out the same things in reference to the trial before the petit jury."

This principle has been maintained with uniformity in many subsequent decisions. *S. v. George,* 30 N. C., 324; *S. v. Potter, supra; S. v. Douglass,* 63 N. C., 500; *S. v. Walker,* 87 N. C., 541; *S. v. Lanier,* 90 N. C., 714; *S. v. Sheppard,* 97 N. C., 402; *S. v. Davies,* 126 N. C., 1007; *S. v. Carpenter,* 173 N. C., 769; *S. v. Lemons,* 182 N. C., 828. When proof is required to support it, the objection must be taken by a motion to quash or by a plea in abatement. *S. v. Bordeaux,* 93 N. C., 560.

It will be noted that the defendant's motion in arrest is not based upon any error apparent in the record, but upon the testimony of witness tending to show that the offense was committed more than two years before the prosecution was begun. All our decisions are to the effect that this is not a sufficient cause for arresting the judgment of the court. Time is not of the essence of the offense charged in the indictment or of which the defendant was convicted, and this Court has expressly held in such cases that, while the burden is upon the State to show that a misdemeanor was committed within two years before the beginning of the prosecution, the defendant should take advantage of a failure to make such proof by a request to the court for proper instruction to the jury. *S. v. Francis,* 157 N. C., 612. In the instant case there was no prayer for instructions and no motion to dismiss the action. Indeed, if the defendant relied on the bar of statute there is nothing in the record to show that he brought such defense to the attention of the court by any prescribed method until after the verdict was returned.

What we have said disposes of the defendant's further objection that the court failed to instruct the jury as to the statute of limitations. The exception to the judgment is formal and requires no comment.

We have not discussed the question whether the bar of the statute would be available to the defendant upon the indictment and the evidence which was introduced because, as indicated, this defense is not properly presented, and concerning it, it is not necessary to express an opinion. We find no error which entitles the defendant to a new trial.

No error.

STATE v. WILL WALTON, FLOYD WALTON, JULE BETHEA, ALIAS JULE EASTERLING, AND WILL McLEAN, ALIAS WILL SHAW.

(Filed 21 November, 1923.)

1. Murder—Evidence—Accessories—Questions for Jury—Trials—Nonsuit.

Evidence in this case that the defendants, charged with being accessories before and after the fact of murder, were with the principals in an automobile, aiding and abetting them, at the time and place of the offense committed, who had since fled the country to avoid the trial; that the deceased was found unconscious and in a dying condition the morning following the night in which the deed was done; and circumstances tending to show that the defendants had afterwards aided the escape of the principals in the automobile: *Held* sufficient upon the facts of this case to sustain a verdict of conviction of the charge of being accessories to the murder before and after the fact; and their motion as of nonsuit at the close of all of the evidence was properly denied.

2. Same—Statutes.

Under the provisions of C. S., secs. 4175-4177, it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence.

3. Same.

Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact; when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder.

4. Murder—Evidence—Anger.

Where the anger of the parties towards the deceased is a circumstance to be considered with other evidence as tending to show the act of murder by the principals, and that the defendants were accessories thereto, a witness may testify the conclusion of his mind that they were angry when he saw them together just preceding commission of the offense.

5. Same—Identity of Principal—Motive—Effect upon Accessory.

Evidence was competent on this trial of the defendants as accessories to a murder, as to the identity of one charged as principal thereto; and the effect of his acts and conduct upon the accessories upon the former's hearing a statement which evidenced a motive for the killing.

APPEAL by defendants from *Sinclair, J.*, at August Term, 1923, of HOKE.

This was an indictment charging Len Walton, Cyrus McLean and Will McLean, alias Will Shaw, with the murder of Dewey Castleberry. The second count charged Floyd Walton, Will Walton and Jule Bethea, alias Jule Easterling, with being accessories before the fact of such murder; and the third count charged Floyd Walton, Will Walton and

Jule Bethea with being accessories after the fact of said murder. Len Walton and Cyrus McLean were fugitives from justice and, therefore, not on trial. Will McLean, alias Will Shaw, was acquitted by the jury. Floyd Walton, Will Walton and Jule Bethea were convicted upon a general verdict of guilty upon the other two counts, and from the judgment upon such conviction the two Waltons and Jule Bethea appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Smith & McQueen and Currie & Leach for prisoners.

CLARK, C. J. Dewey Castleberry, the deceased, was found desperately wounded near a cross-roads, about six miles from Red Springs in Hoke County, on Sunday morning, 15 July, 1923. Late in the afternoon of the day before, the deceased had some difficulty while driving his Ford car along the road with the prisoner Floyd Walton, who was himself driving a Chalmers car, the property of Henry McNeill. The cause of the difficulty does not appear but it was shown that Dewey Castleberry, a white man, fired a pistol at Walton and wounded him in one of his arms. Later that afternoon Will Walton, Floyd Walton and Jule Bethea went to Red Springs to have Floyd's wound attended to. Between 8 and 9 o'clock that night they were shown to have been at Red Springs. Truby Castleberry, a brother of the deceased, testified that when they came into the drug store where he was at the time, that Floyd Walton said they were going to "get my brother that night; he said my brother had shot him through the arm; that he was on the road near Baxter McLean's, near a swamp, when my brother shot him in the arm. He said the three of them were going to get my brother that night and I told him to let the officers do that." The defendants were all colored men.

After Floyd's wound was attended to by the doctor, these three left in the Chalmers car and went towards the cross-roads where the deceased was found desperately wounded the following morning. Truby Castleberry also testified that this Chalmers car used by the prisoners had only one light burning.

T. J. Jones, driving a horse and buggy, left Red Springs that Saturday night after dark. He lived about three-quarters of a mile from the cross-roads at which Dewey Castleberry was shot. He testified that as he was driving along that Saturday night he met some one near the place where Castleberry was shot and this person stopped him. He is under the impression that such person was Len Walton. There were two more persons standing off near there but he did not recognize them. One of these persons had a gun in his hand. He also met a car going

towards Red Springs having only one light, about half a mile from where Castleberry was found next morning. Driving on past this place about 800 yards he stopped at the house of A. L. McLendon, and while talking to him both of them heard three gunshots in the direction of the cross-roads.

McLendon testified that Jones stopped at his house about a quarter past nine o'clock, and while he was there there was some shooting taking place about the cross-roads, and that Jones told him that some one had held him up at the cross-roads and he thought he was going to be robbed when he was stopped, and that he took the man who stopped him to be Len Walton. McLendon and Jones had a clear view of this cross-roads, which was 547 yards off, and before they heard the shots they saw two automobiles come up to the cross-roads and both of these stopped, and soon after they heard the shots.

Both Jones and McLendon early the following morning went to the cross-roads and found Dewey Castleberry desperately wounded with the left side of his head bloody and mangled by shot from a shotgun. He was alive when they got there but unconscious. They testified that he had evidently ridden to this place in his Ford car and was sitting in it when shot, for the top of the machine showed this and the wind-shield in front was broken as though the gun had been fired at close range. On the right-hand side of the car, their testimony is that they saw tracks which indicated that a man was sitting down there on his haunches. On the left-hand side of the road they found the print of the toes of a man's shoes and the print of his knees on the ground, indicating that he was on his knees, and they found a gun-shell just a few steps from these knee-prints and another gun-shell on the public road a few feet off. They also found another shell where Castleberry's Ford left the road and ran out in the cotton patch. A physician, Dr. Johnson, was secured by the neighbors immediately that Sunday morning, and he carried Castleberry to the hospital in Fayetteville where he lingered until the following Saturday morning. The doctor described the wounds which he said caused the death of Castleberry.

Truby Castleberry left Red Springs after the Chalmers car containing Floyd Walton, Will Walton and Jule Bethea, in a Ford car, and passed them. They followed him going in the direction of the cross-roads at which his brother was killed. This Chalmers car belonged to Henry McNeill, but was lent by him to Floyd Walton that afternoon and was returned to him about 11 o'clock that night, the defendants Will Walton, Floyd Walton and Jule Bethea being still in it.

After Floyd Walton was shot by Castleberry, and on his way to Red Springs, he stopped at Duffie's Station, and when he arrived there a big crowd gathered around him. Soon after, Cyrus McLean ran out

and cranked up his car, which was a Ford two-seated runabout, saying at the time that he was going home to get his gun. The witness, Willie McByrde, heard him say that Castleberry had shot Floyd Walton. Cyrus McLean came back soon and inquired if the Chalmers had come back, and then went down the road in his car. There was another man in the car with him, but the witness could not identify him as it was after dark.

John McLean passed the cross-roads, at which Castleberry was afterwards shot, somewhere about 8 o'clock that night and saw three men there, two of whom were in the cotton patch and the other in the road. The witness did not recognize the two in the cotton patch but recognized Len Walton as the man in the road.

Ernest Jordan passed along the road at this point between 8 and 9 o'clock that night traveling in a Ford touring car. He saw a Ford roadster standing just a few steps from the cross-roads. There were seven or eight men there at that time, two or three in the car and two or three around the car. Len Walton stepped from behind the car and motioned witness to stop, which he did, and recognized the man at the steering wheel of the roadster as Cyrus McLean but did not recognize the others. After passing this point the witness met Dewey Castleberry coming from Red Springs and going towards the place he had just left.

Major McNeill also passed this point, driving a mule, between 8 and 9 o'clock that night. There was a one-seated car on the right-hand side of the road and two people in it. There was also a man standing on the edge of the road who asked him, "Did you see Mr. Castleberry down the road; he shot my brother this afternoon and I want to see him." He recognized the man by his voice as Len Walton.

Baker, an officer at Red Springs, corroborated Truby Castleberry that Will Walton told the officers they had better take care of Mr. Castleberry that night; if the officers did not, they would. The crowd with Walton seemed to be pretty angry and talked angrily about the affair. The night watchman at Red Springs testified to the same purport.

Ralph Livingston lived about 500 yards from the spot where Castleberry was shot. He saw the Chalmers car pass with Floyd Walton, Will Walton and several other colored people in it. The car passed within eight or ten feet of him. After passing, it came back again and went toward Duffie's Station, and then came back past his house right after the shooting occurred. This witness heard the shooting, which occurred about twenty minutes past 9 o'clock by his time. At that time the car was going at a very rapid rate of speed.

The above is a summary of the evidence pertinent to charge from which it would appear that the jury adopted the view that the appellants did not do the killing, but aided and abetted Cyrus McLean and

Len Walton in the murder, for they convicted these three defendants of being accessories, both before and after the fact. Both Cyrus McLean and Len Walton disappeared from the community after the killing. All these witnesses, the deceased, and the defendants lived in the community.

From the fact that Floyd Walton did not return the Chalmers car to Henry McNeill until 11 o'clock, and from the other circumstances in the case, the jury drew the inference that these defendants also assisted Cyrus McLean and Len Walton in making their escape after the killing.

We think his Honor properly refused to enter a nonsuit at the conclusion of the State's evidence and at the conclusion of all the evidence. The exception that the court permitted the witness Jones to testify that he took the man who held him up at the cross-roads that night to be Len Walton was properly overruled. *S. v. Spencer,* 176 N. C., 713; *S. v. Lytle,* 117 N. C., 803, and *S. v. Thorp,* 72 N. C., 186. The court properly permitted Willie McBryde to testify, as above, to what Cyrus McLean said and did upon his hearing that Dewey Castleberry had shot Floyd Walton.

Cyrus McLean and Len Walton were identified by the witness as two of the men apparently lying in wait for Castleberry at the cross-roads. There was sufficient evidence to justify the jury in finding that this was a joint enterprise upon the part of all the parties engaged directly in the killing or encouraging it.

It was not necessary to prove that Cyrus McLean and Len Walton killed Castleberry, for it was unnecessary to find the principals guilty under the present statute—C. S., 4175, 4177—before the jury could find the other defendants guilty of being accessories. The evidence brought out was admissible in every respect in the case against the parties on trial.

There was also exception to the court permitting the policeman to testify that the crowd present in Red Springs at the time they went to secure a doctor for Floyd Walton seemed to be angry about the shooting of Floyd. This was a conclusion of the mind as to the mental condition of the parties, and admissible. *S. v. Spencer,* 176 N. C., 709; *Renn v. R. R.,* 170 N. C., 128; *S. v. Leak,* 156 N. C., 643.

The defendants make a further objection that Will McLean, who was tried for the murder of Castleberry, having been acquitted, the verdict necessarily would result in the acquittal of the other defendants charged with being accessories before and after the fact of the killing. But the charge in this case is that the defendants were accessories both before and after the fact. The acquittal of McLean was not an acquittal of Len Walton and Cyrus McLean. C. S., 4175 to 4177, inclusive, is directly applicable to the facts of this case. *S. v. Bryson,* 173 N. C., 803; *S. v. Reid,* 178 N. C., 745.

It is not necessary to consider the other exceptions. Of the three parties charged with the murder, one was acquitted and the other two were fugitives from justice, and therefore not on trial. These defendants were on trial as accessories both before and after the fact, and we cannot say that there was not evidence from which the jury properly could arrive at the verdict that they were guilty as charged. Taking all the evidence into consideration, there was certainly more than a suspicion that these parties were accessories before the fact, and there was sufficient evidence in the movement of the car, of which these defendants were in possession, to justify the conclusion that they also participated in the escape of the two men charged by the grand jury with the murder. They were not convicted because not on trial, but the evidence pointed to them as guilty of the murder, and the evidence, though circumstantial, was properly submitted to the jury upon the charge that these prisoners were accessories to the murder.

No error.

W. N. PARKS AND EMMA V. PARKS v. BOARD OF COUNTY COMMISSIONERS OF LENOIR COUNTY AND FRANK RHEM, SUPERINTENDENT OF COUNTY ROADS OF LENOIR COUNTY.

(Filed 21 November, 1923.)

1. Highways — Counties — Statutes — Repeal — Agencies for Relocating Highways.

Construing the various statutes comprising the road laws of Lenoir County: *Held* those of 1907 were repealed by the Public-Local Laws of 1913, ch. 46, and the later act was modified to the extent subsequent statutes were in conflict with any of its provisions, leaving in force and effect section 13, requiring, for the change or relocation of a highway, the matter be referred to the county superintendent of roads and the patrol superintendent, who shall make report to the board of county commissioners for their action, and *held* that this procedure must be followed, leaving no other course discretionary with the board of commissioners.

2. Same—Statutory Powers—Discretionary Powers.

Where a county road law provides that certain officials or agents of the county shall go upon the lands for the purpose of relocating a county highway, and make recommendation for the action of the county commissioners, giving the owner of the lands sixty days to file his petition for the ascertainment of his damages, with right of appeal to the courts, etc., no notice of the entry by the county's agents upon the lands is required to be given the owner, and he must proceed, if he so desires, by petition, within the time limited by the statute for the ascertainment of his damages for the relocation of the highway on his lands.

3. Constitutional Law—Taking of Property—Just Compensation—Federal and State Constitutions.

While, so far as North Carolina is concerned, the only organic law requiring just compensation to be paid the owner for taking his land for a public use, as the relocation of a highway thereon, is to be found in the Federal Constitution, and relates to such matters as are cognizable by the United States courts thereunder, the principle is grounded in natural equity and applies to the internal matters of State government as a part of the laws of this State.

4. Highways—Relocation—Statutes—Damages—Notice—Local Boards—Courts.

Notice must be given to the owner of land for the assessment of damages claimed by him in accordance with a statute, for the relocation of a highway thereon, before final determination thereof by the local board to which the statute refers it.

CIVIL ACTION. Restraining order, heard before *Grady, J.*, at chambers, from LENOIR. Appeal by plaintiffs from order vacating restraining order.

The complaint alleges that the defendant is the Board of County Commissioners of Lenoir County, composed of H. E. Moseley, R. R. Rouse, Hugh Bryan, J. R. Fields and Norman West, and Frank Rhem is the duly appointed and acting superintendent of roads of Lenoir County. That the plaintiffs own certain land in Moseley Hall Township, Lenoir County—116 acres, and 98 acres of same are cleared and in cultivation. That on the north of this land Garland Waters and others are in control of a millpond on which is situated a grist-mill. That the millpond is not on the LaGrange-Kinston Highway, but is situated on two or more public roads or paths, one of which leads to the LaGrange-Kinston Highway. That certain people, without the consent of plaintiffs, for the past two years have been going over their land from the public road to the mill. That at a meeting of the Board of Commissioners of Lenoir County on Monday, 9 July, 1923, a resolution was passed whereby the establishment and location of a road across the plaintiffs' lands was authorized and directed. Said resolution is as follows:

"ORDER OF BOARD OF COMMISSIONERS

"North Carolina—Lenoir County.

"In the Matter of Petition for Public Road from the Old Kinston-LaGrange Highway to Waters' Millpond.

"At an adjourned meeting of the Board of Commissioners of Lenoir County, under date of Monday, 9 July, 1923 (said meeting being held at such time and place pursuant to an adjournment of the regular meeting

on the first Monday in July), a petition having been presented requesting this board to open, locate and maintain a public road from the old Kinston-LaGrange public road to Waters' millpond, and the said petition having been carefully considered and examined, and it appearing that the same is signed by a large number of citizens of the county, especially of the citizens of Moseley Hall Township, and the petition being further examined and it appearing that the said Waters' millpond is a place where there is maintained a regular grist-mill that grinds for toll, and is a public mill; and further, that the said millpond is now being used as a local resort and place for bathing, and that a large number of the public go to said place for the aforesaid purposes and for other public purposes, and that for some time there has been a roadway from the said old Kinston-LaGrange public road to Waters' mill across the land of W. N. Parks, and now located on his ground, but that said road has not been declared a public road or taken over by the county.

"It is now, therefore, ordered by the board that a public road be and hereby is located and shall be maintained from the old Kinston-LaGrange public road to Waters' mills, and that in the judgment of this board the same will be advantageous to the public, and such is found to be a fact. It is further ordered that the said road so located be taken over, established and maintained by the county for the benefit of the public as a branch or neighborhood road under the terms of the special local act of the Legislature of North Carolina applicable to Lenoir County, and to that end that the width of said road shall be 24 feet. That the same shall be located along the line of the present location of the road across the land of W. N. Parks, but that such location may be shortened or straightened under the direction of this board. That the present road as now located shall remain open as a public road until the relocation, straightening and shortening of said road shall take place under the terms of this order, said board finding that such is necessary and advantageous to the public.

"It is further ordered that R. R. Rouse be authorized and directed to proceed under the terms of this order to lay out and locate said road, and to keep open the present road as now located until the final relocation, straightening and shortening of the said road may be made, and the said Rouse is authorized to take the matter up with W. N. Parks on behalf of this board, and to otherwise carry out the terms of this order, and report his action hereunder to this board.

"It is further ordered that all the rights of W. N. Parks for any damage to which he is entitled shall be reserved, and he is allowed to file his claim as is provided by law in the special local act applicable to Lenoir County.

"A copy of this order will be delivered to W. N. Parks by said Commissioner R. R. Rouse."

That the resolution was irregular and not in compliance with the statute. That, pursuant to the resolution, R. R. Rouse, one of the defendants, went upon the land of plaintiffs and attempted to locate, establish and open a road across the lands of plaintiffs and across the land that had on it growing crops. That the road attempted to be located traversed a distance of more than three times the nearest distance from the said public road to the bridge at the millpond. That the distance from the said public road to the bridge at the millpond does not exceed 300 yards, and goes through woodland, not in cultivation—high, dry land—and land on which a road could be easily and conveniently constructed. That there is already a well-defined woods path leading from the public road to the bridge near the millpond, and the construction of a road through the woods will occasion no damage to any one.

The plaintiffs further allege:

"That the defendant by its act has attempted to convert the lands of the plaintiffs to its own use, without notice and without hearing.

"That Mr. H. E. Moseley, chairman of the board of county commissioners, had assured, some time previous to 9 July, the plaintiff, W. N. Parks, that the board would give him proper hearing before any action was taken in regard to the location of this road.

"That the road to the said millpond is, and would be, used mainly by children of irresponsible age and by insolvent people, they using it for the purpose of enjoying the water of the millpond; that these heretofore have occasioned considerable damage to the crops and lands of these plaintiffs, and for that reason these plaintiffs have been compelled to stop passage over this path.

"That the location of this road as attempted to be located, through the cleared land of these plaintiffs, would work unnecessary and irreparable damage to the lands of these plaintiffs."

Wherefore, these plaintiffs pray:

"1. That the defendants and each of them, their agents and employees, be restrained and enjoined from locating or attempting to locate the said road across the cultivated land of these plaintiffs, as provided in the resolution of the Board of County Commissioners of Lenoir County.

"2. That defendants, and each of them, be ordered to appear and show cause why this restraining order should not be made permanent."

The complaint was duly verified, and Judge F. A. Daniels issued a restraining order citing the defendants to appear before Judge H. A.

Grady at Clinton, 24 July, 1923, to show cause why the restraining order should not be made permanent.

The defendants, in their answer, deny that the individual members of the board of county commissioners are proper or necessary parties. It is not denied that the plaintiffs or any one of them is the owner of certain lands referred to in this action across which a roadway to Waters' mill is now, and had for some time in the past been, located, at present a distance of 700 yards across said land, and when straightened or relocated under the order it will be a distance of about 450 yards across said land.

They admit that a portion of the land is under cultivation. They allege the true facts in reference to the new road to be "that Waters' mill and millpond is situated on the north side of the present paved State highway from Kinston to Goldsboro, and that between the said paved highway and the said millpond runs an old sand-clay public road from Kinston to LaGrange, and that in order for travelers to reach said mill and millpond from said two above-mentioned public roads they must travel across the lands of various persons, including the land of the plaintiff, unless they go a very indirect and circuitous route, and could only then reach said millpond from a roadway which is not a public roadway, and which, even if it was a public roadway, would cause great inconvenience for the vast majority of the public who desire to go to and from the said millpond. It is expressly denied that the said millpond is situated on any public road or path, it being situated only upon a private path or way, which should not be adopted by the authorities of Lenoir County as the only public way to said mill, and which has not been adopted as a public road or way by the defendants, in their judgment and discretion, which they are authorized to exercise under the law.

Defendants further allege "That the said millpond has been developed into a public summer resort and bathing place, and has for years been used as a public grist-mill, and that the vast majority of its patrons and the public who desire to go to said mill and have business thereat come from the LaGrange section, from Kinston, LaGrange and other points along the paved highway aforesaid, and along the old sand-clay road above mentioned, and that at present hundreds of persons daily go to said Waters' pond, the number being larger on holidays and week-ends. That for thirty years in the past, continuously, a road has gone across the lands of the plaintiffs and others, with their entire consent, connecting Waters' millpond with both of the above-mentioned public roads, and for the past ten years said road across plaintiffs' land has been located just as it is now located, and has been thus used, without any objection whatsoever on the part of the plaintiffs. It is admitted that

at a regular adjourned meeting of the Board of County Commissioners of Lenoir County, duly held on Monday, 9 July, 1923, a petition was presented, requesting that a public road be laid off and adopted from the LaGrange-Kinston Highway to Waters' millpond, to the end that the urgent needs of the public might be properly met, and because the said road which has been used for years had never theretofore been taken over as a public road, but had merely been used by the public without objection, and by the consent of the property owners, including the plaintiffs; and, pursuant to said petition, the matter having theretofore been carefully examined by the said board, an order was duly and unanimously passed, under and in accordance with the authority vested in said board by the special acts of the Legislature of North Carolina, constituting road laws of said county, and appearing in chapter 259, Public Laws 1907, and chapter 46, Public Laws 1913, and a copy of said order was forthwith delivered to plaintiffs. That all things as contemplated by law applicable were duly considered and done by the defendant board, and a copy of the action so taken is the resolution that is set forth in plaintiffs' complaint. That, further, said board, in its said action, exercised the authority vested in it by law in the utmost good faith, which was based upon the necessities and advantages of the whole public. It was admitted that R. R. Rouse, under authority of the board, went upon the land to carry out the order of the board.

The answer further alleges that, by some means unknown to the defendant, a large quantity of nails were concealed in the road, which the defendant is advised, informed and believes, and so avers, did serious injury to the automobiles of those who entered said road.

It is further alleged that the said road connecting the two aforesaid public roads with Waters' millpond, as now located, have been used without objection for the past ten years, but that the location of the public road as contemplated in the aforesaid order has not yet been determined, but that, in accordance with said order, the said present road is to remain open as a public road until the relocation, straightening and shortening of the said road shall take place under the terms of said order. That the action of the said board has at all times been for the purpose of meeting its duty to the public, and that it has acted in good faith.

The defendants ask judgment:

"1. That the temporary order hereinbefore entered be vacated," etc.

On the hearing the plaintiffs presented a petition, signed by 113 persons, as follows: "We, the undersigned citizens of Lenoir and Wayne counties, being familiar with the location and condition of the road leading to Waters' millpond, recommend that the road be not located through the cleared land of W. N. Parks and through the cleared land

of J. E. Jones. We are fully satisfied that the convenience of the public will be served by the location of this road through the woodland of W. N. Parks and J. E. Jones to Waters' millpond."

The defendants presented a petition, signed by 285 persons, as follows: "We, the undersigned citizens of Lenoir County, realizing the importance, convenience and need of a public road from the LaGrange-Kinston Highway to Waters' millpond, do hereby petition the county commissioners of Lenoir County to open and construct a public road from said highway to said pond."

Numerous affidavits were presented to the court, on the hearing by plaintiffs and defendants, sustaining their respective contentions. An affidavit, signed by 20 persons, alleged that the road through the cleared land of plaintiffs and others to the millpond, is 773 yards farther than through the woodland of plaintiffs, and others, to the old Kinston and Jason Road.

The judgment rendered on the hearing is as follows:

"This cause coming on to be heard before me, Henry A. Grady, resident judge of the Sixth Judicial District, this 24 July, 1923, upon the motion of the plaintiffs to continue the restraining order issued herein by Hon. Frank A. Daniels, and returnable before me this day; and it appearing to the court, from an inspection of the record and exhibits filed, that the board of commissioners have made an order providing for the laying out of a public road across the lands of the plaintiffs; and the court being of the opinion that said matter lies entirely within the discretion of said board of commissioners and is not subject to review by the court, and there being no allegation in the complaint that said board of commissioners has abused the discretion reposed in it by law, it is, therefore, ordered and adjudged that the restraining order heretofore issued in this cause be, and the same is hereby, vacated and dissolved; and said board of commissioners will proceed under the resolution referred to in the pleadings.

"It is further ordered that said board of commissioners be permitted to proceed to use the old path or cartway, referred to in the pleadings, as a public road; but, as to the relocation of said road, or widening the same, said board will defer action until the rights of the plaintiffs can be passed upon by the Supreme Court."

A further order was made, that the plaintiff W. N. Parks be restrained and enjoined from interfering with the use of the road as now located, etc.

The above are all the material facts necessary for a proper understanding of the case.

J. F. Thomas and R. D. Johnson for plaintiffs.
Cowper, Whitaker & Allen for defendants.

CLARKSON, J. The defendants contend that the order of the board of county commissioners was "in accordance with the authority vested in said board by the special acts of the Legislature of North Carolina, constituting road laws for said county, and appearing in chapter 259, Public Laws 1907, and chapter 46, Public Laws 1913." The reference to chapter 46, Public Laws 1913, should be, and was intended to be, "Public-Local Laws of North Carolina, Session 1913." It will be noted that the repealing clause in the 1913 act says: "That chapter 259 of the Public Laws of 1907 and all the laws and clauses of law in conflict with this act are hereby repealed."

The road acts, before mentioned, and the subsequent road acts for Lenoir County, were intended to make a more efficient system of roads for the county, better maintenance and more permanent construction. Chapter 391, Public-Local Laws 1919 (repeals chapter 46, Public-Local Laws 1913 and amendatory acts "only in so far as the same are modified by and inconsistent with this act") provided for a $2,000,000 bond issue to be voted by the people, and created a highway commission for the purpose of expending this money "for the purpose of building and constructing its public roads, highways and thoroughfares of durable materials and in permanent manner," etc. This highway commission was to exist until the proceeds of the sale of the bonds, etc., under the act were expended in building hard-surfaced and dependable roads and permanent bridges. The people voted for these bonds, and Public-Local Laws, chapter 119, Laws 1921, and chapter 24, Extra Session 1921, validated and legalized the issue to cure certain irregularities, and for other purposes. Public-Local Laws, chapter 466, Laws 1921, designated the hard-surfaced roads to be constructed. Chapter 458 provided certain districts, five, and each to select a county commissioner. Lenoir County, from these constructive acts, was one of the forerunners of hard-surfaced, durable county roads and maintenance of same in North Carolina.

From a careful examination of the road acts of Lenoir County, the only authority we can find for *locating new roads* is set forth in Public-Local Laws 1913, ch. 46, sec. 13, which is as follows:

"That, subject to the approval of the said board, the county superintendent of roads and the patrol supervisor are hereby empowered to locate or change any part of the public roads of Lenoir County, when in their opinion the same would be advantageous to the public; and when any person or persons on whose land the new road or a part thereof is to be located claims damages therefor, and within sixty days files a petition before the said board asking for a jury to assess such damages, the said board, within not less than twenty days nor more than sixty days after the completion of the said road, shall order a jury of three

disinterested freeholders to be summoned by the sheriff or constable as provided by law, who shall give said landowner, or his local representatives, forty-eight hours notice of the time and place when and where the said jury will meet to assess the damages; and the said jury, being duly sworn, in considering the question of damages shall also take into consideration the benefit to the owner of the land, and if such benefit shall be considered equal to or greater than the damages sustained, then the jury shall so declare, and shall in any event report in writing its findings to the board of commissioners for revision or confirmation: *Provided,* that if the said landowners be nonresidents of the county and have no local representative, it shall be deemed sufficient service of such notice for the sheriff or constable to forward by mail a written notice of the purpose, time, and place of such meeting of said jury to the last known post-office address of such landowner seven days in advance of such meeting, and also to post a notice for seven days at the courthouse door in said county."

This section provides a method of locating new roads. The method provided must be substantially followed.

"Where the owner of land seeks to recover damages for the injury resulting from the location of a railroad on his land, he must pursue the remedy prescribed by the charter of the railroad company, as this statutory provision takes away by implication the common-law remedy by action of trespass on the case." *McIntire v. R. R.*, 67 N. C., 278. See *S. v. Lyle,* 100 N. C., 503; *R. R. v. McCaskill,* 94 N. C., 746; *Allen v. R. R.*, 102 N. C., 381. Where the Legislature has prescribed a method of procedure, the statute on the subject must ordinarily be followed. *Proctor v. Comrs.*, 182 N. C., 59.

"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." *Lee v. Waynesville,* 184 N. C., 568, citing *Dula v. School Trustees,* 177 N. C., 426-431; *Crotts v. Winston-Salem,* 170 N. C., 24; *Newton v. School Committee,* 158 N. C., 186-188; *Jeffress v. Greenville,* 154 N. C., 490; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Small v. Edenton,* 146 N. C., 527; *Ward v. Comrs.*, 146 N. C., 534; *Durham v. Rigsbee,* 141 N. C., 128; *Tate v. Greensboro,* 114 N. C., 392; *Brodnax v. Groom,* 64 N. C., 244. See, also, *Cotton Mills v. Comrs.*, 184 N. C., 227, and *Edwards v. Comrs.*, 170 N. C., 448.

From a careful reading of section 13 of the Road Act, *supra,* the method to *locate* any road in Lenoir County is as follows:

(1) The county superintendent of roads and the patrol supervisor are empowered to locate the public road, when in their opinion the same

would be advantageous to the public. A report to this effect should be made to the Board of County Commissioners of Lenoir County. The commissioners can approve or disapprove the location. If the location is approved, then,

(2) The person or persons on whose land the new road, or a part thereof, is to be located claims damages therefor shall, within 60 days, file a petition before the said board asking for a jury to assess such damages. After the completion of the road, the board shall order a jury, etc. The board shall then proceed, as set forth in said section, and act.

We think the method provided in the act requires no notice to the landowner when the road is first located. The county superintendent of roads and the patrol supervisor have the power to locate the public road (subject to the approval or disapproval of the board of county commissioners), or to take a surveyor, or other person or persons, if they see fit, and do what is necessary for the purpose of locating the road. The going on the land by the employed agents of the county and locating the road is sufficient notice. It can hardly be conceived that in public matters of this kind those who are clothed with authority should not in this, and all other public matters, act with courtesy in carrying out the governmental right. It is frequently a perplexing problem to tell how far the individual has to yield his personal and property rights for the common good. Sometimes in carrying out the idea of the "greatest good to the greatest number," when it strikes the individual as to his own personal or property rights being affected, he would rather the application be applied to his neighbor. The taking of private property for public use by paying just compensation is a part of the fundamental right that the legislative branch of the government can grant to a county or other agencies. The present act should be carefully administered as it goes as far as any act of this kind; and, while it makes for efficiency, the individual is affected and his rights should be carefully guarded.

"Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State, *S. v. Newsom,* 5 Iredell (27 N. C., 250), yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." *Johnston v. Rankin,* 70 N. C., 555; *S. v. Lyle,* 100 N. C., 497.

Under the special statute for Lenoir County the "person or persons on whose land the new road or a part thereof is to be located claims

damages therefor and within 60 days files a petition before the said board asking for a jury to assess such damages." This claim must be made within the statutory time. *R. R. v. McCaskill, supra; Dayton v. Asheville,* 185 N. C., 12.

"On the back of the telegraph blank was the usual requirement that any claim for damages must be presented to the company in writing within sixty days after filing the message. This regulation has been held reasonable and valid in *Sherrill v. Tel. Co.,* 109 N. C., 527, and has been often approved since." *Bennett v. Tel. Co.,* 168 N. C., 498. The State Highway Act allows 60 days. *Road Commission v. State Highway Commission,* 185 N. C., 56.

The assessment of damages after the road is located is well settled in this State. *McIntire v. R. R., supra; R. R. v. McCaskill, supra; S. v. McIver,* 88 N. C., 690. Notice need not be given the owner unless required by the statute, as to entry on land—notice must be given as to assessment of damages. *S. v. Jones,* 139 N. C., 616; *Durham v. Rigsbee,* 141 N. C., 131; *Kinston v. Loftin,* 149 N. C., 255; *Jennings v. Highway Com.,* 183 N. C., 68; 2d Lewis' Eminent Dom., sec. 66.

The powers that can be granted to local governmental agencies unless restrained by constitutional prohibition are broad and comprehensive. The powers when granted should be exercised with care and caution.

"Unless prohibited by the Constitution, the power of the State to appropriate private property to public use extends to every species of property within its territorial jurisdiction, and where a public-local act creates a county highway district and gives to it, broadly and without restriction, the right to condemn private property for highway purposes, the power so given will include dwelling-houses, trees and yards of the owner of land lying upon the roadway, unless such power is excluded under general or other State laws applicable." *Clifton v. Duplin Highway Commission,* 183 N. C., 211; *Gunter v. Town of Sanford, ante,* 452.

From the record the statute, Public-Local Laws of 1913, ch. 46, has not been substantially complied with. This cause is remanded to the end that the county superintendent of roads of Lenoir County and the patrol supervisor locate the road as pointed out in this opinion, and the procedure be as herein indicated. That the order in the record signed by the court below restraining and enjoining W. N. Parks continue in force in accordance with the order. That the cost in this cause be equally divided between the parties plaintiff and defendant. As herein modified, judgment is affirmed.

Modified and affirmed.

W. W. PARLIER *v.* J. J. MILLER AND W. W. MILLER, ADMINISTRATORS OF E. B. MILLER, DECEASED.

(Filed 21 November, 1923.)

1. Contracts—Parol—Statute of Frauds—Promise to Pay Debt of Another—Mortgages—Deeds and Conveyances—Consideration.

A purchaser of land received his deed therefor and gave back a mortgage, which was registered, for the balance of the purchase price secured by his notes under seal, and thereafter conveyed his equity to a third person in consideration of a certain cash payment and his grantee's parol promise to pay off the mortgage debt: *Held*, the parol agreement for the payment of the mortgage debt was not a promise to pay the debt of another required by the statute of frauds to be in writing (C. S., sec. 987), and is valid and enforceable as a direct obligation of his grantee supported by a sufficient consideration.

2. Same—Parties—Privies—Actions.

Where the grantee of the mortgagor has agreed as a part of the purchase price of lands to assume the payment of a mortgage thereon, the mortgagee, as the one for whose benefit the contract was made, though not strictly a privy thereto, may maintain his action thereon, both against his mortgagor and the grantee in the latter's deed.

3. Same—Notes Under Seal—Limitation of Actions.

Where the grantee of a mortgagor of lands has assumed, under a valid agreement, to discharge the mortgage debt, evidenced by notes under seal, the ten-year statute of limitations applies. C. S., sec. 437.

4. Evidence—Motions—Nonsuit.

Upon a motion to nonsuit plaintiff, the evidence will be considered in the light most favorable to him.

APPEAL by plaintiff from *Lane, J.*, at July Term, 1923, of ASHE.

Civil action. The essential facts in the case are that on 11 October, 1910, W. W. Parlier, the plaintiff, and his wife, Ida Parlier, executed and delivered to one J. F. Brown and wife, Julia Brown, a deed in fee simple to a tract of land containing about 45 acres in Watauga and Avery counties, and the deed was recorded. That to secure the balance of the purchase-money on the land, J. F. Brown made a mortgage of even date on the land to W. W. Parlier, the plaintiff, for $300, evidenced by three bonds under seal dated 11 October, 1910, of $100 each, due on 11 October, 1911, 11 October, 1912, and 11 October, 1913. The mortgage was duly recorded. That no part of the bonds have been paid. That thereafter, in the fall of 1911, J. F. Brown and wife sold the land deeded to them by plaintiff and his wife to E. B. Miller and made a deed to him for the land. That E. B. Miller is dead and the defendants are his administrators. That at the time Miller purchased the land from Brown, the Parlier mortgage was duly recorded in

Watauga and Avery counties, where the land was situate. That at the time Miller purchased the land from Brown and the deed was made, the following agreement took place between them in regard to the Parlier bonds and mortgage, as testified to by the following witnesses for plaintiff:

S. S. Revis testified: "I knew E. B. Miller and know W. W. Parlier. I had a conversation with E. B. Miller with reference to notes executed by J. F. Brown to W. W. Parlier for lands in Watauga County and Avery County. I have no interest in this suit. E. B. Miller, in this conversation, told me that he was to pay what was behind to Mr. Parlier or would sell to Parlier; that he did not know what he would do, but would do one or the other. E. B. Miller told me what Brown sold the land to him at and what the stock was worth and what was behind, and that he had to sell out to Parlier at what it cost him or he would have to pay the Brown notes to Parlier. Said he was to pay Mr. Parlier what Mr. Brown owed on the land. Miller told me he got the land for the consideration that he was to pay Mr. Brown $100 and pay the notes of $300 that Brown owed Parlier.

"The conversation I had with E. B. Miller was in the late fall of 1911. About two or three years after this, E. B. Miller told me that he had never done anything about settling with Parlier, and said he wanted to sell out to Parlier, if he could."

Mrs. Julia Brown testified: "I am the wife of J. F. Brown, and I was present when my husband sold the land to E. B. Miller, the Parlier land. We executed a deed to E. B. Miller for the land, and at the time the deed was made, my husband told Mr. Miller that he owed Mr. Parlier and had executed and delivered three notes of $100 each to Mr. Parlier and that they had not been paid, and told him about the mortgage to Mr. Parlier, and Mr. Miller said he would take them on his own risk and pay whatever there would be to pay on them—that is just what he said.

"E. B. Miller agreed with my husband to pay the notes he had given to W. W. Parlier, but I cannot tell you just when it was—about a year or so after Mr. Brown gave the notes."

The suit was started 1 December, 1919. The deed from Parlier and wife was made to Brown and wife. Brown alone signed the mortgage to plaintiff, but as Brown and wife signed the deed to Miller, this fact is not material.

At the conclusion of all the evidence, the defendants made a motion to nonsuit. The court below allowed the motion, and plaintiff excepted and appealed to this Court, and assigned as error the court's granting the nonsuit and signing judgment of nonsuit.

Chas. B. Spicer and Park & Johnston for plaintiff.
F. A. Linney and T. E. Bingham for defendants.

CLARKSON, J. We think the court below erred in granting defendants' motion to nonsuit.

The promise made by E. B. Miller (defendants' intestate) to J. F. Brown to pay W. W. Parlier the notes of $300 that Brown owed Parlier under the facts in the case, if true, was a binding contract, founded on a valuable consideration and enforceable. J. F. Brown owed W. W. Parlier $300 and interest, balance of purchase-money of land that was deeded to himself and wife by Parlier and wife. He gave Parlier a mortgage on the land to secure the $300—three bonds of $100 each. When J. F. Brown and his wife conveyed the land to E. B. Miller, if the evidence is true, Brown told him what was due on the land, and as part of the consideration, or purchase price of the land, Miller agreed to pay the $300 bonds and mortgage on the land that was owing to Parlier. From the evidence, E. B. Miller received a deed for the land and promised to pay the debt on it.

"An assignee of a note secured by a mortgage is entitled to the full benefit of the mortgage; and where the mortgagor has conveyed the mortgaged land, subject to the payment of the mortgage debt, and it has successively been conveyed to several grantees, one to the other, each assuming in his deed the payment of said debt, a holder for value of the note thus secured, under the equitable doctrine of subrogation, has a right of action, not only against the mortgagor of the lands for whatever balance on the note the foreclosure fails to satisfy, but also against the several grantees of the land, who successively and from each other assumed the indebtedness secured by the mortgage, and evidenced by the note sued on." *Baber v. Hanie,* 163 N. C., 588. The assumption of the debt need not be in writing.

The matter is fully discussed and the principle above set forth sustained by *Walker, J.,* in *Rector v. Lyda,* 180 N. C., 577. The same learned Judge wrote the *Baber case, supra.* See *Woodcock v. Bostic,* 118 N. C., 822; *Way v. Transportation and Storage Co., ante,* 224.

We deduce from the authorities that it is well settled that where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover, although not strictly a privy to the contract.

It is well settled that a direct action will lie against the promissor when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the principal contracting parties.

The defendants filed no brief and did not argue the case in this Court. In the answer the learned counsel for the defendants, among other defenses, relied on the statute of frauds and the three-year statute of limitations. The statute of frauds, which is as follows, does not apply to the facts in this case:

"No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith or some other person thereunto by him lawfully authorized." C. S., sec. 987, well known as 29 Charles II.

The three-year statute of limitations does not apply. The promise was to pay the bonds, which were under seal, and ten years had not expired when this action was commenced. C. S., 437, says: "Within ten years an action . . . upon a sealed instrument against the principal thereto."

Professor Minor, in his great treatise on Real Property, says: "If the assignee (of the land) does thus assume payment of the mortgage debt, he thereby becomes the principal debtor, and the original mortgagor is only liable subsidiarily as a surety. And while the mortgagee may continue to hold the mortgagor personally liable upon his contract to pay the debt, notwithstanding the assumption of the mortgage by the purchaser of the land, he may also, it seems, hold the purchaser directly responsible, though he is not a party to the agreement between the mortgagor and the purchaser—a right based sometimes upon the principle that one may sue upon a contract to which he is not a party, if it be made for his benefit, and sometimes upon the theory of the subrogation of the mortgagee to the rights of the mortgagor (the surety) against the purchaser (the principal debtor)." 1 Minor on Real Property, sec. 647. *Baber v. Hanie, supra.*

These are the only defenses that can now be considered in the record on the motion of the judgment for nonsuit, which is always to be taken in a light most favorable to plaintiff. Upon a new trial there may be other defenses.

For the reason stated, there was error.

Reversed.

PHILOUS E. TUCKER v. HENRY EATOUGH, INDIVIDUALLY AND AS AGENT FOR THE UNITED STATES TEXTILE WORKERS OF AMERICA, AN UNINCORPORATED ASSOCIATION.

(Filed 21 November, 1923.)

1. **Actions—Defenses—Unincorporated Societies—Process—Principal and Agent—Slander—Corporations—Statutes—Pleadings—Demurrer.**

An unincorporated association or society has no legal entity at common law, and there is none conferred by statute, for liability for libel of an alleged agent, and when it appears that the summons in the action had only been served on one as agent for such society, the court will dismiss the action when the complaint itself shows want of jurisdiction, *ex mero motu*. Nor can a written demurrer to this want of jurisdiction confer it on the courts: *Held further*, the service would not have been sufficient upon a corporation under the facts of this case. C. S., sec. 483 (1).

2. **Same—Class Representation.**

Our statute permitting the joinder of parties and recognizing representation by common interests, C. S., sec. 457, cannot have application to an attempted suit against an unincorporated society, when no individual has been made a party defendant, or appears to defend the action in behalf of himself or other member of the society.

APPEAL by plaintiff from *Harding, J.*, overruling a demurrer, 16 August, 1923, from MECKLENBURG.

This action was begun 11 May, 1923, by the issuance of summons against "Henry Eatough, individually, and as agent and organizer of and representing the members of the United Textile Workers of America, an unincorporated association," but when the complaint was filed it disclosed that the purpose of the action was to sue the United Textile Workers of America and said Henry Eatough for $10,000 damages for an alleged libel issued by him.

It appears from the complaint of the plaintiff, as well as in the summons, that the United Textile Workers of America is an unincorporated association and service was made on Eatough alone.

The case coming on to be heard before Harding, J., upon the complaint and demurrer, the court "being of the opinion upon the pleadings filed that the defendant, United Textile Workers of America, is not properly before the court, the demurrer is sustained," and the plaintiff excepts.

William L. Marshall for plaintiff.
J. Frank Flowers for defendant.

CLARK, C. J. In the summons, the sheriff was commanded "to summon Henry Eatough and Henry Eatough as agent and organizer of and

representing the members of the United Textile Workers of America, an unincorporated association, defendants in the above action." If the "United Textile Workers of America" had been a corporation the service would have been invalid, C. S., 483 (1), and the action should have been dismissed as to them by the judge *ex mero motu*. As the summons recites that they are unincorporated, for a still stronger reason the summons should have been dismissed. In either event the action of the judge would have been correct.

The United Textile Workers of America did not appear and could not for they had no legal or actual existence, and there was and could be no service on any one as to them. The demurrer by whomsoever filed was not and could not be an acknowledgment of service by any one, and the court could act *ex mero motu* upon the allegation of the plaintiff in the summons and in the complaint that the party attempted to be sued was unincorporated, and the return of the sheriff that there had been no service upon any one except Henry Eatough.

The complaint avers that Henry Eatough issued a printed circular that was libelous and reflected on the plaintiff, and that as he was the agent of the said unincorporated association, said association is responsible without naming any of them or service on any of them, and asks for $10,000 damages out of said Henry Eatough and said unincorporated association, and naming no one, and service being had on no one except said Henry Eatough.

It has been held by our Court that unincorporated associations cannot be sued in the manner attempted in this case, and it has been held by various other courts also that voluntary unincorporated associations have no separate legal existence; that they cannot make contracts or be sued as an association except through the individuals who compose its membership.

It has been held in some of the equity courts of this country that where some of the members of an unorganized body have been made parties that proceedings will lie against them, but this rule is only applicable in those courts after sundry members have been made parties, and in this case none of the members of the alleged United Textile Workers of America have been made parties, and even the equitable doctrine of virtual representation adopted by the chancery courts in some other jurisdictions cannot apply.

In this State, our statute does not even go to that extent, C. S., 457, which merely provides for the joinder of parties as follows: "When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all," but that is merely permissive to them and clearly does not apply

to the circumstances of this case. Here Eatough is sued as an individual and as agent of the United Textile Workers. No member of the union is in court or even named as a defendant. Eatough alone is sued, first as an individual and second as alleged "agent or organizer of the union," but it is not even alleged that he is a member, and, on the contrary, the complaint avers that the union is composed of a large number of individuals who are not incorporated. It does not appear that any one is authorized to represent them.

In *Abbott v. Hancock,* 123 N. C., 99; *Sullivan v. Field,* 118 N. C., 358, and *Winders v. Southerland,* 174 N. C., 235, cited by the plaintiff, it was held that a demurrer does not lie for superfluous parties, but this does not dispense with the requirement that before a party named as defendant can be proceeded against, it must be served with summons and possess legal capacity to be sued.

In *Kerr v. Hicks,* 154 N. C., 268, it is said: "A voluntary association has no existence or power except as contained in its formal articles of agreement or established by custom acquiesced in by the parties to it." The complaint in this case shows plainly that the action was brought against the association, and in this State only natural or artificial persons can be brought into court upon summons. The defendant, United Textile Workers of America, not being incorporated, is without capacity to sue or be sued, and the court properly dismissed the action *ex mero motu.*

In *Nelson v. Relief Department,* 147 N. C., 104, the matter is discussed fully, and the Court said that it appeared that the alleged defendant was neither incorporated nor a legal entity, adding that even a State department like the Insane Asylum, or the Board of Education, or the State's Prison, though created by statute, had no power to sue and are immune from liability to suit except when the statute creating them especially granted the permission to sue or be sued, and said that the alleged "Relief department is not a natural person. It is not a corporate body. It has no legal entity. It is, in the eye of the law, an 'airy nothing.' It has no power to contract. Any contract made in its name would be the contract of the individual assuming to act for it or the contract of the railroad company whose 'agency' it was. A judgment against the 'relief department' would have nothing to act on. The sheriff could find no one upon whom to levy his execution. It would glide from his grasp as the shade of Creusa eluding the embrace of Eneas.

"Tenuesque recessit in auras.
Ter frustra comprensa effugit imago.
Par levibus ventis volucrique simillima somno."

Virg. Eneid II, v. 791 et seq.

It was also said in that case that there being a defect of jurisdiction, the court should have dismissed the action *ex mero motu*. "The position of the plaintiff was no better than if the summons had been served on an infant in an action on contract."

The subject has also been discussed in *Ball-Thrash v. McCormick*, 162 N. C., 475; *Brewer v. Abernathy*, 159 N. C., 285; *Kochs v. Jackson*, 156 N. C., 328. In all of these cases it was held that a proper method of taking advantage of the defect in parties on the ground of incapacity to be sued is by a written demurrer when the defect appears on the face of the record, as is the case here, or by answer when the incapacity to be sued does not appear.

It is true that if a defendant named in a summons or an action, who has the capacity to sue or be sued, appears therein for any purpose, except where his appearance is properly restricted to the purpose for which a special appearance can be entered, his appearance cures any irregularity in the method and detail of service, and by his appearance, if he has the legal capacity to be sued, he waives the question of venue. But that is not the case here, for the reason that the demurrer is based upon the want of legal capacity to sue or be sued.

The only party in this case was Henry Eatough, and the language of the summons could not bring the United Textile Workers of America in as defendant even if that association was a legal entity.

Among other cases, in the *Coronado Coal case*, 259 U. S., 344, *Chief Justice Taft* uses the following language: "Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member." In the famous *Taff-Vale case*, in which an unincorporated labor union was held to be suable, this was placed solely upon the ground that Parliament had passed the Trade Union Act of 1871, which permitted trade unions to be registered, and gave to registered unions the power to own property and to act by agents. This is cited and explained by *Judge Taft* in the *Coronado Coal decision, supra.*

In North Carolina there is no legislation thus changing the common law, and the Legislature has not authorized, but has refused to authorize these unincorporated associations to take and hold property in their association name. In the *Coronado case* it is said by *Chief Justice Taft:* "There is no principle better settled than that an unincorporated association cannot, in the absence of a statute authorizing it, be sued in the association or company name, but all the members must be made parties, since such bodies, in the absence of statute, have no legal entity distinct from that of its members. 5 C. J., 1369; 20 R. C. L., 672, and many other cases.

If an action could be brought against Eatough, it certainly could not be served upon Eatough alleging that he is agent for the United Textile Workers of America, but it must be served upon some officer of the corporation designated by statute for that purpose. This alone would sustain the action of Judge Harding.

But upon the broader ground, if contrary to common law, an action could be brought without authority of a statute against an unincorporated body, it would be permissible for any person to bring an action against the Confederate Veterans Association, or the American Legion, or the League of Women Voters, or any other unorganized body upon an allegation that one of their members had committed the libel or other legal wrong against the person bringing the action. It certainly cannot be necessary to discuss further the proposition that the United Textile Workers of America not being a legal entity, and there being no statute authorizing them to be sued, that the action was properly dismissed as to them.

The defendant, Eatough, is liable for any libel that he may be proven to have issued, and any individuals or corporations who aided and abetted him in issuing a libel can be made parties defendant, but not an unincorporated body of men.

Affirmed.

WASHAM & PATTERSON MOTOR COMPANY v. H. B. REEP.

(Filed 21 November, 1923.)

Appeal and Error—Motions—Certiorari — Record—Dismissal—Rules of Court.

It is indispensable for the appellant to conform to the rule requiring that he aptly file the record proper of his case with his motion for a *certiorari* to bring it up to the Supreme Court; otherwise, it will be dismissed upon appellee's motion made in accordance with the rules regulating appeals.

THIS was a motion under Rule 17 of this Court, 185 N. C., 792, regularly made, upon the proper certificate, to docket and dismiss this appeal. The case was tried at April Term of GASTON, and the certificate is in proper form and filed in proper time, and the appellants failed to bring up and file a transcript of the record seven days before the call of the docket of the causes from that district.

S. T. Durham for plaintiff.

Woltz & Woltz and George W. Wilson for defendant.

PER CURIAM. This case was tried at the April Term, 1923, of Gaston. It was requisite that the appellant should docket his appeal in this Court seven days before the call of the Fourteenth District, to which it belongs. The only exception under Rule 17 is that if for any sufficient reason the full record of the case on appeal could not be docketed in time, the appellant must file, seven days before the call of the district, the record proper, and upon sufficient cause apply for a *certiorari*. The plaintiff makes this motion, but has not filed any record proper, or in any respect complied with the requirements of the rule which applies to all other appellants.

The appellant filed, it is true, a statement that he appealed, and that he asked the clerk of the court below to send up the record, but avers that by some mistake the clerk confused it with another record and has failed to send it up. The clerk of the court below, in contradiction, filed a statement that such application to send up the case was not made so far as is recalled by the clerk's office, but, however that might be, it was incumbent upon this appellant, as upon all others, to see that his case was sent up and docketed in time; and in any event if, without fault of the appellant, this was not done, it was his duty to have gotten a copy of the record proper, duly certified by the clerk, and filed it in the office of this Court seven days before the call of the docket as an indispensable requisite for a motion for *certiorari* to cure the defect to bring up the appeal in time. This has not been done, and the appellant does not even allege that he has paid, or tendered the cost of making out the record, or has taken any steps whatever to have it sent up.

The motion for *certiorari* in this, as in all other cases under like circumstances, must be denied, and the motion to docket and dismiss must be allowed. The precedents to this effect are numerous and uniform.

Motion for *certiorari* denied.

Motion to docket and dismiss allowed.

MERCHANTS NATIONAL BANK v. DORTCH & HINES AND DANIEL ALLEN.

(Filed 28 November, 1923.)

1. Wills—Devise—Estates—Rule in Shelley's Case.

The rule in *Shelley's case* prevails in this State as a rule of property, overruling any particular intent of the grantor or devisor expressed in the instrument to the contrary, falling within its application.

2. Same—Fee Tail—Statutes—Fee Simple.

A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in *Shelley's case*, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee-simple title. C. S., sec. 1734. *Harrington v. Grimes*, 163 N. C., 76, cited and applied.

CONTROVERSY without action heard and determined before his Honor, *Calvert, J.*, at November Term, 1923, of WAKE.

Plaintiffs have contracted to sell and defendants to buy a tract of land in said county, known as the Reedy Creek land, subject to the life estate of Martha Maynard, widow of Jacob Maynard, deceased, at a specified price, and defendants decline to proceed further on the ground that plaintiffs' title to said land is substantially defective and in violation of the terms and conditions of the contract. On the facts submitted, the court being of opinion that the title is good, entered judgment that defendants comply with the contract of purchase, and defendants except and appeal.

Albert L. Cox, Carroll W. Weathers, and Smith & Maxwell for plaintiffs.

Raymond L. Henry for defendants.

HOKE, J. The title offered depends upon the proper construction of the last will and testament of Jacob Maynard, deceased, devisor and former owner of the property, the items of the will appertaining to the question presented being in terms as follows:

"I give and bequeath to my oldest son, James Maynard, after the death of my wife or the termination of her widowhood, one-third of my land known as the Reedy Creek land, his lifetime only, and then to his body heirs.

"I give and bequeath to my oldest daughter, Penina Sorrell, after the death of my wife or the termination of her widowhood, one-third of my land known as the Reedy Creek land, her lifetime only, then to her body heirs.

"I give and bequeath to my youngest daughter, Mary King, after the death of my wife or the termination of her widowhood, one-third of my land known as the Reedy Creek land, her lifetime only, then to her body heirs."

In this connection it appears that Jacob Maynard, devisor and former owner, died in 1910, making disposition of the property in his last will and testament as above stated. That the three devisees, his only children and heirs at law, survived the testator, and also his widow, Martha,

who is still living. That after the death of said testator, Penina Sorrell died without issue or will, and later, Mary King died, leaving three children as her heirs at law, her husband having died before her. That plaintiff has acquired and holds the title to the property, subject to the life estate of the widow, by formal deeds from J. B. Hill, the latter having purchased and taken deeds in fee sufficient in form from James Maynard and from the three children of Mary King. Upon these facts plaintiff contends that its deed tendered to defendants will convey the entire title subject to the life estate of the widow.

Defendants contend that the title is defective in that, under the will of his father and by its true intent and meaning, James Maynard has only a life estate in the property, the devise being to "James Maynard for his lifetime only, and then to his bodily heirs."

In numerous decisions of the Court, the rule in *Shelley's case* has been recognized as existent in this State, and in cases calling for its application it is held that it prevails as a rule of property, overruling any particular intent to the contrary appearing in the instrument, deed or will by which the same is created. *Hampton v. Griggs,* 184 N. C., 13; *Wallace v. Wallace,* 181 N. C., 158; *Nobles v. Nobles,* 177 N. C., 245; *Robeson v. Moore,* 168 N. C., 388; *Harrington v. Grimes,* 163 N. C., 76; *Nichols v. Gladden,* 117 N. C., 497.

In the recent case of *Hampton v. Griggs, Stacy, J.,* delivering the opinion, said: "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 otherwise, 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."

In *Wallace v. Wallace* it was held "That a limitation coming within the rule in *Shelley's case,* recognized as existent in this State, operates as a rule of property passing, when applicable, a fee simple both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument." And a like ruling is approved in *Nobles v. Nobles* and *Robeson v. Moore, supra.*

In *Robeson v. Moore:* "It is established by repeated decisions of the Court that the rule in *Shelley's case* is still recognized in this jurisdiction, and where the same obtains, it does so as a rule of property without regard to the intent of the grantor or devisor."

Applying these principles, the devise in question to James Maynard for life and then to his bodily heirs, a fee tail under the old law converted by our statute, section 1734, into a fee simple, clearly comes within the rule in *Shelley's case,* and the first taker has a fee simple notwithstanding the estate of the devise is said to be "for his lifetime only."

The court below, therefore, has made correct ruling on the facts presented, and the judgment that defendants comply with their contract of purchase is

Affirmed.

ELMUS COLE v. OXFORD SAVINGS BANK AND TRUST COMPANY.

(Filed 28 November, 1923.)

1. Trusts—Wills—Devises—Active Trust—Corpus of Fund.

A devise to another of the interest on a certain sum of money to be collected and paid over to the testator's son during his life, and at his death the designated sum to be paid in certain proportions to certain persons designated, is not construed as the intent of the testator of a gift of the *corpus* of the fund to the first taker, but only that it be invested and the income thereof paid to him for his life.

2. Same.

Where there is a special duty to invest funds and pay the interest to another during his life, an active trust is created for the collection and application of the income, it being required that the trustee hold the legal title for the performance of his duties.

3. Same—Contracts—Beneficiaries.

Where the testator creates an active trust for the investment of a fund and the payment of the interest thereon to the son for life, directing a distribution after his death in certain proportions to designated beneficiaries, an agreement among the beneficiaries that the son shall have the *corpus* of the fund will not affect the trust created by the original owner of the funds.

4. Same—Residuary Clauses.

Where an active trust is created in a certain item of a will for the payment of interest on a certain fund by the trustee to the testator's named son for life, and at his death to certain beneficiaries, and by a residuary clause the undisposed-of property shall be divided among these beneficiaries in the same proportion as designated in the former item, specifically referring to it, the testator's intent is construed as giving to his son his part of the residue upon the same condition or with the same status as the specified sum therein—*i. e.*, the income for his life, etc.

APPEAL from *Bond, J.*, at April Term, 1923, of GRANVILLE.

Haly F. Cole made his will, directing that all money belonging to his estate be collected, his remaining property converted into cash, and his debts paid. In Item 2, to his daughters, his sons, one brother and certain grandchildren, he made certain bequests of money, one of which is the following:

"To my son, E. F. Cole, I will and bequeath the income from the sum of six hundred dollars, to be paid to him as follows: I will and direct that said sum of $600 be placed at interest in the Oxford Savings Bank and Trust Company, and the interest therefrom paid to him annually by said bank during his natural life; after his death I direct that said sum of $600 shall be distributed among the other legatees of my estate named herein in the proportions they severally share in said estate."

Item 3 follows: "All the rest and residue of my property, after the payment of debts and charges of administration and of the legacies above provided for, I will and bequeath and direct shall be divided between my children, brother and grandchildren named in the second paragraph hereof in the proportion that the specific bequest to each of said children, brother and grandchildren, as set out in said paragraph 2, bears to the whole amount of money so bequeathed to them, that is to say, any remainder after said payments shall be divided between said children, brother and grandchildren, so as to preserve the same relative proportions in the distribution of said remainder as exist between the bequeaths made in the second paragraph hereof."

Seven of the legatees signed this paper:

"We, the undersigned heirs at law and devisees of H. F. Cole, hereby give and deliver to our brother, Elmus Cole, all of the property devised to us by our father by Items 2 and 3 of his will. We hereby intend to give our said brother our fee-simple interest in the property devised by our father to him for his life with the remainder to us in fee, which amounts to about $600 or $800."

Upon the pleadings and the evidence, the controversy involved the construction of the will; and his Honor held that the plaintiff was entitled to recover seven-tenths of the $600 deposited in the bank under Item 2 (h) and seven-tenths of $284.40 deposited in the bank under the residuary clause. The defendant excepted and appealed.

T. Lanier for plaintiff.
Royster & Royster for defendant.

ADAMS, J. In the contested clause it is provided that the bank shall pay the legatee annually during his natural life the "income," that is, the interest on the sum of $600, and after his death shall distribute the principal among the other legatees named in the will. The general rule is that a gift of the income of property is to be regarded as a gift of the property itself only when no limitation of time is attached; but where a testator directs that the interest on a sum of money be paid to a designated beneficiary annually during his natural life, and that after his death the principal shall be distributed among other legatees, the legacy is construed, not as a gift to the first taker of the *corpus* of the fund, but only of the income for the intermediate period. 28 R. C. L., 246, sec. 214; *In re Smith,* 27 A. S. R., 587.

The testator obviously intended that the principal sum should be invested during the life of the plaintiff and distributed after his death. In effect he appointed the Oxford Savings Bank and Trust Company a trustee with specific directions as to the manner in which the trust

should be executed. Perry says: "Any agreement or contract in writing, made by a person having the disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice." Trusts and Trustees, sec. 82. If a special duty be imposed upon the trustee, such, for example, as the collection and application of the income or the rents and profits of the estate, the trust is called "active," because the trustee must have the legal title in order to perform his duties. *Lummus v. Davidson,* 160 N. C., 484; *Rouse v. Rouse,* 167 N. C., 208; *Fowler v. Webster,* 173 N. C., 442. Under these circumstances the agreement relied on by the plaintiff cannot destroy the trust and deprive the bank of its right to hold and disburse the fund described in Item 2 (h) of the will as therein provided.

We think the same conclusion is applicable to the residuary clause, in which it was provided that all the residue of the property should be divided among the legatees named in the second item in the proportion that the specific bequest to each of them bears to the whole amount given them. In Item 2 no part of the *corpus* of the estate was bequeathed to the plaintiff, and we think it was the testator's intention to give to the plaintiff during his lifetime the annual income or interest to be derived from the amount deposited in the bank under the residuary clause ($284.40) in like manner with the provision in Item 2 (h) of the will.

For the reasons assigned the judgment is

Reversed.

STATE EX REL. C. E. McINTOSH v. GEORGE E. LONG, W. G. BANDY, AND GEORGE E. BISANER.

(Filed 28 November, 1923.)

1. Statutes—Education—Schools—Repeal.

Where the Legislature has appointed a board of education of a county of three members, later increases the number to five, and provides that it shall consist of three members, but that the present incumbents hold over for the terms as appointed, the intent of the Legislature is construed to be that until the expiration of the existing terms there should be five members of the board, reduced to three as the terms of the incumbents expire.

2. Constitutional Law—Office—Schools—Education—Counties—Boards—Elections.

Where a county board of education consisting of five members, empowered by statute to elect a county superintendent of schools, vote three for the relator and two for the present incumbent, but one of the three has accepted the position of trustee of a graded school, and entered into the discharge of the duties thereof, he is disqualified by holding two offices, prohibited by the Constitution, and the result being a tie, the present incumbent holds over until his successor may be lawfully appointed.

3. Same—Chairman of Board—Second Vote—Tie.

The chairman of a county board of education may not vote as a member for a county superintendent, and also as chairman to break a tie caused by his vote.

APPEAL by relator from *Webb, J.*, at September Term, 1923, of CATAWBA.

This action is brought to try the title of the relator of the plaintiff to the office of Superintendent of Public Instruction for the county of Catawba.

This cause was presented to the judge upon the agreement that he should hear the evidence and find the facts, and from consideration of the admissions in the record, together with the findings of fact by the court itself, it was adjudged that C. E. McIntosh, the relator of the plaintiff, has not been elected, and is not entitled to hold the office of superintendent of public instruction.

The trial judge, construing chapter 175, Laws 1923, held that the Board of Education of Catawba was composed of five members; that at the time of the election of a county superintendent of public instruction, W. G. Bandy was not entitled to vote by reason of having accepted another office; that the relator of the plaintiff at said election received two votes and the defendant received two, and that the defendant, Geo. E. Long, the incumbent, was entitled to hold over until his successor had been elected and qualified. The relator, C. E. McIntosh, excepted and appealed.

W. A. Self for relator.

A. A. Whitener and W. C. Feimster for defendants.

CLARK, C. J. The General Assembly, chapter 184, Laws 1919, appointed W. G. Bandy a member of the county board of education for a period of six years, and by chapter 185, Laws 1921, appointed Geo. E. Bisaner a member of the board for a period of six years, and by chapter 175, Laws 1923, increased the number of members of the Board of Education of Catawba from three to five members by electing Oscar Sherrill and C. C. Huitt for a term of six years each, and F. T. Foard for a

term of two years. At that time W. G. Bandy had still two years to serve and Geo. E. Bisaner four years. The appointment of Sherrill, Huitt and Foard for the terms mentioned seems to indicate the intention of the Legislature that at the time of the expiration of the terms of Bandy and Bisaner the membership of the board would be reduced to three, for the first section of said chapter 175, Laws 1923, fixed the number of the Board of Education for the county of Catawba and others named therein at three, but a later provision in that chapter, *i. e.,* the proviso to section 3, provides:

"The members of the board of education heretofore appointed for the counties of Ashe, Chatham, Catawba (and others named) shall not be changed or shortened, but they shall continue for the full time named in the act or acts appointing them." The Legislature in this statute gives no indication of a repeal of chapter 184, Laws 1919, under which Bandy had been appointed, nor of chapter 185, Laws 1921, under which Bisaner had been appointed, and, on the contrary, provides that the terms of Bandy and Bisaner and others in counties named "shall not be changed or shortened and shall continue for the full time named in the act or acts appointing them." So, taking the entire chapter, we understand the Legislature to mean that Catawba is one of the counties in which the board of education shall consist of three members only, but that, until the expiration of the terms of Bandy and Bisaner, there should be five.

It was admitted by the parties that an election was held on 7 May, 1923, at a meeting of the Board of Education of Catawba County in the courthouse at Newton, at which were present W. G. Bandy, Geo. E. Bisaner, Fred T. Foard, Chas. H. Huitt, and Oscar Sherrill; that it was held as the law directs, after being duly advertised; that Geo. E. Bisaner, who had previously been elected chairman, presided, and that a ballot was taken at which Fred T. Foard and Chas. C. Huitt cast their ballots in favor of the relator, and W. G. Bandy, Oscar Sherrill, and Geo. E. Bisaner cast their ballots for the defendant Long; that the said Long, prior to said election, had been in office for a period of sixteen years as Superintendent of Public Instruction of Catawba County, and has been holding the said office since said 7 May, 1923, by virtue of his election thereto in 1921.

The court held that W. G. Bandy, by reason of his having accepted a position as trustee of the Maiden Graded School, and discharged its duties, though he had not taken the oath of office as such, had vacated his office as a member of the board of education. The court held that the vote therefore stood two to two, and that the ballot thus cast did not constitute an election of the relator as superintendent of public instruction, and that therefore he has not been elected nor is he entitled to hold

the office of Superintendent of Public Instruction for the county of Catawba, and rendered judgment that he pay the costs of this action.

It is true in this case that Geo. E. Bisaner stated that if he had understood that Bandy could not vote he would have given his casting vote as chairman in favor of Geo. E. Long; but our understanding of the law applicable to all legislative and other bodies is that while the chairman or presiding officer can, if he so elect, give a vote on any measure before him, if he does so, he cannot cast a second vote in case of a tie. Bisaner, even if he had attempted to do so, could not cast a vote to make a tie and then a second vote to give a majority. The first vote alone would be valid, as his Honor correctly held.

"In all cases where a proceeding is not of a parliamentary nature, the presiding officer, as a member, votes in the first instance like any other member, and does not give a casting vote." Cushing Legislative Assemblies (9th Ed.), sec. 310.

By a rule of the House of Representatives, adopted in 1789, it is provided: "In all cases of ballot by the House, the Speaker shall vote; in other cases he shall not be required to vote unless the House be equally divided, or unless his vote, if given to the minority, will make the division equal; and in case of such equal division, the question shall be lost." *Ib.*, sec. 312.

In bodies like the U. S. Senate and most of the state senates, where the presiding officer (the Vice-President and lieutenant-governors) is not a member, the Constitution provides that he has only a casting vote in case of a tie.

It follows that Long must hold over until by a change in the personnel of the board a majority can be cast. It was stated on the argument here that Bandy, who has doubtless relinquished the second office which disqualified him, has now been reappointed a member of the board.

The judgment of the court below is

Affirmed.

ADA SIGMON, ADMINISTRATRIX OF C. A. SIGMON, v. SOUTHERN RAILWAY COMPANY AND YADKIN RAILROAD COMPANY.

(Filed 28 November, 1923.)

1. Carriers—Employer and Employee—Master and Servant—Contributory Negligence—Negligence—Federal Employers' Liability Act—Statutes.

A locomotive engineer, in inattention to "meet orders," running his train, at a junction, upon another track upon which the coming train was expected, resulting in a collision therewith, is guilty of contributory

negligence in causing the injury that resulted in his death; but in an action for damages against the railroad company therefor, under the Federal Employers' Liability Act, such negligence will not bar recovery, when it is shown that the conductor on the train should have avoided the injury by giving him timely signals to stop the train, and that in his presence the brakeman had signaled to go ahead, which would not have occurred had the conductor and flagman been observant of their duty.

2. Same—Damages—Comparative Negligence.

Under the provisions of the Federal Employers' Liability Act, where negligence and contributory negligence are shown, the jury are empowered to apportion the recovery according to the ratio which they find existed between the causal effect of the contributory negligence of the plaintiff's intestate, whose death resulted, and that of the negligence of the defendant.

3. Actions—Carriers—Principal and Agent—Joint Agencies—Negligence.

Where railroads are operated by the employees of both, an action against them both will lie for damages resulting from the negligence of the employers.

APPEAL by defendants from *Webb, J.*, at April Term, 1923, of CABARRUS.

This was an action against the Southern Railway Company and the Yadkin Railroad Company under the Federal Employers' Liability Act, for the negligent killing of C. A. Sigmon, engineer, the Yadkin Railroad being owned and operated by the Southern Railway Company.

C. A. Sigmon was an engineer on passenger train No. 3, operated by the defendants between Salisbury and Norwood, N. C. He was killed in a head-on collision between a passenger train and a freight train about one mile east of the Yadkin junction, where the Yadkin Railroad connected with the Southern Railway a short distance west of Salisbury. A "meet order" was issued at Salisbury by the defendants, known as a "double meet" order, fixing the meeting point of the two trains at said Yadkin junction. This order was given to the conductor, O. C. O'Farrell, of the passenger train, and was also given to the engineer. The conductor testified: "I am not sure whether Mr. Sigmon read the order to me or I read it to him. Anyway, I delivered it to him in Mr. Rainey's presence." The engine of the freight train belonged to the Southern Railway Company. The Yadkin junction was about one mile north of where the collision took place. The train left Salisbury on the day in question, 28 September, 1920, and the evidence of the flagman of the passenger train is that the conductor, O'Farrell, told him he had orders to meet the other train at Yadkin junction. At Yadkin junction the fireman "lined the switches" to cross over to the Yadkin Railroad track. The conductor was engaged in taking up the tickets while the

flagman was doing the work. At the junction the train did not stop as required by the meet order but passed on upon the track of the Yadkin Railroad Company, and a mile further on the collision occurred. The jury found upon the issues submitted that the death of the plaintiff's intestate was the result, in whole or in part, of the negligence of the officers, agents and employees of the Southern Railway Company and of the Yadkin Railroad Company, as alleged in the complaint. That the plaintiff's intestate, by his own negligence, contributed to his death, and assessed the damages. From a judgment on the verdict, the defendants appealed.

Evans & Galbraith, T. W. Maness, and Frank Armfield for plaintiff.
Manly, Hendren & Womble and L. C. Caldwell for defendants.

CLARK, C. J. This case is important, but the controversy lies within a very small compass. There can be no question that the intestate, the engineer, contributed to his death by his negligence in failing to obey the "meet order," which required him to wait at Yadkin junction for the arrival of the freight train coming from Norwood on the Yadkin Railroad. The jury have so found, and there is no question as to the correctness of the verdict, but it was also the duty of the conductor and flagman, when they found that the engineer had gone contrary to orders, to have signaled the train to stop. In this case the flagman testifies that he "forgot it," and the conductor, when asked why he did not give the signal to the engineer to stop, said that he "did not know why he did not." There was no telegraph office or telephone station at the junction, which is about one mile west of the station of the Southern Railway at Salisbury. It is in evidence that, while there was no contract in writing between the Southern and the Yadkin railways, the two roads were operated by the joint employees of the two companies.

From the time the train left the station at Salisbury until the collision occurred, a mile south of the Yadkin junction, the conductor did not give any signal. There were not the required two signals and a short signal to the engineer to stop at the junction. The conductor saw the flagman pull the two signals for the engineer to go ahead. He knew that the signals meant for the engineer to pull his train ahead and go upon the Yadkin track, but he went on taking up his tickets. The next thing the conductor knew was the collision. The train was worked by signals, and the purpose of the cord was to signal the engineer when to start and stop his engine.

The conductor was asked the following question: "When the flagman pulled that cord and started that man on, why did you not pull the cord and stop him?" and he answered, "I don't know why I did not do it."

Without elaborating the evidence, it is sufficient to say that it justified the verdict of the jury that the collision was caused by the negligence of the officers, agents and employees of the defendants. While the intestate was guilty of contributory negligence, there was ample evidence that the collision would not have occurred but for negligence on the part of the conductor and of the flagman.

Under the Federal Employers' Liability Act the jury was empowered to apportion the recovery according to the ratio which they found should exist between the causal effect of the contributory negligence of the engineer and that of the defendants in the conduct of the conductor and flagman.

In the verdict and judgment we find

No error.

R. L. KEARNS v. DAVIS BROTHERS.

(Filed 28 November, 1923.)

Mortgages, Chattel—Parol Agreements—Intent—Evidence.

It is not necessary to the validity of a chattel mortgage between the parties that it be in writing or in any particular form, and where the seller takes from the purchaser a chattel mortgage unintentionally left unsigned by the purchaser, the intent of the parties may be evidenced thereby, as well as by their admissions and other relevant circumstances tending to show their intent at the time of the transaction.

APPEAL by defendants from *Lane, J.*, at March Term, 1923, of UNION.

This is an action to recover principal and interest on a $450 note, and for the possession under a chattel mortgage of a Fordson tractor which the defendants had bought of the plaintiff. It was alleged in the complaint and admitted in the answer that the chattel mortgage in writing had been duly executed, but on the trial it appeared that though the defendants had agreed to the chattel mortgage, and it had been drawn by defendants, it had not actually been signed, and the defendants asked permission during the trial, and obtained leave, to amend their answer to allege that no written chattel mortgage had been executed.

The jury responded to the issues that plaintiff was entitled to recover of the defendants $450 and interest, and was entitled to possession of the property described in the complaint, and judgment was entered accordingly. Appeal by defendants.

Hammer & Moser for plaintiff.
C. N. Cox and Brittain, Brittain & Brittain for defendants.

CLARK, C. J. The defendants admit that they made the note to the plaintiff for $450 for balance due on the purchase of the tractor in question. The defendants allege misrepresentation in regard to the condition of the tractor, which the answer avers was not new nor all right and did not operate as represented, and set up a counterclaim. It is not necessary to consider the details of the controversy involved in the counterclaim because it was simply a matter of fact which the jury has answered against the defendants, and there is no dispute that $450 was the sum due by a note given as a balance due on the last payment for the tractor.

The real question at issue is as to the validity of the chattel mortgage, which the evidence shows was agreed to be given and which was drawn up, but on the trial appeared not to have been actually signed. The defendants objected to the introduction of the unsigned chattel mortgage as evidence and to the evidence which the court permitted to be introduced as to the filling out and acknowledgment of the unsigned memorandum, which the defendants admitted in their original answer was intended for a mortgage, but we think this evidence was competent and relevant, and the jury found that such paper-writing, although not signed, plainly and clearly expressed the intention on the part of the defendant to create a mortgage. No particular form is necessary to create a chattel mortgage. *McCoy v. Lassiter,* 95 N. C., 88; *White v. Carroll,* 146 N. C., 230. In the latter case *Walker, J.,* says: "We have held that no particular form of words is necessary to create a lien or constitute a mortgage, it being sufficient that the parties intended their agreement to operate as such. The law seeks after the common intention of the parties, and enforces it as between them when it is ascertained."

In *Odom v. Clark,* 146 N. C., 550, *Mr. Justice Hoke* says: "A valid mortgage of personalty can be executed without writing. It has been held with us that a chattel mortgage in parol is good between the parties without writing." *Moore v. Brady,* 125 N. C., 35; *Mower v. McCarthy,* 7 L. R. A. (N. S.), 418, and notes; Jones Chattel Mortgage, sec. 2.

The intention of the parties to create a chattel mortgage could not be more clearly and forcibly expressed than in this case, by the pleadings, by the evidence of the plaintiff and his witnesses, by the admissions of the defendants and the circumstances affecting and surrounding the entire transaction.

Upon the entire record we find no reversible error, and the judgment of the court below is

Affirmed.

D. A. RUDISILL v. FRANK LOVE AND R. C. McLEAN, ADMINISTRATORS, AND M. M. RUDISILL AND K. B. NIXON.

(Filed 28 November, 1923.)

Evidence—Deceased Persons—Statutes—Transactions—Parties—Adverse Interests—Executors and Administrators—Bills and Notes—Negotiable Instruments.

In an action to recover upon a note against the personal representatives of a deceased person, and others whose names appear thereon as joint principals, the admission in the pleadings that the others whose names appeared on the instrument as makers were in fact but sureties thereon, is incompetent as being a personal transaction, etc., with a deceased person, C. S., sec. 1795, it being in the interest of those thus claiming it, and against that of the deceased; and these interests being conflicting, the fact that they were all parties defendant does not vary the rule.

APPEAL by defendants, Frank Love and R. C. McLean, administrators of the estate of Edgar Love, deceased, from *Long, J.*, at May Special Term, 1923, of GASTON.

Civil action to recover upon the following promissory note:

"$7,500. CHERRYVILLE, N. C., March 1, 1920.

Six months after date, we promise to pay to the order of D. A. Rudisill seven thousand five hundred dollars, with interest from date at six per cent, for value received.

EDGAR LOVE. (Seal)
M. M. RUDISILL. (Seal)
KEMP B. NIXON. (Seal)"

Defense interposed by M. M. Rudisill and Kemp B. Nixon that they signed said note as sureties only, and that they are not liable thereon as principals.

Upon the issues thus raised, the jury returned the following verdict:

"1. Did the defendants execute the note set out in the complaint, as alleged in the complaint? Answer: 'Yes.'

"2. Are the defendants indebted to the plaintiff, as alleged in the complaint; and if so, in what amount? Answer: 'Yes; the amount of note, $7,500, and interest from 1 March, 1920.'

"3. Was the note sued on executed by the defendants, M. M. Rudisill and K. B. Nixon, as sureties for Edgar Love, to the knowledge of the plaintiff, D. A. Rudisill? Answer: 'Yes.'"

Judgment for the plaintiff in accordance with the verdict, from which the administrators of the estate of Edgar Love, deceased, appealed.

Woltz & Woltz, David P. Dellinger, and Geo. W. Wilson for plaintiff.

A. L. Quickel and Mangum & Denny for Frank Love and R. C. McLean, administrators.

STACY, J. On the hearing, and over objection of Frank Love and R. C. McLean, administrators of the estate of Edgar Love, deceased, plaintiff was permitted to offer in evidence a part of paragraph 5 of the answer of Rudisill and Nixon and the corresponding allegation in the fifth paragraph of the complaint, as follows:

Complaint: "5. That the defendants are justly indebted to the plaintiff in the sum of $7,500, with interest on $7,500 from the first day of March, 1920, until paid."

Answer of Rudisill and Nixon: "5. Answering the allegations of paragraph 5 of the complaint, these defendants deny that they are indebted to the plaintiff as principals upon the note referred to therein, and allege that the note was executed by Edgar Love as principal, and by these defendants as sureties thereon."

We think this evidence, tending to show the alleged suretyship of Rudisill and Nixon, was incompetent as against the administrators of the estate of Edgar Love, deceased, under C. S., 1795. It necessarily involved a personal transaction or communication between the defendants, Rudisill and Nixon, and the deceased, for upon the face of the note they all appear to be principals. Obviously, if the contention of the defendants, Rudisill and Nixon, be correct, some different understanding must have existed between the parties to the transaction. Rudisill and Nixon, being parties to this proceeding and interested in the event, may not testify to any such transaction or communication with the deceased, over objection of the administrators. The fact that Rudisill and Nixon are codefendants with the administrators cannot have the effect of rendering this evidence competent, because their interests are in conflict with the interests of the administrators. *Sutton v. Wells,* 175 N. C., 1.

For the error, as indicated, there must be a new trial on the third issue; but the new trial will be limited to this issue, as we find no error in respect to the others. *Pickett v. R. R.,* 117 N. C., p. 639.

Partial new trial.

OTELIA CUNNINGHAM ET AL. v. J. A. LONG ET AL.

(Filed 28 November, 1923.)

1. Trusts—Parol Trusts—Statute of Frauds.

At common law, a trust in favor of a mortgagor of land may be engrafted upon the legal title acquired by the purchaser at the foreclosure sale by a parol agreement between them, that the latter should convey the legal title upon repayment by the mortgagor of the price such purchaser had paid, with the interest thereon to date of payment, and the seventh section of the statute of frauds requiring that a writing to that effect be signed by the parties, etc., being omitted from the statute in this State, is not in effect here, and such writing is not required, the matter standing as at common law.

2. Same—Evidence.

Evidence that before and after the foreclosure sale, under mortgage, the purchaser agreed with the mortgagor, a close personal friend of his, that he would bid in the property and hold the title for his benefit until he could repay the purchase price with interest thereon; that the price so paid was much less than the value of the lands; that the purchaser was wealthy and had declared that he had all the lands he wanted, and did not desire the lands for himself or family, is sufficient of facts and circumstances *de hors* the deed inconsistent with the idea of an absolute purchase to take the case to the jury upon the issue as to whether a parol trust had been established in the mortgagor's favor.

3. Same—Questions for Jury.

In order to establish a parol trust in lands, the question whether the evidence, if sufficient, is clear, cogent and convincing, is one for the jury.

4. Same—Tender.

In order to enforce a parol trust upon the title to lands, it is not necessary that an actual tender of the consideration should have been made, when it is made to appear that the holder of the legal title had refused to recognize the trust and would have refused to accept the tender had it been made.

5. Trusts—Parol Trusts—Laches.

Held, in this case there was evidence tending to show an express trust with an indefinite period for the redemption of the land, the subject of the trust, and there was nothing shown of record that concluded the plaintiff, on the ground of laches or unreasonable delay, from enforcing it.

APPEAL by plaintiffs from *Bond, J.*, at April Term, 1923, of DURHAM.

Civil action. J. S. Cunningham instituted the action on 27 March, 1920, and filed his complaint on or about 5 April following. His amended complaint was filed 4 November, 1921. He died on 4 April, 1922, and at the May term his heirs were made parties plaintiff.

In the amended complaint it is alleged that J. S. Cunningham was the owner of certain lands in Person County; that on 10 June, 1903,

and 5 June, 1905, he and his wife executed certain deeds of trust for a portion of said lands to W. W. Kitchin, trustee, for the purpose of securing certain indebtedness of said Cunningham; that on 30 March and 30 December, 1907, he and his wife executed other deeds of trust to J. S. Bradsher, trustee, to secure other indebtedness of said Cunningham; and that on 4 December, 1909, both trustees made sale of said lands and J. A. Long became the highest bidder for the several tracts at the aggregate price of $16,625. These allegations were admitted by the defendants.

Section 12 of the amended complaint is as follows:

"That on or about 1 November, 1909, and on other dates subsequent thereto, and prior to the purchase of the lands by J. A. Long, who was the lifelong friend of the plaintiff, in whom the plaintiff reposed absolute confidence, and who was under many and great obligations to said plaintiff, he agreed with plaintiff that he would buy the said land at the said trustee's sale and hold the same for plaintiff, and convey the same to plaintiff upon the repayment to him of the said purchase-money and interest, and said plaintiff agreed with J. A. Long that he would repay to him the purchase-money and interest; that the substance of said agreement was that said Long would purchase and hold said land in trust for plaintiff, and the plaintiff would repay him the said purchase-money and interest thereon. That said parol agreement was made by said J. A. Long in his office in the town of Roxboro, N. C." The defendants denied these allegations.

In answer to section 14 of the complaint the defendants admitted that they had received a letter from J. S. Cunningham written 14 February, 1920, which was "similar in substance" to the following:

"On 4 December, 1909, lands amounting to 2,043 acres, situated in Woodvale Township, Person County, on the waters of Hyco Creek, Gent's Creek, Story's Creek and Marlowe Creek, adjoining the lands of Mrs. Mollie Walters and the late C. S. Winstead, Walter Williams, W. M. Faulkner, George G. Moore, J. G. Rogers and others, were sold by J. S. Bradsher and W. W. Kitchin, trustees, under deeds of trust executed by me, for the aggregate price of $16,626. They were purchased by Mr. James A. Long, deceased, and are now held by his widow and heirs at law. Mr. Long purchased these lands under and in pursuance of a trust agreement with me, made before the sale, and afterward confirmed by him, that he would buy and hold the lands for me, and convey them to me, upon the repayment to him of the said purchase-money and interest. Mr. Long thus held the lands in trust for me, and they have descended to you subject to the said trust agreement. I now offer to repay to you, in such proportions as you may agree

amongst yourselves, the said purchase price and interest, without delay, and I demand that you shall, upon such payment, reconvey the said lands to me. I ask that you will inform me at once whether you will comply with my demand, and in what proportions the said purchase-money shall be paid to you. I have heretofore made this demand. I am sending a copy of this letter to each of you. I will thank you for an early reply."

The defendants admitted that they are the heirs of J. A. Long, who died intestate 12 April, 1915, but denied that the lands descended to them subject to the asserted trust, and further alleged in section 15 of the amended answer:

"It is admitted that only one of the defendants, to wit, J. A. Long, Jr., responded to said letter, and his reply stated that he would not convey said lands, but said letter was written by him on behalf of all of the defendants. And these defendants say that said J. A. Long, deceased, went into the possession of the lands referred to in the complaint and amended complaint filed herein very soon after 4 December, 1909, and remained in possession thereof until the day of his death, to wit, 12 April, 1915; and these defendants have been in the quiet, peaceable, open, notorious and adverse possession of said lands ever since the day of the death of the said J. A. Long, all to the knowledge of the plaintiff. That this action was not commenced until 27 March, 1920, nearly five years after the death of the said J. A. Long, and more than ten years after said lands were sold; that if there was an agreement existing between the plaintiff and the said J. A. Long, as alleged in the complaint and the amended complaint, this fact was, of course, known to the plaintiff during all of said last-mentioned period of time, and he could and should, in good conscience, have brought his action to enforce the performance of said alleged agreement before the death of the said J. A. Long, in order that he might have an opportunity to testify therein; and these defendants are advised and believe, and therefore allege, that the plaintiff has, by laches, forfeited his right to bring and prosecute this action, and that it would be inequitable to permit him to recover herein."

W. M. Cunningham testified as follows:

"My name is William Murray Cunningham. I now live with my family at Arden, N. C., but my home is in Danville, Va. I am a brother to the late Col. John S. Cunningham. I knew J. A. Long and knew him all my life. Some time during the latter part of August or in September, 1910, I was in Roxboro, N. C. On that visit to Roxboro I had a conversation with Mr. J. A. Long, now deceased. I had the conversation at the hotel in Roxboro. It was in the evening a little

while before supper. I did not hunt up Mr. Long, he came to me; he came up to the hotel. I was in the lobby when he came in. I had a conversation about the sale of my brother's land, the late John S. Cunningham. While I was in the lobby Mr. Long came up there and we got in a conversation—I came up from South Boston to Roxboro on some business and was stopping at the hotel and while I was up there Mr. Long came up there in the evening—how long before supper I do not exactly remember, and he spoke to me in the lobby and we talked along in general conversation, and he asked me if I had any business to attend to, and I told him 'No,' I did not have anything. And he said, well he would like to see me, and asked me to go on the porch and sit down and talk with him, and I did, and after talking for a while he said he was very much distressed about the Colonel's affairs. That was my brother; he always called my brother, John S. Cunningham, Colonel. He said that he was distressed at the Colonel's affairs and that he was glad to be in a position to help him. He told me he bought this land at the sale for Colonel Cunningham with the understanding that he would give Colonel Cunningham all the time he wished, and whenever he got ready to pay for it he could pay him. He stated that he did not care for the land; that the land was cheap and he and his sons had all the property they wished for, and he promised him none of the land would ever be sold. He stated that he was sorry that Mrs. Cunningham and her family had to leave and that he hoped they would soon get back their property; and he said he had told his family none of this property was to be sold, and he promised him all the time that his wishes would be carried out. He stated also that none of the timber would be sold off this place, and no timber should be cut except for the use on the property. At that time Mrs. Cunningham had not moved off the farm. I think they moved some time about December of the same year. I never heard anything about the relation between J. A. Long and Colonel Cunningham except that they were the best of friends. They visited each other. Mr. Long told me that he visited the Colonel's home a great deal and was never shown more hospitality than in the Colonel's home. I know the general reputation as to the means of J. A. Long. According to reputation, he was always supposed to be worth a half million.

"I know the lands that were owned before this sale by my brother, that 2,000 acres, pretty well. I had known that tract of land all my life. The land was worth $35 to $40 per acre in the latter part of 1909.

"The Colonel Cunningham home place, the old dwelling and mansion, was on this 2,000 acres. There was much timber. Right many creeks ran through it. There were seven or eight tenant houses and overseers'

houses on it. It was located five or six miles from the Atlantic and Danville Railroad, that being from the Colonel's home place, to Cunningham Station."

The following questions were propounded by the plaintiffs to the witness W. M. Cunningham, and the following answers were made by him thereto:

"Q. You stated that Mr. Long said Colonel Cunningham could get back the land whenever he paid him the money. Did he specify what money was to be paid? A. No, sir; he did not specify how much.

"Q. Did he specify what money? A. The amount of money loaned him on his farm?

"Q. The amount Mr. Long paid for it. A. Yes, sir."

It was admitted that J. S. Cunningham moved off the land in December, 1910, and that he and those claiming under him have not occupied it or received the rents and profits from it since that time.

At the close of the evidence the defendants moved to dismiss the action as in case of nonsuit. The motion was allowed, and the plaintiffs excepted and appealed.

Pou, Bailey & Pou, Brawley & Gant, John W. Hinsdale, and Douglass & Douglass for plaintiffs.

W. D. Merritt, Luther M. Carlton, Brogden, Reade & Bryant, and Fuller & Fuller for defendants.

ADAMS, J. The object of the action is to establish a parol trust. The tracts of land described in the deeds were sold by the trustees on 4 December, 1909, and purchased by J. A. Long, under whom the defendants claim title. The plaintiffs allege that on or about 1 November, 1909, and at other times subsequent thereto, and prior to the sale, the purchaser agreed with J. S. Cunningham that he would buy the land in question at the trustees' sale and hold it for said Cunningham, and convey it back to him upon repayment of the purchase-money and interest; that said Cunningham agreed to repay this amount; and that by virtue of the agreement the purchaser accepted, and the defendants now hold the legal title in trust for the plaintiffs.

The defendants deny that such agreement was made, and insist that the purchaser acquired the legal title under absolute conveyances, having done nothing which was inconsistent with complete ownership, and that they have succeeded to his interest in the property conveyed.

The alleged agreement was in parol. It was not essential that it be in writing. At common law it was not necessary that a trust should be declared in any particular way; consequently it was provided by the seventh section of the statute of frauds that all declarations or crea-

tions of trusts or confidences in any lands, tenements or hereditaments should be manifested and proved by some writing signed by the party enabled by law to declare such trusts, or by his last will in writing. But this section has not been adopted in North Carolina, and, as there is no other statute which requires the declaration of a trust to be in writing, the matter stands as at common law. Therefore such declaration, as *Chief Justice Pearson* said in *Shelton v. Shelton,* 58 N. C., 292, may "be made by deed or by writing, not under seal, or by mere word of mouth." *Foy v. Foy,* 3 N. C., 131; *Strong v. Glasgow,* 6 N. C., 290; *Cook v. Redman,* 37 N. C., 623; *Riggs v. Swann,* 59 N. C., 119; *Ferguson v. Haas,* 64 N. C., 773; *Shields v. Whitaker,* 82 N. C., 516; *Pittman v. Pittman,* 107 N. C., 159; *Sykes v. Boone,* 132 N. C., 200; *Gaylord v. Gaylord,* 150 N. C., 227; *Jones v. Jones,* 164 N. C., 321; *McFarland v. Harrington,* 178 N. C., 189.

While not directly assailing this principle, the defendants say that the plaintiffs have undertaken to engraft a trust upon deeds purporting to convey a fee; that such trust must be established by evidence *de hors* the deeds; that the alleged declarations of the purchaser are not supported by such evidence, and that the nonsuit was properly granted.

In *Clement v. Clement,* 54 N. C., 184, the object of the bill was to convert the defendant into a trustee for the plaintiffs on the ground that the defendant's intestate had purchased a slave named George for and with the money of Lawrence Clement, under whom they claimed, and had taken the conveyance to himself; and the Court said that the intention must be established, not merely by proof of declarations, but, in addition, by proof of facts and circumstances *de hors* the deed inconsistent with the idea of an absolute purchase by the party for himself. See, also, *Hinton v. Pritchard,* 107 N. C., 128; *Hemphill v. Hemphill,* 99 N. C., 436; *Briggs v. Morris,* 54 N. C., 193; *Brown v. Carson,* 45 N. C., 272. In *Williams v. Honeycutt,* 176 N. C., 103, it was held that the declarations of a purchaser made after the sale and transmission of the legal title were competent to prove the previous agreement; and in *Ferguson v. Haas, supra,* it is suggested that it would be hard to conceive of a case which could be founded on words only, without some corroborating acts and circumstances.

As we understand it, the evidence in the instant case discloses several circumstances tending to corroborate the alleged declarations of the purchaser. Among other circumstances are these: J. S. Cunningham was in financial straits; he had executed several deeds of trust to secure his creditors; he had found it difficult to raise money; the purchaser of the land was wealthy; he was Cunningham's friend; the land sold by the trustees embraced 2,043 acres, worth from $70,000 to $80,000; it was bought at the sale for $16,625; Cunningham remained on the

land until December, 1910; the purchaser did not care for the land; and it was not to be sold and no timber was to be cut except for keeping up the farm. Of course, as to the merits of the evidence we have nothing to say; but when we consider it in the light most favorable to the plaintiffs, we regard it of sufficient probative force to be considered and passed upon by the jury. The evidence, it is true, must be clear, cogent, and convincing, but whether it meets this requirement is a matter for the jury and not for the court. *Cobb v. Edwards,* 117 N. C., 245; *Lehew v. Hewitt,* 130 N. C., 22; *Avery v. Stewart,* 136 N. C., 426; *Cuthbertson v. Morgan,* 149 N. C., 72; *Hendren v. Hendren,* 153 N. C., 505; *Taylor v. Wahab,* 154 N. C., 220; *Boone v. Lee,* 175 N. C., 383; *Lefkowitz v. Silver,* 182 N. C., 339.

The defendants further contend that in any event it was not incumbent upon them or their ancestor to reconvey the land until the purchase price was paid, and that neither payment nor tender had been made. In the letter written the defendants by J. S. Cunningham is the following language: "I now offer to repay you, in such proportions as you may agree amongst yourselves, the said purchase price and interest without delay, and I demand that you shall upon such payment reconvey the said lands to me." It is admitted that J. A. Long answered this letter on behalf of all the defendants, and declined the offer and refused to reconvey the land. Under these circumstances a more formal tender of the purchase-money would have been idle, for obviously it would have accomplished nothing. A tender is not necessary when it is reasonably certain that it will be refused. *Phelps v. Davenport,* 151 N. C., 22; *Gallimore v. Grubb,* 156 N. C., 575; *Gaylord v. McCoy,* 161 N. C., 686; *Headman v. Comrs.,* 177 N. C., 263.

The defendants interpose the additional objection that J. S. Cunningham made no assertion of his claim until about five years after the death of J. A. Long, the purchaser, and that it would be inequitable for this reason to enforce the alleged trust; and in support of this position they rely on the doctrine stated *In re Dupree's Will,* 163 N. C., 256, and in *Coxe v. Carson,* 169 N. C., 132. In the first of these cases it is said that after a will had been regularly proved in common form the right to file a caveat prior to 1907 (Public Laws, ch. 862) was forfeited by acquiescence or unreasonable delay, and while the time required at common law for the operation of the principle was not definitely fixed, twenty years was the period generally prevailing. And in *Coxe's case* it was held that without reference to the statute of limitations, those who had delayed for more than thirty years to assert their claim to land said to have been held upon a parol trust would be deemed to have lost their rights. Neither of these cases is necessarily decisive of the question here presented. In the instant case there is evidence tending

to show an express trust with an indefinite period for the redemption of the land; and in the record as it now appears we find nothing which concludes the plaintiffs on the ground of laches or unreasonable delay. The statute of limitations was not pleaded.

The judgment of his Honor dismissing the action as in case of nonsuit is reversed to the end that the controversy be determined as provided by law.

Reversed.

STATE v. ROY HUMPHREY.

(Filed 28 November, 1923.)

1. **Appeal and Error—Service of Case—Settlement of Case—Discretion of Court—Extension of Time to Serve Case—Statutes.**

   Before the amendment of 1921, C. S., sec. 643, conferred no power upon the trial judge to enlarge the statutory time for the service of appellant's and appellee's cases on appeal beyond that therein prescribed, and this formerly could only be done by the agreement of the parties; and the power conferred on him by the amendment is limited to his action during term, wherein the parties, being present, are put upon notice of their rights.

2. **Same—Term—Notice.**

   Where the appellant has served his case on appeal within the time extended by agreement, and the appellee has served his case beyond that agreed upon, it is not within the statutory discretion of the trial judge to settle the case thereafter, allowing appellee to file exceptions, the appellant's case being the proper case on appeal.

3. **Same—Districts—Counties—Statutes.**

   The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, under the provisions of C. S., sec. 644, except by agreement of the parties, or when the countercase or exceptions had been served, respectively, within the time prescribed by the statute. C. S., sec. 643.

4. **Criminal Law — Evidence — Character — Issues—Appeal and Error—Prejudice.**

   The solicitor may not comment to the jury, in a criminal action, on the failure of the defendant to testify at the trial in his own behalf, or the bad character of the defendant as a substantive fact to show guilt, when the defendant had not himself put his character in evidence on the issue.

APPEAL by defendant from *Long, J.*, at June Criminal Term, 1923, of MECKLENBURG.

Indictment for assault with intent to kill, and assault on a female. There was a verdict of guilty of assault on a female, with recommendation for mercy, sentence that defendant be imprisoned for twelve months

in the county jail and assigned to work the roads of the county during said time, and defendant excepted and appealed, assigning errors.

On the imposition of the sentence it was ordered by the court that appellant be allowed twenty days for serving case on appeal on the solicitor, and the solicitor be allowed twenty days thereafter to except or serve countercase. The case on appeal by appellant was prepared and served on the solicitor within the time specified, to wit, on 27 June, 1923. The countercase, containing the only exceptions made, was not served on appellant's attorney until 25 July, 1923, five days after time allowed. Thereupon appellant's case on appeal, with the record proper, was certified to Supreme Court and duly docketed for hearing.

Some time after the service of the countercase by the solicitor, both cases were sent by him to the judge who had presided at the trial, this apparently on 25 October, 1923, and at Fayetteville, N. C., who then undertook to settle a case on appeal, and directed that the same be filed as the case, and that the clerk notify counsel on both sides, and defendant allowed five days thereafter to file exceptions.

At the call of the cause in this Court, the Attorney-General suggested a diminution of the record, and moved that the case served by the court be docketed as the only correct and proper case on appeal. Motion disallowed, and cause heard and determined on case as tendered and served by appellant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. F. Flowers for defendant.

HOKE, J. Our general statute governing the settlement and service of cases on appeal (C. S., sec. 643) makes provision as follows:

"The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy, with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved."

And in the decisions construing the section it has been heretofore held that the time fixed by this statute for settlement and service of a case could only be changed by agreement of the parties, and that the

trial court itself was without power to change or modify the statutory period or to change or interfere with the agreement the parties may have made on the subject. *Lindsay v. Knights of Honor,* 172 N. C., 818; *Cozart v. Assurance Co.,* 142 N. C., 522; *Barber v. Justice,* 138 N. C., 20.

And it is further held that where exceptions or a countercase have not been properly made or served within the time specified, the appellant's case shall be deemed approved and constitute the proper case on appeal for this Court—a ruling that is in accord with the express provisions of the statute. *Barrus v. R. R.,* 121 N. C., 504; C. S., sec. 643, and citing among other cases *McNeill v. R. R.,* 117 N. C., 642; *Forte v. Boone,* 114 N. C., 176, to the effect that the failure to except or serve a countercase within the time required is not cured because the judge has thereafter undertaken to settle the case. This being the position that has hitherto prevailed, the Legislature of 1921, considering that it was not well that the trial court should be without any control or power in the premises, amended this section (643) by adding thereto a proviso, as follows: "*Provided,* that the judge trying the case shall have the power in the exercise of his discretion to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter-statement of case." Laws 1921, ch. 97.

In the exercise of the powers so conferred, the court in the present case fixed the time for preparation and service of appellant's case at twenty days, allowing twenty days thereafter for service of exceptions or countercase.

It will be noted that while the amendment referred to allows the trial judge in his discretion to fix the time for the preparation and service of the case and countercase, this being at times necessary to the seemly and efficient disposition of the matter, it does not otherwise modify or purport to modify the statute; and, therefore, whether the time allowed be that fixed by order of court, or, in the absence of such order, by agreement of the parties or in accordance with the law, unless a countercase is served or exceptions duly made within the time required, the case of appellant shall stand approved as the proper case on appeal. And we do not approve the position contended for, that the amendment of 1921 confers upon the trial judge the right at any time or place to change the time fixed upon by the statute. As a general rule, judgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested. *Cox v. Boyden,* 167 N. C., 321; *Bank v. Peregoy,*

147 N. C., 293; *Parker v. McPhail,* 112 N. C., 502; *McNeil v. Hodges,* 99 N. C., 248; *Bynum v. Powe,* 97 N. C., 374.

True, in section 644, C. S., the judge, under differing circumstances as therein set forth, may settle a case on appeal at any place within the district, on proper notice, and at times out of the district, but, as shown by a perusal of the section, that power does not arise to him except by agreement of the parties or when the countercase or exception had been made by appellee within the time "as prescribed." And an order fixing the time under the amendment should, as stated, be made at the term when the question is presented, so that the parties may then be advised of their rights in the matter.

The countercase, therefore, having been tendered after the time fixed by the judge's order, the case of appellant, being prepared and served within the time, becomes the proper case, and, in connection with the record, may alone be considered in determining the rights of the parties involved in the appeal. In that aspect it is conceded by the Attorney-General that reversible error has been shown, it appearing that on the trial the solicitor was allowed, over defendant's objection, to make adverse comment on the fact that the defendant did not take the stand as a witness in his own behalf, and also as to the bad character of the defendant as a substantive fact tending to show guilt, when defendant had not himself put his character in evidence on the issue, both of which objections must be sustained under our statute and decisions appertaining to the subject. *S. v. Traylor,* 121 N. C., 674; C. S., sec. 1799.

We consider it not improper to note that neither of these exceptions are presented in the case as settled by the careful and able judge who presided at the trial; but, for the reasons heretofore given, we are restricted to the facts as set forth in appellant's case on appeal, and the cause has been determined on the exceptions therein presented. So considered, defendant is entitled to a new trial, and it is so ordered.

New trial.

J. J. JONES v. J. D. WINSTEAD AND K. C. WAGSTAFF, ADMRS. OF J. W. WINSTEAD, DECEASED.

(Filed 28 November, 1923.)

1. Bills and Notes — Negotiable Instruments — Evidence — Execution — Presumptions—Consideration—Mental Capacity.

Where the execution of a negotiable instrument has been established in an action thereon, it is a rebuttable presumption that it had been given for a sufficient consideration, and that the maker had mental capacity to execute it, requiring the defendant, attacking its validity on these grounds, to disprove its validity by his evidence. C. S., secs. 3004, 3005, etc.

2. Same—Appeal and Error—Objections and Exceptions—Demurrer.

Where the maker of a negotiable instrument had been confined in an insane asylum twelve years before the execution of his note in suit, but since then had been actively and successfully handling his own large business affairs, the question as to presumption of insanity continuing, unless the contrary has been shown, so as to render the note invalid, should be by an exception to the refusal of a requested instruction to that effect, and not by motion as of nonsuit upon the evidence; but *held*, such a prayer, under the evidence in this case, should have been refused, the evidence being only of a circumstance tending to establish the defendant's position.

3. Same—Past Consideration— Executory Promise—Contracts.

Where one renders valuable services to another at his request, the law implies the latter's promise to compensate him for their reasonable value; and where the evidence is sufficient to show a mutual intent to this effect, a direct promise to pay, later made, is a sufficient consideration, and a note then given therefor is not objectionable as a promise to pay a past consideration without value received by the maker.

4. Contracts—Services—Consideration—Evidence—Questions for Jury.

Evidence of services rendered by plaintiff to his deceased uncle in the latter's lifetime, in looking after, collecting and disbursing the proceeds of his large crop of tobacco sold on warehouse floors, at his request, is sufficient of a consideration to support an action upon a note he had later given his nephew therefor.

5. Same—Fraud.

Held, in this case there was no valid objection to the adequacy of consideration given for the note sued on, in the absence of evidence of fraud or imposition sufficient to vitiate the contract.

CLARK, C. J., dissenting.

CIVIL ACTION, to recover on a promissory note for $4,000, given by intestate to plaintiff, and tried before *Devin, J.*, and a jury, at August Term, 1923, of PERSON.

Defendants answered and alleged that the note sued on was given without any consideration. Second, that when same was given, the intestate was without sufficient mental capacity to execute it. On the trial, plaintiff proved the due execution of the note, in form as follows:

"April 14, 1919. One year after date, I promise to pay J. J. Jones the full and just sum of $4,000 for value received of him. Interest, five per cent. (Signed) J. W. Winstead."

Defendant offered testimony tending to show that at the time of the execution of the note the intestate was not of sufficient mental capacity to execute the note; and, second, that the same, being executory, was without valuable consideration. In support of the first position, showed among other things that intestate had been three times, at different periods, confined in the insane asylums of the State, the last

time being twelve years before the note was given, and that since his discharge on the last occasion he had never been of sound mind or of capacity to execute the note sued on.

In reply plaintiff offered evidence tending to show that since coming from the State Hospital, twelve years ago, intestate had been in control and management of his own property; that he had a large landed estate, was a good trader, rented out his property himself, and accumulated property; that the note had been executed by intestate in payment of services theretofore rendered by plaintiff to the intestate and in recognition of the claims plaintiff had upon him, and it appeared that the annual interest had been receipted for on the note as per agreement between plaintiff and intestate. The cause was submitted to the jury, and verdict rendered, as follows:

"1. Was the note sued upon executed without any consideration? Answer: 'No.'

"2. Was J. W. Winstead, at the time of the execution of the note, without sufficient mental capacity to execute same? Answer: 'No.'

"3. What amount is due on said note? Answer: '$4,000.' "

Judgment on the verdict, and defendants excepted and appealed, assigning errors.

Luther M. Carlton and William D. Merritt for plaintiff.

Brogden, Reade & Bryant, M. C. Winstead, and F. O. Carver for defendants.

HOKE, J. The execution of the note, a negotiable instrument, having been duly proven, and same put in evidence, under our statutes and decisions applicable, there is a presumption that it was given for value, and the question of a lack of consideration is a matter of defense, the burden being upon the defendant to establish it. *Piner v. Brittain,* 165 N. C., 401, and authorities cited; C. S., ch. 58, secs. 3004 and 3006, etc. There is also a rebuttable presumption that the promissor was sane at the time of the execution of the note, and on that question the burden of showing the contrary, as a general rule, is upon the defendant or the person alleging it.

The court charged the jury generally in accord with these principles, submitting the opposing evidence under full and appropriate instructions, and referring to the fact of defendant's confinement in the asylums of the State, and his condition while there, as circumstances tending to establish defendant's position. Under these instructions the jury have rendered their verdict for plaintiffs, and, after careful consideration, we can find no valid reason for disturbing the results of the trial.

It is very earnestly contended by defendants that, on the entire evidence, if believed by the jury, including that of plaintiff himself, the note was without any valuable consideration, and his Honor should have so ruled, in accord with their prayer for instructions to that effect. On that question plaintiff, a witness in his own behalf, testified among other things that plaintiff, at the time of the execution of the note, and for some time prior thereto, was engaged in the sale of tobacco as employee of a warehouse company at South Boston, Va.; that intestate, owning a large body of land in this State, having numbers of tenants thereon, was in the habit of sending the tobacco grown on his farms to South Boston for sale, and not infrequently, pursuant to intestate's request, by note or otherwise, plaintiff would look after these sales and the disposition of the purchase price, following in such matters defendant's directions given him. Speaking more directly to the execution of the note and the circumstances attending its execution (admitted without objection), the witness said:

"He came over to South Boston one day, and I was busy in the office, and he came in there and told me he wanted to see me, and we went out in the warehouse and sat down on a truck, and he told me that I had been nice to him in South Boston. Lots of times he would send tobacco. Some of his tenants would come over and sometimes sell with me; and if he did not come himself, he would phone me or write me a letter and tell me what to do with the check, and sometimes he would say let one have so much and send me a check for the rest, and I always did just as he told me. He told me he appreciated what I had done for him; that Uncle Charles, who had died a few years ago, did not leave me anything, as he did some of the rest of his people, and he wanted to help me, and I had been nice to him, and he appreciated what I had done for him, and he was going to give me this note. He said, 'I may pay you the money for this before I die,' but he said, 'I am getting to be an old man and I do not know when I will die.' But he said, 'If I die before I pay it, my estate will be worth it, and I want you to collect it.' And that is what I am trying to do. He asked me to credit the interest on this note, and he asked me to send him a receipt, and I sent it to him, and he asked me did I credit the interest after I sent him the first receipt; and he was over there some time later and asked me did I credit it on the note, and I told him I did."

Again, on cross-examination, witness testified as follows: "I was engaged in the warehouse business for somebody else. He did not sell much tobacco with me. He owned some stock in the Independent Warehouse, and I think his people sold more there than anywhere else. But he did sell some at the other warehouses. He did not sell so much tobacco with me, but if he wasn't coming himself he would usually

write me or get somebody to phone me, and he would tell me who was coming and what warehouse they were going to be at, and tell me what he wanted done—if he wanted to let them have anything, and what to do with the other."

"Q. As a matter of accommodation to him, you did as he requested? A. Yes, sir.

"Q. He did sometimes sell tobacco at your warehouse? A. Yes, sir.

"Q. Of course, when he sold tobacco at your warehouse, if he wanted you to do something with the money, you would do it? A. Yes, sir."

On this, the evidence chiefly pertinent, it is insisted for appellant that the facts only present an executory promise to make compensation for a "past consideration," and that the same does not constitute value within the meaning of the exception. It is said by Professor Page, in his valuable work on contracts: "At modern law, the term 'past consideration' means that a right has been acquired or forborne, under circumstances that either never created any legal liability, to pay therefor, or if there was a legal liability originally, subsequent facts have amounted to a discharge. It does not, of course, mean that a promise may not be supported by a prior legal liability as a consideration, whether absolutely valid, voidable, or subject to some subsequent defense. It does not include cases in which the consideration is a legal liability which arose before the promise was made, and upon which the promise is based. Such forms of consideration are sufficient. As used in this sense, a past consideration is no consideration, at modern law, in most jurisdictions." Page on Contracts (2d Ed.), sec. 625.

It will be observed that the evidence all shows that the services in the instant case were rendered by request, and some of the old English decisions, and probably some in this country, seem to be to the effect that wherever services are done by request of another this will import a sufficient consideration. But these decisions, so far as examined, were cases where a request was necessary to create liability, and, on the facts presented, did create it; and a more careful examination of the principle as pertinent to the facts of the instant case will show, in accord with the above citation, that the question properly depends on whether the present executory promise to pay was given for services formerly rendered, and under circumstances which created a legal liability. In such case the services, though at a former time, will suffice as a valid consideration for the subsequent promise, and this in turn usually depends on whether the services were given and received without expectation of pay. In *Winkler v. Killian,* 141 N. C., at p. 578, the Court, in speaking to the general principle involved, said: "It is ordinarily true that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such

services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth. This is a rebuttable presumption, for there is no reason why a man cannot give another a day's work as well as any other gift, if the work is done and accepted without expectation of pay."

And in one of the cases cited and relied on by defendants (*Harper v. Davis, Admr.,* 115 Md., 349), it is held, among other things, as stated in report of case in 35 L. R. A. (N. S.), 1026: "A note given by a man to a stranger in blood, who entered his family and lived there as a daughter, having all the privileges of any member of the family, the past services, which were rendered without any intention on her part of charging for them, or on his part of making compensation for them, is without consideration, and cannot be enforced by the payee."

Considering the facts in evidence in view of these decisions and the principles they approved and illustrate, it appearing that the services were rendered by request, that they were of a kind ordinarily importing liability and that the intestate in acknowledgment of their value subsequently gave to plaintiff the note sued upon, this being a relevant circumstance showing his concept of the matter, we think it a permissible inference that the services were not given and accepted as a gratuity, but under circumstances that established a legal and enforceable liability which required that the case be submitted to the jury, and the court could not have instructed the jury, as requested, that no valuable consideration had been shown.

Defendants except further that, it having been made to appear that the intestate had been confined on three different occasions in the asylums for the insane, the court should have instructed the jury that there was a presumption that the conditions then presented were presumed to continue, whereas these facts were only submitted as circumstances tending to show insanity. It might be a sufficient answer to this exception that there was no prayer for instruction as a basis for this exception, but on the record we are of opinion that the same could not have been properly given. It is true that when insanity has been shown to exist as an habitual or permanent condition there may arise a rebuttable presumption that the same will continue, but the position, in our opinion, does not apply here, because the evidence does not establish the requisite data, and because the fact in question, occurring twelve years after the intestate's last discharge from the asylum, is too remote for a proper application of the principle referred to, and more especially when there are facts in evidence tending to show further that since his last discharge the intestate has exercised general supervision and control of his business affairs and been successful in their management. *Hudson v. Hudson,* 144 N. C., 449-454; Lawson on Presumptive Evidence, 227.

Nor is there any valid objection for inadequacy of consideration, in the absence of any allegation or evidence of fraud or imposition vitiating the contract. *Institute v. Mebane,* 165 N. C., 644-650; 6 R. C. L., title Contracts, sec. 85.

On consideration of the entire record, we are of opinion that no reversible error has been shown, and the judgment is therefore affirmed.

No error.

CLARK, C. J., dissenting: This action is on a note for $4,000, purporting to have been executed by defendants' intestate. The defendants' intestate died in April, 1922. He lived alone at his home in Person County, doing his own cooking and house work a part of the time. He was three times an inmate of the Hospital for the Insane. The first time, some twenty-five years before his death, he was taken to the hospital at Morganton for treatment, and was an inmate for twelve months. Some years later he was again an inmate of the same institution. About ten or eleven years before his death he was an inmate of the State Hospital at Raleigh for about six months. He was never discharged from that institution, but his brother brought him home on leave, and he never returned. From that time until his death he continued to live alone at his home. He was exceedingly "close" in money matters, but at times had a sort of mania for giving notes and making offers of financial assistance among his relatives. He gave at sundry times in this way several notes to his relatives, and among others offered to give a nephew $5,000 and a brother a note for $10,000. These offers, in most cases, were refused, because it was well known in the family that the intestate was of insane or feeble mind, and there was a tacit understanding that none of them would take advantage of his situation. Even among those who accepted the notes, none of them have presented any of such notes for payment, except this plaintiff, a nephew.

On 4 April, 1919, the defendants' intestate gave the plaintiff a note for $4,000, not under seal, saying to him that he had been nice to him and he appreciated it. He further told the plaintiff to credit the interest on the note as it fell due, as if it had been paid, and send him a receipt for it. The administrators refused to recognize the note as a valid obligation of the estate.

It would seem very clear, upon the facts of this case, that the estate of the intestate should not be subjected to the payment of this note. Among the errors assigned are: The court charged the jury that "the burden of proof was on the defendants to satisfy them by the greater weight of the evidence that at the time of signing the note in controversy the intestate did not have sufficient mental capacity to execute the note." Generally speaking, this is a correct proposition of law, but

under the evidence in this case the burden of proving mental capacity should have been cast upon the plaintiff who asserted it. It is not denied that the defendants' intestate was treated at the hospital at Morganton on two occasions—the first about twenty-five years before his death, and that about ten or eleven years before his death he was taken to the State Hospital at Raleigh, where he remained about six months, and was never discharged as cured, but was permitted to accompany his brother home on leave. His brother testified as follows: "He was not discharged as being cured. I wrote the doctor and asked him to let my brother come home, as he kept writing me that he wanted to come home, and the doctor refused, unless I would come down. The doctor told me that he would not discharge my brother, but would let me take him home." This evidence was uncontradicted. The intestate was, therefore, under a legal adjudication of being insane, and was not discharged by the authority of the physician, but, being allowed to go home, he simply did not come back. Upon this testimony the burden was upon the plaintiff to prove by the greater weight of the evidence that the deceased had recovered and that he had sufficient mental capacity to execute the note.

When insanity is once shown to exist, there is a presumption that it continues, unless there is testimony showing the restoration of mental soundness, the burden of which is upon him to assert it. *Beard v. R. R.*, 143 N. C., 140; *Weedman's Estate,* 254 Ill., 504.

This $4,000 ought not to be a burden upon the estate unless it was shown by the greater weight of the evidence that the intestate's mental capacity was sufficient to authorize the jury to find that his mental condition had been restored.

There was no evidence whatever of a consideration for this or the other notes which the deceased at times would scatter around liberally, and which all had refused to profit by, except this nephew. There was evidence of slight kindnesses or exchange of courtesies between the deceased and this nephew, but no evidence of any substantial "service" justifying an obligation to pay the plaintiff $4,000. The court erred in charging that "these services, though they were past consideration, would be sufficient consideration for the note if they were of valuable consideration." This was an expression of opinion by the judge that there had been services rendered.

The appellant, in apt time and in writing, requested his Honor to charge the jury as follows: "The court charges you that if you believe the testimony of the plaintiff, J. J. Jones, there was no consideration for the note sued on, you will therefore answer the first issue 'Yes.'" Upon the inspection of the testimony it was error in the court to refuse to so charge. The defendants in apt time also requested his Honor to

charge the jury, "if they believed the evidence they would answer the first issue 'Yes.'" It was error to refuse to give this instruction, for there is no testimony that could have justified the jury in finding that there was any legal consideration.

Past services may constitute a sufficient consideration to support a note, provided they are such services, rendered under such circumstances, as to create a legal obligation to pay for them, but the evidence in this case totally failed in this respect.

It was also error to allow the plaintiff to testify as to the alleged acts of kindness upon which he asserted his claim that this note for $4,000 was given for a sufficient and valid consideration. The testimony of the plaintiff was incompetent under C. S., 1795 (formerly C. C. P., sec. 343, and Code of 1883, sec. 590), which provides: *"A party to a transaction excluded when the other party is dead.* Upon the trial of an action, on the hearing upon the merits of a special proceeding, a party or person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator, etc., of a deceased person except when the executor, administrator, etc., is examined in his own behalf . . . *concerning the same transaction or communication,"* and the administrators did not testify as to such "transaction or communication."

The testimony of the plaintiff in this case was admitted as follows: "Mr. Winstead executed the note for $4,000 to me. He came over to South Boston one day, and I was busy in the office, and he came in there and told me he wanted to see me, and we went out in the warehouse and sat down on a truck and he told me that I had been nice to him in South Boston. Lots of times he would send tobacco; some of his tenants would come over and sometimes sell with me, and if he did not come himself he would phone or write me a letter to tell me what to do with the check, and sometimes he would say let one have so much and send him the check for the rest, and I did just as he told me. He told me he appreciated what I had done for him. That Uncle Charles, who died a few years ago, did not leave me anything as he did some of the rest of his people, and he wanted to help me, and I had been nice to him and he appreciated what I had done for him and he was going to *give* me this note." Again he says: "He told me I had never bothered him about anything and never had borrowed money from him. He said some of the rest had, and he felt like he wanted to do something for me, and I was named after him, and he appreciated what I had done for him over there."

On cross-examination the plaintiff testified further: "I was engaged in the warehouse business for somebody else. He did not sell much tobacco with me. He owned some stock in the Independent Warehouse,

and I think his people sold more there than anywhere else, but he would sell some at other warehouses. He did not sell so much tobacco with me, but if he was not going himself he would usually write to me or get some one to phone me, and he would tell me who was coming and what warehouse they were going to sell at, and tell me what he wanted done. If he wanted to let them have anything, and what to do to the others."

He testified further on cross-examination:

"Q. As a matter of accommodation to him, you did as he requested? A. Yes, sir.

"Q. He did sometimes sell tobacco at your warehouse? A. Yes, sir.

"Q. Of course, when he sold tobacco at your warehouse, if he wanted you to do something with the money you would do it? A. Yes, sir."

The plaintiff's case on the issue of consideration must stand or fall by this testimony.

In this there is nothing to raise a legal obligation on the part of the deceased, and nothing whatever to indicate that the plaintiff at the time of the services rendered, if they can be called services, expected to be paid, or that the defendants' intestate expected to pay for them.

If the plaintiff expected to be paid he does not say so in this testimony. If the defendants' intestate considered himself under any obligation to pay, he failed to say so to the plaintiff when he gave this note. The words "pay" or "remunerate" were never used. He said he wanted to "help" the plaintiff and to "do something for him." These so-called services were merely little acts of courtesy which are usually performed between people having business relations or between whom there are other ties. What warehouseman or what merchant would expect to be paid $4,000 for such little matters as the plaintiff testified he did as a matter of "accommodation" to the deceased? The plaintiff was a clerk in a public warehouse, and the deceased occasionally sold or sent tobacco there, and they were nearly related.

The plaintiff was given by the court free rein to testify concerning the entire transaction, and he did not say or indicate that the deceased was under obligation to pay him anything.

K. C. Wagstaff testified that he was a nephew of the deceased and one of the administrators. That he saw the deceased two or three times a year. "I do not think the mental capacity of the deceased has been good since he went to the asylum for the last time. For the past three, four, or five years I do not think he was capable of transacting business in a business-like way; he was capable of transacting it in some way." He further said that after he and J. D. Winstead (brother of deceased) had qualified as administrators they "went to the house occupied by the deceased and found money scattered about over the house in different places, in corners, cracks, and barrels. We found about $900. He had

a stock of merchandise there. Most of it was found in bolts of cloth or drawers where he kept thread. The whole stock of merchandise was not worth much. I reckon he had part of it 25 years. The cloth and things were rotten and no good at all. We found two checks, as I remember—one to Mr. Oscar Carter and one to some company off somewhere. One of the checks was 25 or 30 years old and the other five or six years old. We found chattel mortgages given him by his tenants. He wrote most of them himself. We found none of them recorded and none of them witnessed much, and some witnessed at the wrong place—in pretty bad condition. I do not think we found but one recorded mortgage, and that was one that had been transferred to him. You could not tell how much some of them were for. Some of them we could." There was much other evidence of mental incapacity.

The defendant Wagstaff further testified that the plaintiff "did not mention the note to me that day. I saw him several times after that. Saw him at South Boston once after that, and talked with him two hours. We were talking about the estate and I hoped he would mention the note to me, but he never did. He has never mentioned it since then. The first notice came through the bank."

John D. Winstead, the other defendant, testified that he was a brother of the deceased, and one of his administrators, and that the plaintiff is his nephew. He testified as to his brother being in the hospital at Morganton twice, and that on the third time he was taken to Raleigh about twelve years ago. That he was not discharged as being cured but that as he kept writing him he wanted to come home he went down to Raleigh, and "the doctor told me that he would not discharge my brother but that he would let me take him home. He died at the age of 75 years."

He further testified: "For 25 years I looked after some part of his business, and for the last five or six years Emory, a nephew of mine, looked after part of it. I told the deceased I would not look after all of it. From the time I brought him home from the hospital the last time, in my opinion, he did not have sufficient mental capacity to transact business intelligently. This statement is based upon a transaction I had with him. He offered to give me a note for $10,000. I think I could have gotten one for $20,000 if I had asked him for it. I told him I would not have it."

This defendant testified that the plaintiff was employed in the warehouse as a clerk, but neither he nor the other defendant gave any testimony whatever in regard to the transaction or conversation between the plaintiff and the deceased upon which the entire claim of the plaintiff rests, and his testimony as to which was therefore entirely incompetent under the statute, C. S., 1795.

This witness and others testified as to the lack of mental capacity on the part of the deceased. He further testified that there were fifteen heirs at law, and that between 1919 and the date of intestate's death the plaintiff never spoke to him about this note, and nothing was said about it until the notice came through the bank some time after his brother's death.

Upon the testimony in the case, it was error for the judge to say to the jury that the deceased, who had been three times an inmate of the asylum, and who on the last occasion left the asylum without any discharge, was presumed to be sane, and that the burden was upon the administrators of the estate to prove that he was not.

Upon the evidence, also, it was error to charge the jury that the little incidents which the plaintiff, though incompetent to testify to, had narrated were "services" which, "though they were past consideration, would be sufficient consideration for the note if they were of valuable consideration." The plaintiff was incompetent to testify as to such matters, but, conceding that objection was not made on that ground, still the alleged "services" he testified to were not sufficient consideration upon which to justify a verdict against the estate of the deceased for $4,000.

It was also error for the court to refuse to charge the jury as follows: "Where two men enter into a contract, the law does not ordinarily inquire into the adequacy of the consideration, but where the consideration is so grossly out of proportion to the amount of the alleged obligation, and is so obviously inadequate as to shock the conscience and the sense of justice, the law will not enforce the contract; and the court, therefore, charges you that if you shall find from the evidence, and from the greater weight thereof, that the plaintiff rendered the deceased service in consideration of the note, but if you shall further find by the greater weight of the evidence that the value of such service was so out of proportion to the amount of the note and demand by the plaintiff as to shock the conscience of people of average intelligence, you will answer the first issue 'Yes.'"

The burden of proof was on the plaintiff as the note was not under seal, to prove consideration, and the burden was also upon the plaintiff to prove that he was of sufficient mental capacity to assume the liability of $4,000; and it was error to tell the jury upon the evidence that the burden was on the defendants to rebut the presumption of sanity.

J. R. LAZENBY ET AL. v. BOARD OF COMMISSIONERS OF IREDELL COUNTY.

(Filed 5 December, 1923.)

1. Schools—Statutes—Taxation—Special Tax—Petition—Counties—Discretion.

Where the electors of a school district of a county have voted for a special tax for the erection of a public school building, based upon a petition filed with the county commissioners, and approved by the county board of education in conformity with the requirements of C. S., sec. 5526, except that the petition attempted to take away the discretionary power of the commissioners in locating it, this restrictive provision in the petition is contrary to law, and will be disregarded, and the election being free from fraud and giving the electors full opportunity to vote, the special tax thereby approved will be held valid.

2. Same—Ballots—Unrelated Questions—Appeal and Error—Objections and Exceptions.

Where the exception on appeal to the validity of a special tax approved by the voters of a school district for public school purposes, is upon the ground that the question was submitted on several unrelated propositions upon one ballot, it will not be sustained when it properly appears from the findings of the lower court that the only question voted upon and approved by the electors, and involved in the controversy, was the levying of the special tax.

PLAINTIFFS appealed from an order of *Long, J.*, 1 September, 1923, dissolving a restraining order. From IREDELL.

In June, 1922, one-fourth the freeholders in a described territory filed with the defendant the following petition:

"We, the undersigned, petition that Chestnut Grove Schoolhouse be built on the Winston-Salem Highway, somewhere between N. C. Summers' and J. L. Wike's, as the most suitable place. This petition to be null and void unless schoolhouse is built on the Winston-Salem Highway or near said highway, and also higher grades must be added to said school; respectfully petition your honorable board for an election to ascertain the will of the people within the proposed special school district, whether there shall be levied in said district a special annual tax of not more than ten cents on the one hundred dollars valuation of property and .... cents on the poll, to supplement the public school fund which may be apportioned to said district by the county board of education in case such special tax is voted."

The county board of education approved the petition and the defendant ordered an election to be held "for the purpose of voting on a special school tax of not more than ten cents on the $100 worth of property." A majority of the qualified voters voted for the tax, and

the plaintiffs brought this suit to declare the election void and to enjoin the levy and collection of the special tax. The defendant filed an answer, and upon the hearing his Honor found the facts and dissolved the restraining order theretofore issued.

R. T. Weatherman, Grier & Grier, and W. D. Turner for plaintiffs.
Buren Jurney and John A. Scott, Jr., for defendant.

ADAMS, J. The petitioners undertook to prescribe conditions upon which their petition should become "null and void," and the plaintiffs contend that the defendant had no authority to order the election because these conditions were in conflict with C. S., 5526. In this section there are two conditions which are precedent to granting an order for holding the election: (1) the petition must be signed by one-fourth the freeholders within the proposed special school district in whose names real estate therein is returned in the tax list of the current fiscal year, and (2) it must be endorsed by the county board of education.

It was held in *Gill v. Comrs.*, 160 N. C., 181, that the jurisdiction of the board of education and of the county commissioners is dependent upon the presentation to them of such a petition as is required by the statute, and that such petition is precedent to the exercise of the particular authority which the statute confers. See, also, *Key v. Board of Education,* 170 N. C., 123. In the instant case the two conditions prescribed by the statute were complied with, and the question for decision is whether the other conditions stated in the petition were fatal to the exercise of the jurisdiction conferred by law upon the defendant. As to this question both sides refer to the decision in *Comrs. v. Malone,* 179 N. C., 110. In that case the county commissioners were authorized by a public-local law to issue bonds in behalf of any general or special school-taxing district of the county, on approval of a majority of the qualified voters, for the purpose of repairing, altering, making additions to or erecting new buildings, and purchasing schoolhouse sites. In the petition for the election the purpose stated was the erection and equipment of a new school building and the purchase of school grounds; and the court said that if the word "equipment" should be regarded a substantial departure from the purposes contemplated and provided for in the statute, the provisions of the statute mentioned in the petition were controlling, and the term, even if unwarranted, should be rejected as surplusage or disregarded as being in violation of law.

Upon the record in the case at bar this principle is controlling. His Honor found as a fact that in the advertisement of the election neither the location of the schoolhouse nor the character of the school to be

established was mentioned, and that the only question considered by the voters was that of the special tax. There is nothing in the record to indicate fraud or to show that any voter was deceived or misled either as to the location of the building or as to the character of the school. On the contrary, the alleged cause of action is based solely upon the ground that the conditions stated in the petition conflict with the statute and render the election invalid. In this conclusion we do not concur. The right of the petitioners to ask that the choice of a site be submitted to the qualified voters is not involved. The objectionable feature of the petition is the apparent purpose of the petitioners to control the discretion of the board by designating the place where the building shall be erected; but, the petition being otherwise sufficient, the expression of such purpose cannot divest the commissioners of the jurisdiction given them. In other words, the conditions requisite to conferring jurisdiction have been prescribed by the Legislature (*Gill v. Comrs., supra*), and when compliance with these conditions is properly made to appear, the petitioners cannot disregard the statute and defeat or qualify the jurisdiction of the board by incorporating extraneous or irrelevant matter in their petition or by directing in what manner and to what extent such jurisdiction shall be exercised.

Also, the plaintiffs contend that the election is void for the reason that only one ballot was used in submitting to the voters of the district the three propositions whether a special tax should be levied, whether the school should have additional grades, and whether the site should be changed; and in support of their contention they rely on the doctrine stated in *Winston v. Bank,* 158 N. C., 512, and in *Hill v. Lenoir,* 176 N. C., 572. It is not necessary to point out the distinction between the facts in these two cases and those in *Briggs v. Raleigh,* 166 N. C., 149; *Keith v. Lockhart,* 171 N. C., 451, and *Taylor v. Greensboro,* 175 N. C., 423, with a view to deciding whether the three propositions are practically one or whether they are distinct and unrelated. The order of election shows, and in his statement of facts his Honor finds, that the levy of the special tax was the single question which the voters had in mind.

The appeal does not present any amendment of the school law as codified by the General Assembly of 1923.

The record disclosing no error, the judgment is

Affirmed.

HASTY MERCANTILE COMPANY v. E. W. BRYANT.

(Filed 5 December, 1923.)

Statute of Frauds—Debtor and Creditor—Debt of Another—Parol Promise—Consideration—Direct Obligation of Promissor.

Where the landlord receives of his tenant cotton the latter has raised on the lands, under the parol promise to store it until the price should go higher, and to pay his debts, and has also later promised a creditor to pay his tenant's debt to him, the promise so made is not one to pay the debts of another, but is a direct obligation of the landlord to pay the debt, founded upon a sufficient consideration, that he would pay it out of the proceeds of the sale of the cotton placed by his tenant in his hands, and does not fall within the provisions of the statute of frauds, C. S., sec. 987, requiring the agreement to be in writing and signed by the party to be charged.

APPEAL by plaintiff from *Harding, J.*, at June Term, 1923, of SCOTLAND.

Civil action. The material allegations, as stated in the plaintiff's complaint, are as follows:

(1) That during the year 1920, and prior thereto, Frank McLeod lived upon and worked the lands of the defendant as a tenant of the defendant, and while so living and working the said lands of the defendant the said Frank McLeod purchased from the plaintiff certain goods, wares and merchandise of the value of four hundred eighty-six and 45-100 dollars ($486.45), which amount the said Frank McLeod agreed to pay for the said goods, wares and merchandise, but which has not been paid.

(2) That among the crops raised upon the said lands of the defendant during the year 1920, the said Frank McLeod raised a crop of cotton from which has been gathered more than fifty bales of cotton, all of which the defendant, by agreement with the said Frank McLeod, as hereinafter stated, has stored. That during the early part of the gathering season of 1920, when the price of cotton was high but gradually declining, the said Frank McLeod wanted the said cotton sold as it was gathered in order to pay his debts, and requested the defendant to sell the said cotton; that thereupon the defendant suggested that he, the defendant, would store all of said cotton and hold the same for better prices, and promised that he, the defendant, would pay certain accounts and debts of the said Frank McLeod, the debt owing to the plaintiff, as hereinbefore alleged, being one of the said accounts, and would carry the accounts until the said cotton should be sold. That upon the promise of the defendant to pay the said debt which the said Frank McLeod owed to the plaintiff, the said Frank McLeod agreed

for the defendant to hold all the said cotton, and the said cotton has been stored by the defendant.

(3) That, subsequent to the said agreement made between the defendant and the said Frank McLeod, the said Frank McLeod advised the plaintiff of the agreement of the defendant to pay the said debt to the plaintiff. That thereafter, during the first week of October, 1920, the agent and general manager of the plaintiff's business approached the defendant relative to the said agreement between the defendant and the said Frank McLeod, and the defendant thereupon promised and agreed to pay immediately to the plaintiff the said debt which Frank McLeod owed, and requested that he, the defendant, be advised as to the amount thereof. That subsequent thereto Frank Carmichael, the agent and general manager of the plaintiff, advised the defendant that the amount of the debt was four hundred eighty-six and 45-100 dollars ($486.45), and the defendant again promised to pay the said debt.

(4) That from and after the time the defendant promised plaintiff that he, the defendant, would pay the said debt, the plaintiff ceased to look to the said Frank McLeod for the payment of the said debt, but looked to and held the defendant solely responsible therefor, and continues to look to and hold the defendant solely responsible for the payment of the said debt.

Plaintiff prays judgment for $486.45 and interest.

The defendant denied all the allegations of the complaint except:

"That during the year 1920 and prior thereto Frank McLeod lived upon and worked the lands of this defendant as a tenant of this defendant. That Frank McLeod raised and gathered more than fifty bales of cotton upon the said land, and that all of said cotton was stored. That the agent and general manager of the plaintiff's business approached the defendant in regard to the account against the said Frank McLeod, stating that the account was around $400." The defendant especially denies that he promised and agreed to pay the plaintiff the account against the said Frank McLeod.

The testimony of the tenant of the defendant, Frank McLeod, and that of Frank Carmichael, manager of the plaintiff, Hasty Mercantile Co., tended to support the allegations of the complaint. The evidence to prove the allegations was objected to by defendant, and plaintiff excepted. At the close of the plaintiff's evidence defendant made a motion to nonsuit, which the court allowed, and plaintiff excepted and appealed to this Court.

W. H. Weatherspoon and G. H. Russell for plaintiff.

George T. Goodwyn and Cox & Dunn for defendant.

CLARKSON, J. There is only a single legal question involved in this case: Do the allegations of the complaint, on a trial of this cause, if proven to be true, constitute a good cause of action and entitle plaintiff to recover of the defendant? We are of the opinion that the allegations in the complaint constitute a good cause of action.

The defendant relies on the statute of frauds, as follows: "No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." C. S., 987.

We do not think the statute applicable, if the facts are proven as alleged in the complaint. It is well settled that if "A. is indebted to B. and puts money in the hands of C. to pay B., then B. may sue C. for money had and received."

In the case of *Threadgill v. McLendon,* 76 N. C., 24, similar in many respects to the instant case, Threadgill, the plaintiff, was the merchant, and the debt was contracted by the tenant of McLendon, for fertilizer and supplies which were furnished the tenant. In that case, the court below charged the jury "If they should find that the defendant received cotton enough to pay himself and to leave a balance, and that, having so received the cotton, promised the plaintiff to pay the tenant's account, the plaintiff would be entitled to recover to an amount sufficient to pay said account; otherwise the defendant would not be liable." In that case *Pearson, J.,* said that "the defendant was bound by his direct promise to pay, after he had taken the cotton crop into possession, and had in his hands the means out of which to pay the plaintiff's account—cotton being a cash article and convertible at pleasure into money."

The same judge, in *Stanly v. Hendricks,* 35 N. C., 87, says: "The principle is this: When, in consideration of a promise to pay the debt of another, the defendant receives property, and realizes the proceeds, the promise is not within the mischief provided against, and the plaintiff may recover on the promise, or in an action for money had and received. For, although the promise is, in words, to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action." *Hall v. Robinson,* 30 N. C., 56; *Draughan v. Bunting,* 31 N. C., 10; *Mason v. Wilson,* 84 N. C., 51; *Whitehurst v. Hyman,* 90 N. C., 490; *Voorhees v. Porter,* 134 N. C., 604; *Deaver v. Deaver,* 137 N. C., 244; *Jenkins v. Holley,* 140 N. C., 380; *Satterfield*

v. Kindley, 144 N. C., 461; *Dale v. Lumber Co.,* 152 N. C., 654; *Peele v. Powell,* 156 N. C., 557; *Whitehurst v. Padgett,* 157 N. C., 428; *Parker v. Daniels,* 159 N. C., 518; *Craig v. Stewart,* 163 N. C., 533; *Handle Co. v. Plumbing Co.,* 171 N. C., 502; *Rush v. McPherson,* 176 N. C., 567; *Deal v. Wilson,* 178 N. C., 605; *Rector v. Lyda,* 180 N. C., 578. See cases at this term: *Parlier v. Miller, ante,* 501; *Way v. Transportation & Storage Co., ante,* 224.

Applying the law to the facts in this case, we are of the opinion that the court below erred in ruling out the evidence and granting the nonsuit.

Reversed.

RUTHERFORD HOSPITAL v. THE FLORENCE MILLS.

(Filed 5 December, 1923.)

Appeal and Error—Courts—Judgments—Jurisdiction—Pleadings—Cause of Action.

The plaintiff has the right to have a judgment signed upon a verdict in his favor unless the judge sets aside the verdict; and upon the refusal of the trial judge to sign the judgment as a matter of law, an appeal will directly lie to the Supreme Court, in order that the judgment may be signed and the appeal upon the merits be proceeded with according to law.

APPEAL by plaintiff from *Ray, J.,* at August Term, 1923, of RUTHERFORD.

This was an action begun in the recorder's court and tried on appeal at August Term of the Superior Court of Rutherford.

One J. T. Powell, an employee of the defendant, had been seriously injured while in its service, and had been taken to the hospital of the plaintiff and there received medical, surgical and professional services, but died from said injuries. The complaint alleges that such services, including the treatment and nursing that the injuries required, amounted to $462, and alleged that the patient had been carried to the hospital by the defendant. The answer denied that it carried said Powell to the plaintiff's hospital or authorized any treatment, surgical or medical, for the said J. T. Powell. At the conclusion of the evidence the defendant, in apt time, moved for a judgment of nonsuit. Motion overruled, but the record does not show that the defendant excepted.

The jury answered the following issue submitted to it by the court: "Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: '$462.'" The plaintiff then moved for judgment according to the verdict of the jury, and tendered judgment in favor of the

plaintiff and against the defendant for $462 and costs of the action, to be taxed by the clerk of the court. The court refused to sign the above judgment, and to refusal of the court the plaintiff excepted and appealed.

Solomon Gallert for plaintiff.
Quinn, Hamrick & Harris for defendant.

CLARK, C. J. The court, on refusing judgment upon the verdict, dictated the following record entry: "On the coming in of the verdict, the jury having answered the issues as shown in the record, and the court being of opinion that the plaintiff is not entitled to recover, refuses to sign judgment tendered by the plaintiff, as shown by the record, as a proposition of law, to which ruling the plaintiff excepts and gives notice of appeal to the Supreme Court."

There were other assignments of error by the plaintiff as to the admission of evidence and as to the refusal of prayers to charge, but as the verdict is in favor of the plaintiff we cannot notice them. Upon the verdict, which is unequivocal, the plaintiff was entitled to a judgment thereon.

The recital in the record, upon the return of a special verdict "that the court being of opinion, upon this state of facts, the defendant is not guilty, the verdict is so entered," is not such a judgment as will support an appeal. *S. v. Hazell,* 95 N. C., 624; *S. v. Nash,* 97 N. C., 516. And if there had been an appeal by defendant here it would therefore necessarily be dismissed and the cause remanded that a judgment might be imposed.

The verdict of the jury gives the successful party a right to have a judgment imposed thereon of which he cannot be deprived, except only when the court has no jurisdiction or the complaint did not state a cause of action, neither of which was the case here. In *R. R. Connection case,* 137 N. C., 21, it was held that "if the court reverses or affirms the judgment below, it may, in its discretion, enter a final judgment here or direct it to be so entered below. By preference, and as a matter of convenience, the latter of course is, unless in very exceptional cases, the course pursued," citing *Bernhardt v. Brown,* 118 N. C., 710, where the matter was fully discussed, and other cases.

The cause must be remanded to the court below with directions that the presiding judge shall enter the judgment for the plaintiff on the verdict, and the parties may then proceed as they may be advised. The court did not set aside the verdict as it had the power to do. If it had done so for error of law, the plaintiff might have appealed.

It is true the defendant might have appealed from the refusal of a nonsuit if judgment had been rendered for plaintiff, and there may have been other grounds for an appeal, but no appeal lay for the defendant unless judgment was entered against him, nor from refusal of nonsuit unless excepted to before verdict.

Litigation must be ended by a judgment. A case exactly in point is *Ferrell v. Hales,* 119 N. C., 212, where the Court said that when the verdict is recorded, judgment must be rendered upon the facts found by the jury, else "the matter would be forever suspended, like Mahomet's coffin.

In Aladdin's tower
Some unfinished window unfinished must remain.

Not so in legal proceedings which deal with matters of fact, not fancy." It was there held, as always, that while the judge could not at the next term set aside the verdict, it was his duty to enter judgment thereon. To the same purport *Taylor v. Ervin,* 119 N. C., 277, and many precedents, which were cited in both these cases.

The plaintiff, having a right to a judgment upon the face of the verdict, was entitled to come to this Court for an order directing it to be imposed. The appellant is entitled to recover the costs of the appeal.

Remanded.

SKYLAND HOSIERY COMPANY v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 5 December, 1923.)

1. Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.

An exception to the refusal to admit in evidence an unanswered question will not be considered on appeal unless the materiality and relevancy of the proposed evidence is made to appear in the record.

2. Carriers—Express—Receipts—Bills of Lading—Stipulations—Actions.

Where there is a provision in an express receipt excluding liability in an action to recover from the express company for loss, damage or detention of the shipment unless commenced within one year thereafter, the company will not be deemed to have waived its right thereunder, when the claimant has delayed commencing his action and has ceased his negotiations for a settlement for about fourteen months, merely upon the request of the defendant for time for it to make an investigation, without promise of settlement, or request on its part that the action should not be brought.

3. Same—Contracts—Limitation of Actions.

A stipulation in an express receipt or bill of lading against liability for loss, damage, etc., to a shipment unless the action is commenced in a year thereafter, is a reasonable agreement resting upon the contract of the parties, and is not a statute of limitations.

PLAINTIFF appealed from an order of *McElroy, J.*, dismissing the action at June Term, 1923, of HENDERSON.

Arledge & Arledge for plaintiff.
Michael Schenck for defendant.

ADAMS, J. Upon the former appeal the Court awarded a new trial for error committed in placing the burden of proof on the defendant. For a statement of facts, reference is made to the case as reported in 184 N. C., 478. The defendant was afterwards permitted to amend its answer by alleging that under the contract of shipment the defendant was not to be liable for loss unless a written claim therefor was presented by the plaintiff within 90 days, and unless suit for recovery was commenced within one year after such loss, and that the plaintiff had not complied with either of these provisions. The plaintiff replied, admitting noncompliance and alleging the defendant's waiver.

At the close of the evidence his Honor dismissed the action as in case of nonsuit, and the plaintiff appealed.

The first exception was abandoned. The second was taken to the exclusion of an answer to the question whether a witness for the plaintiff knew the custom of the defendant with regard to its prompt settlement of claims. The record does not show whether the witness knew there was such a custom or, if there was, what his answer to the question would have been. The exception, therefore, cannot be sustained. *In re Will of Edens,* 182 N. C., 398; *Snyder v. Asheboro, ib.,* 708.

The shipment was made on 19 September, 1919, and on the next day the loss was discovered. The summons was issued on 8 February, 1921; and the principal controversy between the parties turns on the defendant's contention that under the terms of the contract the plaintiff was limited to twelve months from the loss within which to bring its suit. The clause on which the defendant chiefly relies is this: "Nor shall the company be liable in any suit to recover for the loss, damage or detention of this shipment unless the same be commenced within one year thereafter."

Contractual provisions limiting the time within which suit shall be brought have been upheld in receipts or bills of lading in both interstate and intrastate commerce and in other contracts. *Rogers v. R. R., ante,* 86; *Jones v. Winstead, ante,* 536; *Dixon v. Davis,* 184 N. C.,

207; *Thigpen v. R. R.*, 184 N. C., 33; *Beard v. Sovereign Lodge,* 184 N. C., 154. In the case last cited it is said that a provision of this character is not a statute of limitation but a contract which imposes a restriction upon the right of action by definitely fixing a period within which the plaintiff's rights must be asserted.

The plaintiff does not seriously contest this principle but insists that the condition was waived by the defendant's request for time to make an investigation of the loss. C. P. Rogers, the plaintiff's general manager, testified as to the following conversation between himself and the defendant's superintendent: "I told him that I couldn't see but what the express company was responsible for the loss, and he told me that he would make a thorough investigation of the shortage, and I agreed to give him all the help we possibly could out there to make the investigation, and he told me that when the investigation had been made that he would be able to let us hear from him. I told him that we would have to hold the express company responsible for the shortage; he wanted sufficient time to investigate the matter before he would give any answer." He testified that a few days afterwards they had another conversation at a bank in Hendersonville, and then: "We got no further report from the express company. We waited on them about a year, if I am not mistaken, and then instructed our attorneys to bring suit against the express company for the shortage, and this was done. I waited this length of time in order to give them the necessary time to make a thorough investigation. . . . I knew that matters of that kind take a long time, and was perfectly willing to give them all the time necessary. . . . There were no negotiations or transactions in regard to this case between our company and the defendant company except those conducted by me." He said also that he had no recollection of the defendant's admission or denial of liability for the loss.

In 4 R. C. L., 800, it is said: "A carrier may by his conduct estop himself from insistence on compliance with the terms of the bill of lading with respect to limitations on the time within which an action for loss or injury to the article shipped must be brought, whenever, by negotiations for settlement or otherwise, he so acts as to justify a reasonable belief on the part of the shipper that this claim will be settled without suit. In such a case, if the shipper, acting on this belief, does not institute his suit until the time provided in the bill of lading has elapsed, the carrier will be estopped from invoking the limitation. If, however, notwithstanding such negotiations, the shipper still had ample time after they had ceased within which to begin his action before the stipulated time elapsed, it seems that the carrier will not be estopped from claiming the benefit of the stipulation." See cases cited and note to *Ry. v. Stock Farm,* 88 A. S. R., 118, and Ann. Cas., 1914 A., 235.

The defendant ceased all negotiations with the plaintiff a few days after the loss, and neither promised to pay the claim nor requested the plaintiff not to bring suit. Apparently it wanted time for the investigation to enable it to decide what course to pursue; but we think there is nothing in the record from which the plaintiff should reasonably have assumed that the defendant intended to settle the claim without suit. Action was voluntarily delayed for more than fourteen months after the last negotiations took place, and under the circumstances such delay should be attributed to the plaintiff's laches rather than to the defendant's alleged waiver. *Jennings v. Express Co.,* 194 N. Y. Sup., 679; *Watt v. R. R.,* 135 Pac., 600; *So. Ex. Co. v. Oliver,* 93 S. E., 109; *Ray v. R. R.,* 149 Pac., 397; 27 R. C. L., 909.

We find no error and the judgment is

Affirmed.

JENNIE WOOD v. GAITHER WOOD, ADMINISTRATOR OF KELLY WOOD.

(Filed 5 December, 1923.)

1. Contracts—Quantum Meruit—Services Rendered—Actions.

Service rendered by a woman to her husband's brother, of a household nature, are a sufficient consideration to support his promise "to make ample provision for her and to see that she should be well paid for her services," upon which her action to recover upon a *quantum meruit* will lie.

2. Same—Limitation of Actions.

The statute of limitations for services rendered will run against the one claiming compensation therefor upon an implied promise to pay, upon a *quantum meruit*, three years next before the commencement of the action, in the absence of a prevailing custom to the contrary, such implied promise being to pay for such services as and when rendered. The suggestion in *Hauser v. Sain,* 74 N. C., 552, on the point, is overruled.

3. Same—Instructions—Verdict Directing—Appeal and Error—Prejudice—New Trials.

In an action to recover upon a *quantum meruit* for services rendered to a deceased person immediately preceding the time of his death, involving the application of the three-year statute of limitations, the jury found the issue as to amount in a certain sum, and answered the issue as to the statute in the affirmative, whereupon the judge refused to sign judgment upon the verdict, and directed them to retire and find, in addition to their verdict on the last issue, in effect, that the plaintiff's action was barred "for all time except three years next preceding the death of plaintiff's intestate": *Held,* prejudicial to the defendant, depriving him of the right to have the jury reconsider their verdict as to the amount of the damages to be awarded as falling within the statutory period, in view of the direction given by the judge on the last issue.

APPEAL by defendant from *Ray, J.*, at May Term, 1923, of DAVIE.

Civil action tried upon the following issues:

"1. Did the plaintiff and deceased intestate make and enter into the contract as alleged in the complaint? Answer: 'No.'

"2. What amount, if any, is the plaintiff entitled to recover? Answer: '$1,500.'

"3. Is the plaintiff, in this cause of action, barred by the statute of limitations? Answer: 'Yes, for all time except three years next preceding the death of defendant's intestate.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed.

B. C. Brock and Graves, Brock & Graves for plaintiff.

E. L. Gaither, Hamilton & Morris, and A. T. Grant, Jr., for defendant.

STACY, J. In May, 1915, plaintiff and her husband, it is alleged, entered into a contract with one Kelly Wood, brother of plaintiff's husband, whereby it was agreed that for certain specific services of a household nature, to be rendered by plaintiff, the said Kelly Wood would "make ample provision for the plaintiff and see that she was well paid for her services." The first issue is addressed to this alleged contract, and it is answered in the negative.

Failing to establish the contract as alleged, plaintiff seeks to recover upon a *quantum meruit* for services rendered, and the second issue is addressed to this phase of the case. Plaintiff's right to recover on a *quantum meruit,* if she can bring herself within the principle, would seem to be established by the following authorities: *Debruhl v. Trust Co.,* 172 N. C., 839; *Winkler v. Killian,* 141 N. C., 575; *Ellis v. Cox,* 176 N. C., 616; *Shore v. Holt,* 185 N. C., p. 313, and cases there cited.

But as a general rule, when the statute of limitations is pleaded, plaintiff may not recover on a *quantum meruit* for services rendered more than three years next immediately preceding the commencement of her action. *Miller v. Lash,* 85 N. C., 51; *McCurry v. Purgason,* 170 N. C., 463. Where the law implies a promise to pay for services rendered, in the absence of a contrary prevailing custom, the promise is to pay for such services as and when rendered. Hence the statute is silently and steadily excluding so much as is beyond the prescribed period of limitation. The contrary suggestion in *Hauser v. Sain,* 74 N. C., 552, is disapproved. "Where services are rendered for a series of years, under no definite contract as to duration, rate or mode of compensation other than that implied by law, the promise which the law implies is to pay for such services as they are rendered, and the statute of limitations begins to run then, or, at least, from the end of the year in which they were performed." *Miller v. Lash, supra.*

Kelly Wood died in the spring of 1922, and this action was started by the issuance of summons on 4 November, 1922. There was evidence tending to show that plaintiff and her husband left the home of the deceased in the fall of 1921. Thus it would appear from the answer to the third issue that the amount awarded may be larger than the plaintiff is entitled to recover, even upon the principle stated. But however this may be, we think the circumstance just mentioned, taken in connection with the following portion of the record, makes it necessary to remand the cause for another hearing:

"The jury, in the presence of counsel for both plaintiff and defendant, returned into open court and delivered in open court their verdict, having answered the first issue 'No'; the second issue '$1,500,' and the third issue 'Yes.' The court thereupon refused and declined to accept the verdict and instructed the jury to retire and answer the third issue as the court had instructed them, the court writing the answer out for the jury, as follows: 'Yes, for all time except the three years next preceding the death of defendant's intestate,' to which the defendant excepted."

It will be observed that, under his Honor's last instruction, the jury was not allowed to reconsider its answer to the second issue after the answer to the third issue had been amended. This was necessary in order to make it the verdict of the jury. The jury at first found that plaintiff's cause of action was barred by the statute of limitations. This was equivalent to saying that the work, for which she was entitled to compensation, was performed prior to the time not excluded by the statute. Therefore the crucial question as to how much plaintiff is entitled to recover for services rendered within the statutory period has not been answered by the jury.

New trial.

STATE v. L. J. BLACKWELDER AND ROY DEAL.

(Filed 5 December, 1923.)

Sunday—Municipal Corporations—Cities and Towns—Ordinances—Restaurants—Hotels—Criminal Law.

A town ordinance that makes it a misdemeanor to keep places of business open on Sunday, or sell goods therefrom, including hotels, restaurants, etc., without exception as to the necessity of serving meals within reasonable hours, is invalid so far as it affects the service of the meals to those having no other place to get them, and a conviction as to those under such circumstances cannot be upheld.

STATE *v.* BLACKWELDER.

APPEAL by the State from *Long, J.*, at September Term, 1923, of ROWAN.

Criminal prosecution, tried upon a warrant charging the defendants with violating an ordinance of the town of Landis which made it unlawful for any person, firm or corporation to sell any "goods, wares or merchandise, or other things of value, on the Lord's day, commonly called Sunday."

From a judgment of dismissal, rendered on a special verdict, the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel appearing for defendants.

STACY, J. This prosecution was commenced in Rowan County Court and tried *de novo* on appeal to the Superior Court of Rowan County. From the judgment of the latter court the case comes to us for review. The controlling facts, as established by the special verdict, are as follows:

1. On Sunday, 27 May, 1923, the defendants, who own and operate a restaurant in the town of Landis, Rowan County, N. C., sold and furnished to one Paul Beaver, for a stipulated price, a midday meal consisting of a veal steak, certain vegetables and one coca-cola, contrary to the provisions of a certain ordinance of the town of Landis, the material parts of which are as follows:

"It shall be unlawful for any person, firm, or corporation to be engaged in selling goods, wares, or merchandise, or other things of value, on the Lord's Day, commonly called Sunday; and it shall further be unlawful for any person, firm or corporation to open any place of business or keep any place of business open for the purpose of transacting business or selling any goods, wares, or merchandise therefrom on the Lord's Day, commonly called Sunday. This shall apply to all places of business within the corporate limits of the town of Landis, and shall include stores, restaurants, and other places of business from which goods, wares or merchandise are sold.

"It shall also further be unlawful for any person, firm, or corporation to enter his store, restaurant, or place of business on Sunday and bring therefrom any goods, wares or merchandise for the purpose of sale to another. This shall not apply to cases of absolute emergency or charity. Where it becomes necessary in cases of death or sickness, the mayor of the town of Landis may grant permission for any store or other place of business to sell therefrom such articles of necessity.

"Any person, firm, or corporation violating this act or ordinance, or any part thereof, shall be guilty of a misdemeanor, and upon conviction

to be fined $25 for the first offense and for a second offense, or any other offenses after the first, shall be fined $50."

2. The meal in question was sold by the defendants and purchased by the said Paul Beaver in good faith and for the sustenance of the human body. (*S. v. Shoaf,* 179 N. C., p. 747.)

3. The said Paul Beaver was, at that time, without a home or residence where he could otherwise obtain food, and the restaurant conducted by the defendants was, at that time, the only public place where meals could be obtained on the Sabbath Day in the town of Landis.

4. The defendants did not keep their restaurant open during the entire day of 27 May, 1923, and they have not regularly kept the same open on other Sabbath days, except at stated hours reasonably adapted to the sale and service of regular meals.

Upon these, the facts chiefly pertinent, his Honor held "that the ordinance of the town of Landis appearing in the record, in so far as it affects the defendants upon the facts set out in the special verdict, is unreasonable, oppressive, in derogation of common right, and should be declared unlawful, invalid and an unreasonable exercise of the police power of said town, and the court being of the opinion, upon the special verdict, that the defendants are not guilty, it is, therefore, considered and adjudged that the defendants are not guilty and that this action be and the same is hereby dismissed."

We think the judgment of his Honor below must be upheld. *Barger v. Smith,* 156 N. C., 323; *S. v. Burbage,* 172 N. C., 876.

It will be observed that the ordinance in question makes no exception as to "works of necessity," among which is generally listed, "keeping open a hotel, restaurant or dining-room." 25 R. C. L., 1422. See *McAfee v. Com.,* 173 Ky., 83, as reported in L. R. A., 1917 C, 377, where the authorities on the subject have been collected and discussed in a full and satisfactory note.

All of our previous decisions, from *S. v. Williams,* 26 N. C., 400, down to *S. v. Lumber Co., ante,* 122, are distinguishable from the case at bar. We have found none in conflict with our present position.

It may be well to direct attention to the fact that the ordinance in question is held to be invalid only "in so far as it affects the defendants upon the facts set out in the special verdict." In *S. v. Pulliam,* 184 N. C., 681, a somewhat similar ordinance was upheld, but there the prohibition was against keeping open any "store, shop or other place of business" on Sunday, and it was held that the defendant might not circumvent the ordinance under the guise of running a restaurant in connection with his store, shop, or other place of business, or even in the same room where such was carried on.

Affirmed.

V. A. BERRIER v. BOARD OF COMMISSIONERS OF DAVIDSON COUNTY.

(Filed 5 December, 1923.)

Taxation—Schools—Injunction—Statutes—Repealing Acts—Appeal and Error—Judgments.

It is peculiarly within the legislative authority to levy or repeal a tax; and where an injunction has been issued by the courts against the levy of a special tax for public-school purposes by a school district, affirmed by the Supreme Court on appeal, but before the order had been signed in the Superior Court in conformity with the opinion, the Legislature has abolished the school district and the levying of the tax, the plaintiff's right to the injunctive relief ceases, though the judge thereafter signs the order by inadvertence to the repealing statute.

THE PLAINTIFF appealed from a judgment of *Shaw, J.*, 5 June, 1923, refusing the restraining order set out in the record. From DAVIDSON.

His Honor found the facts to be as follows:

That some time prior to May, 1920, the Board of Education of Davidson County ordered a consolidation of all or parts of five school districts, and an election was duly called to vote on a special tax for said consolidated district; that said election was held and carried; that subsequent to said election an action was brought by a citizen of the said consolidated district to restrain the levy of the special tax voted at said election, and in such action the complaint and answer set up in the complaint in this action were duly filed; that upon the hearing of a motion for an injunction in said action in the Superior Court, the same was ordered from which the defendants appealed to the Supreme Court, where the judgment of the court below was affirmed; that after the said case had been decided in the Supreme Court, but before the judgment according to the opinion of the Supreme Court had been signed, the General Assembly of North Carolina passed an act abolishing and repealing the special tax on the former districts included in said consolidated district, which act is chapter 156, Public-Local Laws, 1923, being House Bill No. 1032, and Senate Bill No. 908, ratified on 2 March, 1923; that the February Term, 1923, of the Superior Court of Davidson County began on 26 February and continued for two weeks, and the judgment in case of *Evans v. Comrs.*, 184 N. C., 328, set out in the complaint herein, was signed at said term, and on 9 March, 1923, and that the said act was not brought to the attention of the court before the said judgment was signed.

That at May Term, 1923, the plaintiff made a motion for an injunction as prayed for in the complaint herein filed, which was refused, and the plaintiff excepted but did not appeal; at the same term the

plaintiff moved to be allowed to take a nonsuit as set out in the record, which was refused, and the plaintiff excepted as set out in the record; the plaintiff then obtained permission of the court to file an amended complaint, which he did; that the facts set out in the amended complaint, as to Cicero Kimel being completely surrounded by the consolidated district, is found not to be true.

Walser & Walser and Z. I. Walser for plaintiff.
Raper & Raper and W. O. Burgin for defendant.

ADAMS, J. The act by which the Legislature repealed the special tax voted in the consolidated district was ratified on 2 March, 1923, and on 9 March, during the February term, his Honor signed the judgment in *Evans v. Comrs.* in accordance with the opinion of this Court as reported in 184 N. C., 328; but at that time the abolition of the tax had not been brought to his attention. The plaintiff insists that the General Assembly had no legal right to abolish or repeal the special tax, and that the county board of education abused its discretion in forming the consolidated district. Neither position can be maintained. We discover no evidence whatever of an abuse of discretion, and the power to levy or repeal a tax is peculiarly a legislative function.

His Honor's judgment in the *Evans case* must be construed as applicable to the facts disclosed by the record, and not as concluding the defendant after the repeal of the tax. Whether the plaintiff is not concluded by Judge Stack's judgment refusing his application for a restraining order we need not decide.

The judgment rendered by Judge Shaw is

Affirmed.

JENNY L. SATTERTHWAITE v. E. H. DAVIS, EXR. OF SAMUEL T. SATTERTHWAITE, DECEASED; FRANK A. DRURY, TRUSTEE, ET AL.

(Filed 5 December, 1923.)

1. Appeal and Error—Supreme Court—Laches—Objections and Exceptions.

The question of appellant's laches in prosecuting his action may not be raised for the first time in the Supreme Court when not falling within the exception as to matters not jurisdictional, or those in the nature of a demurrer to the sufficiency of the complaint to allege a cause of action.

2. Limitation of Actions—Pleadings—Defenses.

The statute of limitations must be pleaded in the answer to be available as a defense to the cause of action.

3. Evidence—Nonsuit—Waiver—Appeal and Error.

The defendant waives his right to insist on his motion as of nonsuit after the close of plaintiff's evidence, by the introduction of his evidence in defense.

4. Evidence—Deceased Persons.

Where an attorney for a deceased person has testified in behalf of the estate of transactions between his client and himself, it is competent for the plaintiff, having testified that she had shown the attorney all telegrams she had received from the deceased, to introduce in evidence a telegram materially bearing upon the fact at issue, and contradictory of the evidence of the attorney, when properly confined to that purpose.

5. Same—Appeal and Error—Instructions—Presumptions—Record.

Where the testimony excepted to is competent for a certain purpose, it will be presumed that the instructions of the trial judge properly confined it thereto, when the charge is not sent up in the record on appeal.

6. Evidence — Deceased Persons — Statutes — Transactions — Letters—Handwriting.

Where the widow of her deceased husband seeks in her suit to set aside an agreement of separation given upon consideration, and to dissent from his will, and it is controverted as a material matter whether they were reconciled before his death and lived together in the marital relations, letters received from her husband by others bearing thereon may be identified by the plaintiff as in the handwriting of the deceased, and introduced in evidence. C. S., sec. 1795.

APPEAL by defendants from *Calvert, J.*, at July Special Term, 1923, of HENDERSON.

The purpose of this action is to rescind and cancel a separation agreement between plaintiff and her deceased husband and the defendant trustee, the heirs at law of the husband being also made parties. The complaint avers that the plaintiff was induced to execute said agreement by fraud and coercion, of which her husband's attorney, one Sibley, was the chief instrument. She avers that on 12 September, 1912, about two and a half months before said agreement was executed, while living with her husband in Boylston, Mass., she was wrongfully and unlawfully deserted by him and was left wholly without means of subsistence, and thus compelled to take refuge in the home of her mother and sister in Worcester, Mass., and forced to depend upon their bounty for her support; that her husband left the country and took up his abode in Winnipeg, Manitoba, where he had considerable property interests. She further avers that in this dilemma of her helplessness she consulted an attorney, W. H. Bent, but he failing to be of service, she went to her husband's lawyer, at his invitation, and laid all the facts before him and impressed upon him that what she wanted was that her husband should come back to her. She was advised by said attorney to accept a money settlement, and this advice was reiterated upon every

occasion that she saw him, and it was represented to her by said attorney that her husband would refuse to return to the United States or make any provision for her support unless she acceded to this demand. Said attorney represented to her that there was no possibility of reconciliation except by her signing such agreement as her husband proposed, and he furthermore gave her to understand that in the event of such reconciliation the agreement would not deprive her of her marital rights in the property of her husband.

It is further alleged in the complaint that, upon this being urged by said Sibley, she telegraphed her husband at Winnipeg: "I am not able to come to Winnipeg. As soon as you are able to come home I will consider a reconciliation, but only before agreement is signed and have talked with you. Reconciliation now must mean for all time. Consider it well." To this the husband replied, which is set out in the complaint: "Positively refuse to return until agreement is signed. Quit telegraphing. Write."

Pressed by her necessities and the insistence of her husband and his attorney, she yielded and advised said attorney that she would sign the agreement, fully believing at the time that her husband was in Winnipeg and that she must sign said agreement in order to procure his return. It was not until after her signature had been affixed to the paper that Sibley made disclosure of the fact that her husband was concealed in his back office. The acknowledgment or probate of said instrument was taken by said Sibley in his capacity as a justice of the peace.

The plaintiff further avers that she did not in her judgment accept or approve said instrument; that she did not sign the same freely or voluntarily, and that on the contrary she signed it under coercion and duress and upon the representation of said attorney that it was only by signing said agreement that her husband could be induced to resume marital relations and give her the support and maintenance which would relieve her of being dependent for support upon her mother and sister, and that she was further influenced and induced to sign said agreement by the expectation held out to her by her husband's said attorney that said agreement would not be binding if the plaintiff and her husband should live together again as man and wife. The money consideration recited in said agreement is admitted to have been paid, and it was proved (though denied in the answer), and is sustained by the verdict, that the parties were promptly reconciled and thereafter lived together as husband and wife.

The complaint further avers that during all the years that plaintiff and her husband lived together thereafter there was never any mention of said purported agreement between them, and from the intimation

which plaintiff had received from her husband's said attorney and her husband's silence in regard to it thereafter, the plaintiff did not think said instrument was a valid and binding agreement.

For the above reasons, the plaintiff repudiates and disaffirms said agreement, and asks that it may be set aside and canceled, and offers to account to the estate for her deceased husband and to the other defendants herein for all the benefits received by her under said purported agreement over and above the support which she was lawfully entitled to receive from her said husband, and for an accounting therefor. It is alleged that the testator, at the time of his death, was a citizen and resident of Henderson County, N. C., and that he died, leaving no child or lineal descendant. It is further alleged that the plaintiff, within the time allowed by law, duly dissented from the will of her said husband; and upon all the grounds above mentioned, she prays for a cancellation of said separation agreement and that she may be allowed her marital rights in the estate of her deceased husband, subject to the accounting which she tenders above.

The answer admits that the plaintiff is the widow of the testator, but denies nearly every other matter in the complaint, including the alleged North Carolina citizenship of the testator and the widow's dissent, and further charges as a defense that the plaintiff "violated her marital vows and was unfaithful to her husband, and that by reason of such conduct on her part the separation was agreed to"; and there is also denial that the plaintiff and her husband lived together as man and wife after the execution of separation agreement. At the trial neither the charge of unchastity nor the denial of cohabitation after the reconciliation was supported by any evidence. There was no plea of any statute of limitations. The controversy was submitted to the jury upon the following issues, which were answered, by consent of the parties and by the jury, respectively, as follows:

"1. Were the plaintiff and her deceased husband citizens of the State of Massachusetts at the time of the execution of the agreement, made 23 November, 1912, as alleged? Answer: 'Yes' (answered by the court, by consent of the parties).

"2. Was the alleged agreement of 23 November, 1912, set out in the pleadings, executed by plaintiff in manner and form required by the laws of North Carolina? Answer: 'No' (answered by the court, by consent of parties).

"3. Was the alleged agreement of 23 November, 1912, set out in the pleadings, executed by the plaintiff in the manner and form required by the laws of the State of Massachusetts? Answer: 'Yes' (answered by the jury).

"4. Was the alleged agreement of 23 November, 1912, such a contract as could at the time be entered into by husband and wife under the laws of Massachusetts? Answer: 'Yes' (by the jury).

"5. Was the plaintiff procured to execute said agreement by coercion or fraud, as alleged in the complaint? Answer: 'Yes' (by the jury).

"6. Was the testator, at the time of his death, a citizen and resident of the county of Henderson, N. C.? Answer: 'Yes' (answered by the court, by consent of parties).

"7. Did the plaintiff dissent from the will of the said testator within the time required by law, as alleged in the complaint? Answer: 'Yes' (by court, by consent of the parties).

"8. Did the plaintiff and the testator live together as husband and wife after 23 November, 1912, as alleged in the complaint? Answer: 'Yes' (by the court, by consent of the parties)."

Upon the foregoing verdict, the court rendered judgment that the separation agreement of 23 November, 1912, set out in the complaint, is null, void and of no effect as a bar to the rights of the plaintiff in the estate of her deceased husband, and the same is hereby vacated and canceled; and it appearing by the verdict that the plaintiff dissented from the will of said testator within the time required by law, it was further adjudged that the plaintiff should "have the same rights and estate in the real and personal property of her husband as if he had died intestate."

And the judgment further required that upon an inspection of the pleadings it is necessary that there should be an accounting by the plaintiff and the defendant as executor for all the benefits received by the plaintiff upon the agreement of separation aforementioned, which she may have received over and above the support which she was lawfully entitled to receive from her said husband. It is further ordered that Welch Galloway is appointed as referee, as upon a consent reference, to take and state said account accordingly, and file his report to the October Term, 1923, of this court.

And it being made to appear to the court that the plaintiff has filed the proceeding within the proper time for a year's allowance, leave was given her to prosecute said proceeding; and it was further adjudged that the plaintiff recover her costs in this action, to be taxed by the clerk, the cause being retained for further orders.

From aforesaid judgment the defendants appealed.

Shipman & Justice, Boone Arledge, and Carter, Shuford & Hartshorn for plaintiff.

Ewbank & Whitmire and McD. Ray for defendants.

CLARK, C. J. The first question presented in the brief of the appellants was not adjudged in the court below, but it is now contended here for the first time that the rights of the plaintiff have been lost by laches. There are questions which may be presented for the first time on appeal in the appellate court which were not presented on the trial below, but those are almost, if not entirely, confined to questions ousting the jurisdiction, or in the nature of a demurrer that the allegations in the complaint do not set forth a cause of action, and this objection need not be considered by us. Besides, there is nothing in the complaint or in the proof which would prove the plaintiff guilty of laches. Neither was the statute of limitations pleaded, and, therefore, if it might have had any bearing, it is waived.

As to the assignments of error, the first, which was for the refusal of a nonsuit at the close of the plaintiff's evidence, was waived, the defendant having offered testimony. The second assignment was for admission of the telegram from the plaintiff to her husband, dated 14 November, 1912. The plaintiff had testified, "I showed Mr. Sibley all telegrams and advised him of any communication which I had in any way," and the record states that "this testimony was offered by the plaintiff and received by the court only as showing what had occurred between plaintiff and the witness, Sibley, whose depositions about the same matters had already been offered in evidence by the defendants." The third assignment of error is expressly abandoned, as stated in the defendants' brief.

The fourth assignment of error is to the admission in evidence, over defendants' objection, of an unsigned writing, which was identified as being wholly in the handwriting of testator, as follows: "If Mrs. Satterthwaite signs the agreement, no doubt, everything will be adjusted." This paper was found, after testator's death, in a box in which he had other papers and contracts. It was couched in terms appropriate to the transaction in controversy, and was properly submitted to the jury under instructions which we must take to have been with suitable cautions from the court as to the purposes for which this evidence was to be considered, since the charge of the court is not sent up.

Assignment 5 is to the admission in evidence, over the defendants' objection, of a letter from the witness Sibley to the testator in reference to particular matters about which he testified for the defendants.

Assignments of error 6 and 7 are not to the admission of communications from the testator to the plaintiff, but to letters and telegrams wholly in the handwriting of the testator to his banker, and relate to the money admitted to have been paid to the wife under the agreement.

The eighth assignment is a blanket assignment of error for the admission of letters from the testator to the plaintiff after full identification.

These were offered by the plaintiff and were competent for the purpose of showing the relation existing between her and her husband, both before and after the agreement of separation, and for the further purpose of showing that the plaintiff and her said husband lived together as husband and wife after the execution of said agreement. The defendants offered no objection to the instructions of the court under which these letters were considered by the jury. The answer had denied that the plaintiff and the testator lived together as husband and wife after the execution of the separation agreement.

The plaintiff was not incompetent, under C. S., 1795, to testify that the signatures and papers were in the handwriting of the deceased. *McEwan v. Brown,* 176 N. C., 249; *Sawyer v. Grandy,* 113 N. C., 42; *Ferebee v. Pritchard,* 112 N. C., 83; *Hussey v. Kirkman,* 95 N. C., 63; *Peoples v. Maxwell,* 64 N. C., 313. And there are still other decisions to the same effect.

The ninth assignment of error is to the denial of defendants' motion, at the close of all the evidence, for a judgment of nonsuit. This ruling is not assailed in defendants' brief upon any ground taken in the trial court, but upon the ground of laches, which is raised in this Court for the first time. The fullness of the evidence is such as to render any discussion of this assignment of error unnecessary.

The remaining two assignments of error are merely formal. After full consideration of all the exceptions presented, we find

No error.

JOSEPH E. McDOWELL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 5 December, 1923.)

1. Evidence—Issues—Burden of Proof—Questions for Jury—Railroads—Fires—Negligence.

Upon conflicting evidence as to whether defendant railroad company's train, in passing the plaintiff's premises adjoining the right of way over which it passed, set afire and destroyed the plaintiff's dwelling, the finding of the fact by the jury that the fire was caused by sparks from the train is only sufficient evidence upon which the jury may find the issue of negligence in the plaintiff's favor, and does not relieve him of the burden to establish the issue of negligence by a preponderance of the evidence.

2. Same—Instructions.

Where the burden of the issue remains upon the plaintiff to show the negligence of the defendant railroad company in causing him damage by setting fire to his property by the passing of its train, with a defective

spark-arrester, it is reversible error for the trial judge to charge the jury that if they found the fire was caused by sparks from the defendant's locomotive, the burden of the issue would shift to it to disprove its negligence as the cause of the damage, the plaintiff's evidence being sufficient only to sustain a verdict on the issue, if rendered in the affirmative.

3. Same—Constitutional Law—Trials by Jury—Substantial Rights.

The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the Federal Constitution, and more emphatically by our State Constitution, Art. I, sec. 19, requiring "that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

4. Same—Instructions—Appeal and Error.

Where there is evidence in plaintiff's behalf, and *per contra*, that sparks coming from defendant's passing locomotive set fire to and destroyed his dwelling, in his action to recover damages for the railroad's negligence therein, the trial judge should instruct the jury properly upon the law as to the burden of the issue, and an instruction that the burden of proof of the issue would shift to the defendant should they find the plaintiff's evidence to be true is reversible error.

CLARK, C. J., dissenting.

APPEAL by defendant from *Lane, J.*, at March Term, 1923, of RANDOLPH.

Civil action. The action is to recover damages for destruction of plaintiff's house, and personal property therein, by fire, on 6 December, 1920, through the negligence of defendant in operating its train, and chiefly by reason of a defective spark-arrester on the defendant's engine, the house being situate just adjacent to defendant's right of way, in or near the town of Asheboro, N. C. Defendant denied that the house was set on fire by its train, or otherwise, and denied that the engine was in any way defective; and both sides offered large numbers of witnesses in support of their respective positions. On issues submitted, the jury rendered verdict as follows:

"1. Was the building and other property of plaintiff destroyed by fire by the negligence of defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage is plaintiff entitled to recover of defendant? Answer: '$4,000.' "

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

Hammer & Moser, C. N. Cox, and H. M. Robins for plaintiff.

J. A. Spence for defendant.

HOKE, J. There were a large number of witnesses examined by both of the parties to the controversy, the testimony on the issue of liability being directed chiefly to the inquiry whether plaintiff's property was set on fire by defendant company or its agents, and if so, was this by reason of a defective spark-arrester on the engine drawing defendant's train at the time? And in reference thereto the court charged the jury as follows:

"There is a rule of law which says that whenever it is shown or found to be a fact, or admitted by a defendant, that a fire is actually caused and started from cinders or sparks from an engine, that then the law raises a presumption that it was due to negligence, and then the burden shifts to the defendant to show by the greater weight of the evidence that there was not negligence and that the fire did not escape from the engine and start another fire because of any negligence; and so, in this case, the burden would be upon the plaintiff to satisfy the jury that the fire actually started from the locomotive engine; and if the plaintiff has satisfied you of that fact by the greater weight of the evidence, then the burden would be upon the defendant to go forth and satisfy you by the greater weight of the evidence that there was no negligence; but unless plaintiff satisfies you first that the fire actually started from the cinders or sparks from the engine, then no presumption of negligence would arise from the mere starting of the fire from the engine, and the negligence proven would have to be proven by the plaintiff by the greater weight or preponderance of the evidence as well as the starting of the fire from the engine."

We find nothing in the further instructions of the court that makes any substantial change or modification in this position, the court, in the latter part of the charge, directing the jury that the evidence should be considered and the rights of the parties on the issue of liability determined under the rule as formerly given. This being true, we are of opinion that the charge as stated is erroneous and defendant, having duly excepted, is entitled to a new trial of the cause.

The question presented has been the subject of extended discussion in this Court, and there has been some variety of decision concerning it, but it is the settled ruling of the later and prevailing cases that where it is shown that the property of a claimant has been destroyed by fire communicated from defendant's train, that will make a *prima facie* case carrying the issue of liability to the jury, and of itself and without more is sufficient to justify a verdict as for a negligent wrong.

In numbers of the cases, particularly of the former time, it is said that the facts suggested raise a presumption of negligence, but, as shown in *Overcash v. Electric Co.*, 144 N. C., 572-582, and other cases, it is but evidence and termed presumptive only in the sense as stated, that it per-

mits and justifies an inference of liability if the jury are thereby satisfied that a negligent wrong is established, and it should never have the effect of changing the burden of the issue by putting on the defendant, as was done in the present instance, the burden of disproving the negligence charged, by the greater weight of the evidence.

Again, it is said in other decisions that when the facts suggested have been made to appear, it is the duty of the defendant to go forward with his proof; but this does not at all mean that, as a matter of law, defendant is required to offer proof in rebuttal, but only that if he fails to offer evidence in explanation of the conditions presented, he takes the risk of having a valid verdict rendered fixing him with liability.

The question referred to was very fully discussed by *Associate Justice Adams* in the recent case of *White v. Hines,* 182 N. C., 276, injury from derailment of a train, and where, after a careful and discriminating review of a large number of the decisions on the subject, it was held to be the rule now prevailing with us:

"Where a *prima facie* case of negligence is made out, the jury will be justified in finding for the plaintiff thereon, the burden of the issue remaining on the plaintiff, it being for the jury to determine whether upon the entire evidence the plaintiff has established the defendant's negligence by the greater weight of the evidence, leaving it for the defendant to determine whether it will introduce further evidence or take the chance of an adverse verdict on the issue."

And, in the opinion, the learned judge, among other things, said: "A *prima facie* case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose. *Troy v. Evans,* 97 U. S., 3; *Kelly v. Johnson,* 6 Pet., U. S., 622; Jones on Evidence, sec. 8; *S. v. Floyd,* 35 N. C., 385; *S. v. Wilkerson, supra.* Even if the *prima facie* case be called a presumption of negligence, the presumption still is only evidence of negligence for the consideration of the jury. *Overcash v. Electric Co., supra; Shepard v. Telegraph Co., supra; Mumpower v. R. R., supra.* In some of our decisions the expressions *res ipsa loquitur, prima facie* evidence, *prima facie* case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury. *Womble v. Grocery Co., supra; Stewart v. Carpet Co., supra; Ross v. Cotton Mills, supra; Shepard v. Telegraph Co., supra; Mumpower v. R. R., supra; Perry v. Mfg. Co.,* 176 N. C., 69. When the plaintiff proves, for instance, that he has been injured by the fall of an elevator, or by a derailment, or by the collision of trains or other like cause, the doctrine of *res ipsa loquitur* applies, and the plaintiff has a *prima facie* case of negligence for the consider-

ation of the jury. Such *prima facie* case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offers evidence the plaintiff may introduce additional evidence, and the jury will then say whether, upon all the evidence, the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant."

And both the statement and the conclusion reached are fully supported by well-considered authorities of this Court dealing directly with the question. *Page v. Mfg. Co.,* 180 N. C., 330-334, etc.; *S. v. Wilkerson,* 164 N. C., 432; *Brock v. Ins. Co.,* 156 N. C., 112; *Cox v. R. R.,* 149 N. C., 117 (a case of putting out fire); *Winslow v. Hardwood Co.,* 147 N. C., 275; *Overcash v. R. R.,* 144 N. C., 572; *Stewart v. Carpet Co.,* 138 N. C., 60; *Womble v. Grocery Co.,* 135 N. C., 474. And the Supreme Court of the United States has approved and upheld this view of the matter. See *Sweeny v. Erwin,* 228 U. S., 233, and authorities cited.

In *Page v. Mfg. Co.,* a case of setting fire to property, it was held among other rulings:

"Where, in an action to recover damages of a railroad for the negligence of the defendant in burning over plaintiff's lands, there is evidence that the injury was caused by sparks from the defendant's passing locomotive which started the conflagration, a *prima facie* case is established under the doctrine of *res ipsa loquitur,* and the burden of the issue remains with the plaintiff, the *prima facie* case being only sufficient evidence to carry the case to the jury and to sustain a verdict in the plaintiff's favor. An instruction to the jury which places upon the defendant the burden of satisfying the jury by a preponderance of the evidence that it was not negligent is error.

"It is reversible error for the trial judge to instruct the jury, in effect, that the burden of the issue did not remain with the plaintiff, in his action against a railroad company for negligently setting out fire from its passing locomotive to the injury of his land, where applying the doctrine of *res ipsa loquitur.*"

In *Cox v. R. R.,* 149 N. C., 117, the decision is expressed in the headnote as follows: "In an action to recover damages to plaintiff's property alleged to have been negligently caused by sparks emitted from defendant's passing engine, when there was evidence tending to show negligence: *Held,* (1) It was error in the trial judge to charge the jury, in effect, that if they found the evidence to be true there would be a presumption in law of defendant's negligence, and the burden of proof would be upon defendant to show to the contrary. (2) Plaintiff's evidence made out a *prima facie* case to the extent only of carrying the

case to the jury to find whether or not the injury was caused by defendant's negligence. (3) The burden of the issue does not shift from plaintiff, while the burden of proof may do so. (*Winslow v. Hardwood Co.*, 147 N. C., 275, cited and approved.)

And in the United States case of *Sweeney v. Erwin* it was held: (1) Where the rule of *res ipsa loquitur* applies it does not have the effect of shifting the burden of proof. (2) *Res ipsa loquitur* means that the facts of the occurrence warrant an inference of negligence, not that they compel such an inference, nor does *res ipsa loquitur* convert the defendant's general issue into an affirmative defense. (3) Even when the rule of *res ipsa loquitur* applies, it is for the jury to determine whether the preponderance is with the plaintiff.

In *White v. Hines* a verdict and judgment for plaintiff was upheld on the ground that, construing the charge as a whole, it was not clearly made to appear that there was reversible error. It is possible that the charge in that case received an interpretation by the Court too favorable to the plaintiff; but, however that may be, there is no doubt of the principle there announced, and fully supported by the other cases cited, that the burden of the issue never shifts to the defendant, and that it is reversible error for the trial court to instruct the jury that, on a *prima facie* case being made to appear, the defendant has the burden of disproving negligence by the greater weight of the evidence.

In the present case, and under the principle stated, the charge of the court having placed this burden upon the defendant, and without qualification, the same is erroneous and defendant's exception thereto must be sustained.

And we may not approve of the suggestion that the exception is not of sufficient importance to justify an interference with an extended and costly trial of this kind, or that the jury should be allowed to settle the question at issue without any rule to guide them in their deliberations. This trial by jury has been the accepted and approved method of determining questions of disputed fact among English-speaking peoples for more than 900 years, and while particular verdicts have been at times severely criticized, the proposition to make a change to any other method has never made any headway, but the principle has grown and strengthened by time, and its integrity is guaranteed in the Constitution of both State and nation; that of the State being especially impressive, Article I, section 19, providing "that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." And one of the chiefest features of such a trial as contemplated in these instruments is that the evidence shall be received and weighed in accordance with established rules which have

been found by time and experience to make for the ascertainment of truth and the maintenance of right, and a clear violation of such rules can never be regarded as of slight importance.

Speaking to this question in *Hosiery Co. v. Express Co.*, 184 N. C., 478-480, *Stacy, J.*, said: "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."

In *S. v. Parks*, 25 N. C., 296, *Gaston, J.*, said: "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."

And *Chief Justice John Marshall*, in *Mima Queen v. Hepburn:* "It was very justly said 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 liberties 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.' "

Nor should it be for a moment considered that the jury should be left to determine these vital rights between man and man without any authority to instruct or guide them in their deliberations. Such a course would turn this ancient and accepted mode of trial from an authoritative and orderly judicial procedure to a mere arbitration in *pais*, with all the uncertainties and inconsistencies that such a method would involve. We are gratified to believe that no such demoralizing proposition is likely to prevail in this jurisdiction now or at any future time.

For the reasons heretofore stated we are of opinion that defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

CLARK, C. J., dissenting: The dwelling-house of the plaintiff and his personal property therein were destroyed by fire 6 December, 1920, now three years ago, and the plaintiff alleges this loss was due to a defective spark-arrester on the defendant's engine, the house being situate just adjacent to defendant's right of way. The defendant denied that its negligence caused the damage, and this was the sole question at issue. The case was tried upon that issue of fact, and 57 witnesses testified for the plaintiff and 65 for the defendant.

It was a question of fact which could only be settled by testimony of witnesses and the verdict of a jury.

For many hundreds of years issues of fact have been thus settled, and the only burden ever imposed was that the plaintiff must prove his allegation to the satisfaction of the jury, or, in criminal cases, the formula has been the State must prove the defendant guilty beyond a reasonable doubt, and this Court has held that "fully satisfied" and "beyond a reasonable doubt" are synonymous. The jury have heard the case for many days and 122 witnesses, and have found there was proof to their unanimous satisfaction that the house was destroyed by fire caused by the negligence of the defendant as alleged in the complaint, and that the plaintiff is entitled to recover of the defendant $4,000.

Some fifteen or twenty years ago some dreamer or idealist conceived the design of splitting up the simple burden which the jury could understand of "fully satisfied" and "by the greater weight of the evidence" and procured this Court to hold, as he had previously persuaded some others to hold, that the burden of proof should be split up, and there then began the installation of the doctrine of the "burden of proof" shifting, and then there was the addition of the "burden of the issue," and then that these could shift, and then some ingenious and metaphysical word-carpenter added the doctrine of *prima facie* case and when that could carry the burden of liability to the jury or not, and the doctrine of *res ipsa loquitur* and the presumption of law and presumption of fact and as to which of these was preponderant, and when each of them should prevail and when they should shift back and when it was requisite to tell the jury as to these different shiftings backwards and forwards. The result has been so to entangle the matter that it is safe to say that there is not a judge presiding in any trial court in North Carolina today who can, with any safety of being affirmed on appeal, charge the jury as to these various weighty matters as to whether the burden of the *prima facie* case, or the burden of proof, or the burden of the issue or either of the presumptions should shift or exactly when it should shift and at what particular time it should be transferred, and whether and when the party shifting or transferring "should go forward with proof," and many other equally intelligible refinements.

Instead of the law being simplified, it has been inextricably confused, and it has been made impossible for any judge to assert with certainty that he has complied with these difficult and numerous complicated and embarrassing requirements which have been substituted for the old-fashioned, age-long requirement, which alone juries can understand and do understand, as to which side has the burden of proof. "By the multitude of words counsel has been darkened."

There has been no statute whatever in North Carolina nor any indication of one laying down a rule requiring these complicated disquisi-

tions to the jury, which can have no effect except to divert attention from the matter which the jury are to determine. If there is a trial judge in this State who can be sure that he is absolutely and accurately complying with the refinements which can be argued on appeal as to the exact time when the burden of the issue or the burden of proof shall shift, or the *prima facie* case, or the presumption, or when it should shift back, and whether in any case such shifting should be done by the greater weight of the evidence, or, as was gravely argued recently, whether upon a given state of facts it should shift back upon an even weight of the evidence and not by preponderance—if all these matters are clear to any trial judge, it is very certain that there is not a jury of twelve honest, intelligent men who can understand them. They cannot spend a lifetime to puzzle them out, nor have they the bulging fees to induce them even to try to do so.

If this innovation had been brought about by any statute there might have been some clear form of expression prescribed which would enable the judges to guess as to the various phases of these technicalities and the exact time and the exact shifting of the preponderance of these various matters, and the indications that would foreshadow and adumbrate them, and to what extent they may go.

In this particular case the man's house was destroyed. He has asked for compensation, and a speedy trial was guaranteed by Magna Carta more than seven hundred years ago, but the result has been that he has been out of his house for more than three years, and up to date the matter is still not determined.

While there is but a single question for the twelve men to decide, and that is whether the jury are satisfied by the greater weight of the evidence that his house was burnt by the negligence of the defendant or not, the houseless man has now been condemned to go back and go over the whole trouble again, though he has put 57 witnesses on the stand and the defendant has had 65 witnesses to testify, and nothing yet is accomplished except court costs and lawyers' fees.

Such changes in our law should not be invented or introduced by the Court, for it is certain that no Legislature voicing the will of the people would ever enact such obstructions in the administration of justice.

The greatest trouble in the introduction of so many technicalities, so many ways to

"Distinguish and divide a hair betwixt south and southwest side,"

is the enormous and overwhelming advantage it gives wealthy suitors and corporations in delaying trial, making them costly, not only by the refinements as to the burden of these imperceptible distinctions as to who at a given moment is chargeable with the burden upon any given

point, but by insuring, as in this case, a new trial upon some perfectly immaterial and irrelevant matter which, no matter how it had been charged, according to the new rules, would not have made any difference to the jury who could not have understood such refinements. They are fully satisfied whether the house was, or was not, burned down by the negligence of the defendant, and to determine that was the sole object of the trial. The jury of "good men and true" was not impaneled to split hairs.

There is also a tendency, notwithstanding the many recent statutes simplifying indictments, to add new requirements of technicalities as in the recent case, where the indictment for burglary was *verbatim* that which had obtained for ages, but a new technicality was added, without statute, with the result that a negro who entered the room of a white woman and laid his hands upon her at midnight was granted a new trial because of the omission of the word "attempt," which had never been required before, and for the failure to charge, as the defendant's counsel insisted, that the jury should have the option to give five different verdicts when upon the evidence only two were possible—guilty or not guilty in manner and form as charged. And this week, whether as a consequence or not, another negro charged with assault upon a white woman, upon trial in an adjoining county, has been "hid out" each night, a spectacle never before known in North Carolina.

In the case at bar, being a civil case, the jury, after hearing the testimony of 122 witnesses, found the only material fact, that the plaintiff's house had been destroyed by fire set out by the defendant's engine; and now, after the lapse of three years, he must start over again to present his case, without his house, minus his lawyers' fees and plus a tremendous bill of costs, and the next judge, possibly three years hence, may make some slight mistake in charging as to the presumption or the burden of the issue or the burden of proof, or the "going forward with the evidence" at exactly the right time or on the right side, and other matters of that nature. When such technicalities prevail, even the successful party is bankrupted unless very wealthy.

It ought to be the effort of every court, and certainly it is to the interest of the public, that trials should be made speedy, and be decided upon the merits and regardless of technicalities which make always in favor of the side in a civil case which can endure delay and expense, and in criminal matters they invariably work not for the public good nor for the administration of justice, but in behalf of the criminal, especially as to the latter in cases of exploiting a bank (when the sufferers have been the masses, the depositors) and in crimes against women, for as to these two crimes juries rarely misunderstand the evidence, and the demand of astute counsel for additional technicalities is urgent.

If the people of North Carolina wish these delays and desire these refinements, which frustrate justice and serve no good end, the change in that direction should be made by statute that we may know it is the will of the people, and not by refinements introduced by technical lawyers who urge them for the immense advantage it gives to a certain set of clients.

Certainly the people of the State have always evinced the opposite disposition, and *Chief Justice Ruffin* well said in *S. v. Moses,* 13 N. C., 463, that "in the criminal law nice objections of this sort were a disease of the law and a reproach to the Bench." A statute was then passed which the *Chief Justice* said was "meant to disallow the whole of them" and cut them up by the roots in consequence of a case, among others, in which one convicted of a heinous murder was discharged because the indictment left out the letter "k" in the word "knife" with which, as specified in the cumbrous indictment of that day, it was charged that he had made a wound of a certain depth and width and charged to be of a certain value, with many other refinements, including the allegation that the murderer had been "moved and instigated by the devil"—altogether an indictment of two or three pages for which a later statute, following the English form, has substituted an indictment for murder in three lines, with injury to none, and since then we have had many other statutes simplifying civil procedure and criminal trials.

In this case, three years after the man's house had been burned down and after a jury who heard 122 witnesses have found the sole fact at issue, that it was destroyed by the negligence of the defendant company, this case ought not to be sent back for a new trial upon a refinement as to shifting the burden of proof, or shifting the burden of the issue, or when it should be shifted, or when to "go forward" with proof and when and by whom this should be done, or any entanglement about the two presumptions, and whether they should carry the case to the jury and *res ipsa loquitur,* and as to the exact weight and effect to be given to any of these things.

With 122 witnesses the jury must have understood this case, and they have found, upon what they believe was the weight of the evidence, according to custom and practice of centuries, their verdict, and the judgment imposed thereon by the learned judge who tried this case should be sustained. The courts should not "bore with a gimlet," but cases should be tried and decided upon their merits.

If any judge has yielded to the "refinements," so called, which impede the administration of justice, it is no estoppel. He can overrule his own errors as we overruled the greatest of our predecessors on this Bench when they, in *Hoke v. Henderson,* 15 N. C., 1, made the mistake

of holding a public office was private property. After that decision had endured, to the great inconvenience of the public, for more than 70 years and been cited with approval in 60 cases, this Court overruled it.

All courts are fallible and often overrule their own errors. This is to their credit, not to their discredit. Justice only is eternal. Her only should we seek after and follow.

STATE v. ROBERT J. HART.

(Filed 5 December, 1923.)

1. Criminal Law—Principals—Aiders and Abettors.

An aider or abettor is one who advises, counsels or procures, or who encourages another to commit a crime, whether personally present or not at the time and place of the commission thereof, and when two persons aid and abet each other therein, both being present, both are principals and equally guilty.

2. Same—Statutes—Females—Carnal Knowledge.

One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under eighteen years of age, in violation of C. S., sec. 4209; and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abettor in the commission of the offense, and punishable as a principal therein.

3. Instructions—Statutes—Expression of Opinion.

It is not required by C. S., sec. 564, that the judge intimate in the direct language of his charge his opinion of whether, upon the evidence, a fact is fully or sufficiently proved, and if such intimation is reasonably inferred from his manner or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of the statute, and a new trial will be ordered on appeal.

4. Constitutional Law — Criminal Law — New Trials — Custody of Defendant.

In preserving to the defendant in a criminal action a fair trial in accordance with the bill of rights preserved to him by our Constitution, and in granting him a new trial in the Superior Court, it does not necessarily follow that he is to be discharged from the custody of the courts.

CLARKSON, J., dissenting; CLARK, C. J., concurring in the dissenting opinion.

APPEAL by defendant from *Bond, J.*, at February Term, 1923, of GRANVILLE.

STATE *v.* HART.

Criminal prosecution tried upon an indictment charging H. S. Hicks and Robert J. Hart with having carnal knowledge of a female child over 12 and under 14 years of age, who had never before had sexual intercourse with any person. C. S., 4209.

The alleged offense of which the defendant was convicted occurred on 6 February, 1923, while the Superior Court of Granville County was in session. There was a preliminary hearing on the following day, before a justice of the peace, and both Hicks and Hart were bound over to the Superior Court. The case against Hart was tried in the Superior Court at the term then in session. Hicks, who was engaged in some highway work at Oxford, failed to appear and forfeited his bond. The material facts are as follows:

On the night of the alleged offense the defendant Hart, a boy 16 years of age, was returning to his work at Lyon's Drug Store, when he saw Hicks and a companion named Gill engaged in a conversation on the street. He stopped to talk with them, and very soon Gill mentioned the name of the prosecutrix. Hicks asked the defendant Hart if he knew the girl, and requested that he go with him in his one-seated Ford coupé to her home and they would bring her to the drug store for a drink. This Hart agreed to do.

When they reached the home of the prosecutrix, Hicks remained in the automobile while Hart went to the door and asked for the girl. They had some conversation about going to the drug store; and, after obtaining her mother's consent, the prosecutrix got into the car with Hicks and Hart, she sitting on the seat between them, and Hicks drove away. When they reached the corner at which it was necessary to turn in order to go to the drug store, Hicks drove his car in the opposite direction. Hart asked if they were not going to the drug store. Hicks said they did not want a drink, and the prosecutrix said that she would just as soon ride around.

As they were riding out College Street, Hicks and the prosecutrix engaged in a conversation which Hart could not hear on account of the noise of the machine. When they had passed out beyond the hospital and across the railroad, Hicks stopped the car on the side of the road and asked Hart if he had a rubber. (The prosecutrix said on her direct examination in the Superior Court that Hart asked Hicks about a rubber, but on her cross-examination she said she did not know which one asked the question. On her examination before the magistrate she said Hicks made the inquiry, and this is in accord with Hart's testimony.)

From this point on there is a conflict in the evidence for the State and that of the defendant.

The prosecutrix testified that Hicks offered to get out of the car first, but that Hart said no, he would get out, and he did. Hicks then had sexual intercourse with the prosecutrix without any resistance on her part, as she testified: "I did not attempt to resist. He was in the car with me about seven minutes. Hicks got up and did not say anything. Robert Hart was then standing at the door of the car. Hicks got out of the car. Hart got in the car. He said he was going to do what Hicks did. I told him that he was not, and he blew the horn and Hicks got in and turned the car around and we came back to town."

Hart testified that he had no knowledge of Hicks' ulterior purpose until he asked about a rubber, and that he then told Hicks that if he was going to do anything like that he would get out of the car and go back to town. He did get out and had started back when he decided that, as he had gone to the girl's home and asked her to go with them for a drink, he ought not to leave her; whereupon he turned around and went back to the car and they all three came back to Oxford. When they reached the home of the prosecutrix, Hart helped her out of the car and went to the door with her. She asked him what excuse she should give her mother for staying out so late. Hart suggested she might say they were detained at the store on account of a rush and he was busy waiting on customers.

The prosecutrix told her mother, soon after she reached home, that she had been abused, but she stated to her father that Hart had treated her like a gentleman. He did not have intercourse with her. The prosecutrix further testified that she was 13 years old and had never had intercourse with any other person; that she had not been introduced to Hicks before that night, though she had talked with him on the street.

Hart was convicted of aiding and abetting Hicks in the commission of the alleged offense and sentenced to five years in the State's Prison. He appeals, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Hicks & Stem, Parham & Lassiter, and Brogden, Reade & Bryant for defendant.

STACY, J. The defendant's demurrer to the evidence and motion for dismissal, or for judgment as of nonsuit under C. S., 4643, was properly overruled. An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense. 2 C. J., 1024. And if two persons aid and abet each other in the commission

of a crime, both being present, both are principals and equally guilty. *S. v. Jarrell,* 141 N. C., 722; *S. v. Skeen,* 182 N. C., 844.

In *S. v. Davenport,* 156 N. C., p. 614 (opinion by *Walker, J.*), it is said: "A person aids and abets when he has 'that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission.' Black's Dict., p. 56, citing 4 Blackstone, 34. An abettor is one who gives 'aid and comfort,' or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict., p. 6); or one 'who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary; and in such case he is liable as a principal.' 1 McLain Cr. Law, sec. 199."

But mere presence, and no more, is not sufficient to make one an aider and abettor. "For one who is present and sees that a felony is about to be committed, though he may do nothing to prevent it, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor." *Ruffin, C. J.,* in *S. v. Hildreth,* 31 N. C., 440.

To like effect is the language of *Chief Justice Smith* of the Supreme Court of Mississippi in the recent case of *Crawford v. State,* 97 So., 534: "In order for one to aid and abet the commission of a crime he must do something that will incite, encourage, or assist the actual perpetrator in the commission of the crime. Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him. The law does not punish intent which is without influence on an act."

Again, in *Burrell v. The State,* 18 Tex., p. 732, *Wheeler, J.,* quoting from Roscoe Cr. Ev., 213, says: "Although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who committed it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony, or apprehend the felon." See, also, Whart. Am. Cr. L., 6364; Whart. L. Homicide, 157.

The following are the defendant's main exceptions and assignments of error:

1. At the close of the State's evidence, the defendant's motion for judgment as of nonsuit was overruled. Then the solicitor, as the court was about to take a recess for the night, in open court, and in the presence of the jury, addressed the court and prayed the defendant into custody. The defendant was under a bond of $1,000, which had been ordered given the previous week of the court, and under order of the court, the bond was conditioned upon the appearance of the defendant each day during the term and not to depart without leave. In the presence of the jury, the presiding judge ordered the defendant into the custody of the sheriff. No question was raised by the solicitor as to the sufficiency of the sureties on the bond. The court stated, in the hearing of the jury, that putting the defendant in custody did not mean at all that the court thought he was guilty. To both the prayer of the solicitor and the order of the court, in the presence of the jury, the defendant excepted.

2. In the course of his Honor's charge to the jury he said: "The law used to be if a man had connection with a girl under 10, it was a capital felony, and if between the ages of 10 and 12, it was a felony if she had never before had sexual intercourse. The Legislature later moved the age of consent up to 14 (and a few days ago, one House of the Legislature passed a bill, I believe, moving the age of consent up to 16 years)." Exception by defendant to that part in parenthesis.

3. Again in the charge: "The defendant introduced certain character witnesses, the Rev. Mr. Black, the chief of police, a man named Floyd, and several others. They all stated his character was good. You will remember who the witnesses were and what they said. In answer to this character evidence, the State contends that neither of these character witnesses said Hart didn't go out with Hicks to have connection with the girl, and did not testify as to what did or did not take place." Exception by defendant. See opinions of *Henderson, C. J.*, and *Daniel, J.*, in *S. v. Lipsey*, 14 N. C., 485.

4. Still again in the charge: "Every case of this nature, if the defendant's guilt be established, which results in an acquittal, tends to injure society." Exception by defendant.

5. And again in the charge: "I am not appearing for either side. I am not interested in Mr. Hart's acquittal, and I am not especially interested in his conviction, but I am interested in seeing that both the State and the prisoner have a perfectly fair trial." Defendant excepted.

6. The defendant also excepted because in the charge his Honor repeatedly called the attention of the jury to the contentions of the State, while but slight reference was made to the contentions of the defendant.

7. Finally, the defendant excepted for that his Honor failed to instruct the jury as to the law relating to aiding and abetting, but simply charged the jury that the defendant Hart would be guilty if he aided or abetted Hicks, without any explanation or instruction as to what constituted aiding and abetting.

Defendant earnestly contends that these exceptions, taken as a whole, or in their totality, if not singly, make it quite clear that his Honor, at times during the trial, was inadvertent or inattentive to the provisions of C. S., 564, which provides: "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."

This statute has been interpreted by us to mean that no judge, in charging the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to establish any issuable fact. It is the duty of the judge, under the provisions of the statute, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. *Morris v. Kramer,* 182 N. C., 87; *S. v. Cook,* 162 N. C., 586; *Park v. Exum,* 156 N. C., p. 231. "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct." *Bank v. McArthur,* 168 N. C., p. 52. And in *S. v. Ownby,* 146 N. C., p. 678, it was said: "The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

The judge may indicate to a jury what impression the testimony or evidence has made on his mind, or what deductions he thinks should be made therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give to one of the parties an undue advantage over the other; or, again, the same result may follow the use of language, or form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *S. v. Dancy,* 78 N. C., 437. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indi-

rectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N. C., p. 192.

The able and learned judge who presided at the trial of this cause was inspired, no doubt, by a laudable and profound sense of justice, but we think it is quite clear, from the above exceptions, that an unfavorable impression against the defendant was conveyed to the jury by his Honor, unintentionally, of course, and in an earnest desire to see that the right, as he conceived it, should prevail. But just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case. "A charge, therefore, which indicates to a jury what is the opinion of the court upon the evidence violates the act. We all know how earnestly, in general, juries seek to ascertain the opinion of the judge trying the cause, upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the act was to guard against such results—to throw upon the jurors themselves the responsibility of responding to the facts of the case. Nor is it proper for a judge to lead the jury to their conclusions on the facts." *Nash, C. J.,* in *Nash v. Morton,* 48 N. C., p. 6.

Our most able and upright judges, at times, have inadvertently overstepped the limits fixed by the law; and in each case this Court has enforced the injunction of the statute and restored the injured party to a fair and equal opportunity before the jury. Our view that the statute has been violated in the instant case is sustained by the authorities already cited, and to which the following may be added: *S. v. Rogers,* 173 N. C., 755; *S. v. Horne,* 171 N. C., 787; *Chance v. Ice Co.,* 166 N. C., 495; *Ray v. Patterson,* 165 N. C., 512; *Sprinkle v. Foote,* 71 N. C., 411; *Powell v. R. R.,* 68 N. C., 395; *Reiger v. Davis,* 67 N. C., 185; *S. v. Bailey,* 60 N. C., 137; *S. v. Dick,* 60 N. C., 440; *S. v. Pressley,* 35 N. C., 494; *S. v. Thomas,* 29 N. C., 381; *S. v. Davis,* 15 N. C., 612; *Reel v. Reel,* 9 N. C., 63.

Speaking of a similar situation in *S. v. Dick, supra, Manly, J.,* said: "This (referring to the statute), we suppose, has been adopted to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their

natures, and disposed to shift off responsibility; and in danger also from the ever active principle that power is always stealing from the many to the few. We impute no intentional wrong to the judge who tried this case below. The error is one of those casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury."

The capable and painstaking judge who presided at the trial did not intend to prejudice the defendant's case, but, after a careful and earnest consideration of the record, we are constrained to believe that the defendant is entitled to a new trial, and such will be awarded.

In view of the wide range of discussion which the case has taken, it may not be amiss to remark that the defendant is not to be released or discharged; he is to be tried again. A new trial does not mean an acquittal; it signifies an effort and determination on our part, in keeping with numberless precedents, to preserve to the defendant his constitutional right of trial by jury. 24 Cyc., 100. This right, says *Judge Story,* is justly dear to the American people; it has ever been esteemed by them as a privilege of the highest and most beneficial nature. See, also, 3 Bl. Com., 271.

"The just purpose and excellence of trial by jury, especially in criminal cases, are not imaginary and whimsical, or the outgrowth of popular ignorance and persistent clamor. While it is not perfect as a method of trial, has its imperfections, and is sometimes perverted and prostituted, nevertheless the practical experience of one of the freest and most enlightened nations of the earth for centuries and of this country during all the time of its existence, the sanction of it by the wisest statesmen and jurists in different ages, as well as common sense, have proved its inestimable value as the best method of trial, in criminal cases especially, and the necessity for it as a constituent provision in any system of free government." *Merrimon, J.,* in *S. v. Holt,* 90 N. C., p. 751.

It is our duty, under circumstances like the present, to declare the law with impartial neutrality and to hold the scales of justice with an even hand. To this end, it is expressly enjoined in the bill of rights that no man shall be "deprived of his life, liberty, or property but by the law of the land." As the case goes back for another hearing, by reason of what we conceive to be an erroneous expression of opinion by the trial court, we refrain from any discussion of the evidence.

After a careful scrutiny of the record, we have arrived at the conclusion that the defendant, in the present case, has not been tried in accordance with the law as it prevails in this jurisdiction. It is fundamental with us that every citizen, charged with crime, shall be given a

fair, impartial and lawful trial by a jury of his peers. We think his Honor overstepped the bounds, inadvertently of course, but nevertheless to the prejudice of the defendant. The writer knows from a personal acquaintance with the trial judge, and from the records which come to this Court, that he usually protects, with sedulous care, the rights of a defendant in a criminal prosecution as well as those of the State. He was not conscious of expressing any opinion adverse to the defendant in this case, but we think the jury must have so understood his remarks, as appears from the above exceptions.

Venire de novo.

CLARKSON, J., dissenting: It is with regret that I cannot agree with the majority opinion in this case.

The statute under which the defendant was indicted, C. S., 4209, is as follows:

"Obtaining carnal knowledge of virtuous girls between 12 and 14 years old. If any person shall unlawfully carnally know or abuse any female child over twelve and under fourteen years old, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the State's Prison, in the discretion of the court."

The Legislature of North Carolina, chapter 140, Session 1923, amended the above act to read as follows:

"If any male person shall carnally know or abuse any female child over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court; and any female person who shall carnally know any male child under the age of sixteen years shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court: *Provided,* that if the offenders shall be married or shall thereafter marry, such marriage shall be a bar to further prosecution."

This act was passed 3 March, 1923, and went into effect 1 July, 1923. The good women of the State used their influence with the 1923 Legislature of North Carolina to extend the "age of consent" from fourteen to sixteen.

The Legislature of the State in these acts used the words *female child.* The purpose of these acts was to protect the girl children of the State, in their purity and innocency, from the unbridled passion and lust of evil, amorous men—human spiders—who would ensnare purity and innocency, and when caught in the net they would become helpless victims. To protect the female girlhood from them that lay in wait and lurk privily to destroy virtue. The motive of the law-makers was

for purity and virtue among the girl children of the State. Unconscious in their innocent childhood as a bird caught and trapped in the snare and knoweth not that it is for her destruction.

Has the defendant violated this laudable statute? Was he tried fairly and convicted, as he was, by a jury of twelve men, and in accordance with the rules of law of this State? I think he was. Let us examine the facts in this case upon which the defendant was convicted. The defendant, Robert J. Hart, and one H. S. Hicks were indicted jointly. Hicks is a fugitive from justice, and only Hart was on trial. The child, Deloris Mangum, testified that she was 13 years old and living with her father and mother in Oxford. She knew both Hart and Hicks, the former about a year and the latter about six months. She had never been introduced to Hicks, but had talked to him on the streets. Hart was a clerk in a drug store in Oxford and Hicks was working in a highway construction office. Neither had ever visited her at her father's home. On the night of 6 February Hart came to the front door of her home about six o'clock. Deloris Mangum testified: "I went to the front door and he asked me if I did not want to go to the drug store and get a drink. I told him it was too late and that I was not dressed. He said that was all right, and I went to the kitchen and asked mother, and she asked who Robert Hart was, and I told her he was Allie Hart's brother. She went to the door and I heard Robert Hart tell her we would not be gone long. She said it was mighty late, but consented for me to go. I went with Robert to the car. It was a Ford coupé and had one seat. It was Hicks' car and he was driving. We turned and went up Pennsylvania Avenue to College Street corner and then turned to the left up College Street. If going to the drug store we should have turned to the right at the corner. I did not say anything when we turned to the left at the corner. I did not say anything when we turned up College Street instead of going to the drug store. We went up College Street and out on the asphalt road to the other side of the hospital, across the railroad track about 200 yards. Hicks was driving and stopped the car on the side of the road. Robert Hart asked Hicks if he had a rubber. Hicks said 'No.' Hicks said he would get out, Hart said no he would get out. Hart got out of the car and walked away up the road. Hicks asked me how long it was before my periods. I told him about two weeks, he said that was all right and told me to lie down. I laid down on the seat with my head next to the steering wheel. He kissed me. I unfastened my bloomers and he took one leg of them down. He then had sexual intercourse with me. I did not resist. Hicks got up and said nothing. Hart was standing at the door of the car. Hicks got out of the car and Hart got in. He said he was going to do what Hicks did.

I told him he was not. He blew the horn and Hicks got in and turned the car around and we came back to town. I was in the car alone with Hicks about seven minutes. On the way back we stopped to get the ice off of the windshield. There was snow and sleet on the ground. Hart told me to tell my mother the reason we were late they had a rush at the drug store. I do not know where my father was. Hart got out of the car and went to the door with me. My father came up and told him never to come there again and take me off. I went in the house and my mother asked me where I had been, and I told her they had insulted me and they treated me just like married folks. I did not tell my father. My mother told him. Dr. Watkins came after supper and examined me. I told him what had been done. I had never had sexual intercourse with any one before that time." She stated that she would be 14 years old next September. On cross-examination she said that she did not know which one asked about the rubber, and she told her father that Hart had treated her like a gentleman.

Mrs. Mary Ella Mangum, the mother, and Elvis Mangum, the father, of Deloris Mangum, corroborated her in all material matters. Her mother testified that the morning of the preliminary examination "she was very nervous. She was a nervous wreck."

Her father, Elvis B. Mangum, testified that when he got home in the evening his wife was nervous and worried and told him that Deloris had gone to the drug store with Robert Hart, and he immediately went in search of her.

Dr. G. S. Watkins, a physician who examined her, corroborated her and said: "I give it as my opinion that she had never had sexual intercourse with any person before this time," and further, at the preliminary examination, "she was very nervous."

On the preliminary examination Deloris Mangum said: "He told me to lie down, and laid me down. I did not attempt to resist. I did not say anything. I knew it was no use. He laid me down on the seat. After he laid me down he kissed me. I did not say anything. He got on me; he had intercourse with me. He did not say anything. When I saw Robert Hart he was standing at the car door. When Hicks got up he got out, and Robert got in." In the Superior Court examination she said, "He said he was going to do what Hicks did. I told him he was not."

There was testimony that the character of Deloris Mangum and that of her father and mother were good.

This was in substance the State's testimony.

Robert J. Hart, the defendant, was examined in his own behalf, and his testimony corroborated that of Deloris Mangum in many particulars. He was 17 years old, and testified, in part: "I did not know that

any such thing was going to be attempted. I left the store and got in the car with Hicks. I thought that he just wanted to meet the girl and that we would bring her to the store and get a drink."

In the defendant's evidence are the ear-marks of the web that they were weaving for this young girl, and the conspiracy can be traced in defendant's evidence. After trapping her, they destroy her character and thus obtain an acquittal. Cullom Hester testified that he saw Deloris Mangum and Alvin Eakes on 16 January, 1923, in a Ford roadster near a path that comes into the Salem road, and Charles Hester said that he was with his son and that his son said the boy and girl were Deloris Mangum and the Eakes boy. Ralph Turner testified that he was a student at Oxford High School, and that he saw Deloris Mangum get in a car in front of the High School building on the afternoon of 16 January and go out towards the Salem road. To like effect was the testimony of Bailey Currin. On cross-examination he said that Robert Hart came to him and said, "I am in trouble with a girl and she has squealed on me, and you have got to help me out." This is a plain admission by Hart, testified to by his own witness. The statute does not allow "consent" by a virtuous child.

The young men at the school, from this incident, commenced talking about Deloris Mangum. Alvin Eakes, in rebuttal of anything wrong, said that about 3 o'clock in the evening of 16 January, 1923, he did not have much to do and he got in his Ford roadster and went to the Oxford High School building and stopped his car in front of the building. Deloris Mangum got in the car and he told her he would take her home, and he drove her around Oxford, but was never on the Salem road. This was in the afternoon, about 3 o'clock—day-time. Deloris Mangum corroborated Eakes and denied she had ever met Charles or Cullom Hester on the afternoon of 16 January on the Salem road, and stated that she had known Eakes ever since she could remember. The incident of young Eakes and Deloris going to ride in the afternoon commenced to be whispered around. These young people (she a high-school girl) took a ride in broad daylight, with a playmate she had known all her life. The whispers started from evil minds.

What does the defendant Hart say on that fatal night for Deloris Mangum, 6 February, 1923?: "Late in the afternoon of 6 February I left the store to get my supper. I went to my uncle's, and when I came back up town I saw H. S. Hicks and a boy named Edward Gill at the foot of the steps leading up to General Royster's office. They were talking, and I came up, and Gill told Hicks that he knew a girl who was crazy to meet him. I said, 'I bet I know who it is.' Gill said to me that I was thinking about that Mangum girl. I told him that I was not thinking of her especially. I went in Pittman's drug store,

which was next door to where we were standing. Hicks came in and sat down at a table with me. He asked me to go with him down to her home. I told him that it was too late, and that I had to go back to work in a few minutes. It was nearly six, and I was supposed to be back at my work about six. He said that he would not be away but a few minutes and that we would bring the girl to the drug store. He said that his car was out there on the street. He said, 'Come and let's go,' and that I could go straight back to work. I got in the car with him and went. When we got to Mr. Mangum's I went in; a little boy met me at the door. I asked for Deloris Mangum, and she came to the door. I asked her if she did not want to go to the drug store and get a drink. She said that she did, but that she was not dressed. I told her that was all right, and to ask her mother. She went to ask her mother, and Mrs. Mangum came to the door. I spoke to her, and she said that she needed her daughter to help about the supper, but that she could go. We went and got in the car; it was a Ford coupé, and Deloris Mangum sat between us."

On cross-examination he testified: "Knew the hospital was not far from where the car stopped. I did not try to give any alarm after I got out of the car. There was snow on the ground. I got out and started back to town, and then I thought that I ought to go back, because I had invited the girl to go with us in the car. I went back to the car. I did not try to have intercourse with the girl. I had never made any plan with Hicks to get the girl out. I had talked with the girl before in the drug store, but had not had any conversation with her that day. *When the car stopped near the hospital and Hicks asked me about the rubber, I knew what he was going to do. When I got out of the automobile I knew what was going to happen.* I said to Hicks, 'I'll get out if you are going to do anything like that.' I did not make any outcry or give any alarm. I did ask Deloris for an engagement the following night. I asked her how about coming to see her, and she said she didn't know."

This much of the crime, as charged, on all the evidence, is undisputed:

1. That the child was under fourteen years old.

2. That she had never before had sexual intercourse with any person. (Her own testimony and that of Dr. Watkins, her physician.)

H. S. Hicks, who actually committed the crime, has fled from the State.

The only question of fact disputed is: Was Robert J. Hart an aider and abettor? The jury of twelve men has so found. Does the evidence justify this finding? Has the able and conscientious judge, W. M. Bond, who presided at the trial, committed any error in law?

The foul suspicion had been whispered in the ears of the lustful young men at the high school and those loafing about the drug store. Gill and Hart and Hicks talking about the Mangum girl on the street, at the steps of General Royster's office. They go to Pittman's drug store. Hicks and Hart sit down together in the drug store. They commenced talking about Deloris Mangum. The two agree to go down in Hicks' car and bring the girl to the drug store. The two went together, in Hicks' car. Hart goes in, and Hicks waits out in his car. Hart obtains Deloris Mangum's mother's consent, under a promise and trust that he would take her, the little high-school girl, to the drug store, and bring her back. He took her that winter night from the mother and the home of her father, and as she stepped from her home to the snow on the ground she was as clean and pure and white as snow, from the evidence, and when he brought her back she was as a lily dipped in soot. Shall he be turned loose? A judge and a jury of twelve men in his own county say not. He says, "When the car stopped at the hospital and Hicks asked me about the rubber, I knew then what he was going to do." They—Hicks and Hart—both knew all about the implement of the seducer and debaucher. Hart and Hicks took her away that cold winter night—these two conspirators—beyond the hospital, across the railroad some two hundred yards—away from the lights of the city into the darkness and night, to accomplish the deed. When the wrong was done, Deloris testified: "Hicks got up and did not say anything. Robert Hart was then standing at the door of the car. Hicks got out of the car. Hart got in the car. He said he was going to do what Hicks did. I told him he was not."

Hart, himself, who took this child to her ruin, said Deloris Mangum asked what she should tell her mother, and said to him, "Tell me something to tell her," and he told her she could tell her mother that "we had had a rush at the drug store and I had to work, if she wanted to."

The cry of this child. In her agony she thought of her mother. She was entrusted by her mother to Hart. What shall I tell her who suffered and bore me? Hart told her to tell her an untruth. He got her from the home under a false pretense, that he was going to take her to the drug store, and he returns her to tell an untruth. But she told her mother the truth. "I told my mother they had insulted me—they treated me just like married folks."

When the blood of Abel was spilled, Cain, who did the deed, was asked that momentous question, "Where is Abel, thy brother?" and he said, "I know not; am I my brother's keeper?" Cain told an untruth. Hart, who aided and abetted, as found by the jury, told the child to tell an untruth to cover up his own wrongdoing.

I have given the material facts as I conceive them to be, presented on the record. Now, as a matter of law, has the court below erred and not given the defendant a fair trial? In accordance with the law of the land he is entitled to this. This is a land of law and orderly government. No man or set of men are above the law. The hope of civilization is obedience to law.

There is no difference between the majority opinion and myself that the defendant's demurrer to the evidence, or, as defendant puts it, "at the conclusion of all the testimony the defendant again renewed his motion for judgment as of nonsuit," that this motion was properly overruled, and there was sufficient evidence to go to the jury—that Hart was an aider and abettor.

The only debate is, during the progress of the trial did the court below commit error or prejudicial or reversible error?

The law of what constitutes "aider and abettor" in the majority opinion is law so far as it goes, and the law as therein stated is sufficient on a new trial for the jury to pass on the facts, but our authorities go further.

In *S. v. Cloninger,* 149 N. C., 572, the Court says: "John Cloninger and Charles Costner were aiders and abettors. There is abundant evidence to sustain a conviction, where the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection." *S. v. Jarrell,* 141 N. C., 725.

"A servant who stands passive and knowing that his employer is being robbed, permits it, is guilty as principal." *In re Sherman,* 6 City Hall Record (N. Y.), 2.

Hart was intrusted with the care of Deloris Mangum and he stood by and saw her robbed of her virtue.

In the *Jarrell case, supra,* quoted in the majority opinion, *Brown, J.,* says: "There is much in the conduct of Jarrell, according to the evidence, which indicates a design to encourage and aid Hicks in an assault. 'When a bystander is a friend of the perpetrator and knows that his presence will be regarded as encouragement and protection, presence alone may be regarded as encouraging.' Wharton, *supra,* sec. 211a, who cites many cases in support of the text. Jarrell was in a situation to be able readily to go to Hicks' assistance if necessary. The knowledge of this was calculated to give additional confidence to Hicks. In contemplation of law this is aiding and abetting. *Ib.,* sec. 211a; *Thompson v. Com.,* 1 Metc. (Ky.), 13; *S. v. Douglass,* 38 La. Ann., 523; 15 Cox Cr. Cases, 51, 52."

In the majority opinion the following are treated as defendant's main exception and assignments of error:

I will take up *seriatim* the position of the majority opinion under the "main exceptions."

I give the entire record of what took place, and not a part, as excepted to.

(1) "At the close of all the evidence defendant moved for judgment of nonsuit, which was denied. The solicitor, as the court was about to take a recess for the night, in open court, and in the presence of the jury, addressed the court and prayed the defendant into custody. The defendant was under a bond of $1,000, which had been ordered given the previous week of the court, and under order of the court the bond was conditioned upon the appearance of the defendant each day during the term and to abide the orders of the court. In the presence of the jury the presiding judge ordered the defendant into the custody of the sheriff. No question was raised by the solicitor as to the sufficiency of the sureties on the bond. The court stated in the hearing of the jury that putting the defendant in custody did not mean at all that the court thought he was guilty. To both the prayer of the solicitor and the order of the court in the presence of the jury the defendant excepted." The statute was against the court giving "an opinion whether a fact is fully or sufficiently proven." Ordering the defendant into custody was no opinion in regard to a fact fully or sufficiently proven.

The other defendant, Hicks, had fled the court. The court below has a sound discretion to make the order. The court said, in the presence and hearing of the jury, that "the putting the defendant in custody did not mean at all that the court thought he was guilty."

There is no doubt about the law that in the court's "sound discretion" it had the right to order the defendant into custody. "While the necessity for exercising this discretion in any given case is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." *Jarrett v. Trunk Co.*, 142 N. C., 469; *May v. Menzies, ante,* 144; *S. v. Hopper, ante,* 405.

The complaint is that it was made in the presence of the jury. This Court upheld a remark in the presence of the jury, a clear inference of the impeachment of a witness, and no explanation was made by the court to disabuse the minds of the jury. In that case, the Trust Company, 183 N. C., 41, *Stacy, J.*, says: "There is one exception of a different nature, however, which calls for further discussion. We quote from the record: 'During the taking of the testimony, pending argument as to the competency of certain questions and answers and ex-

planations offered by the witness, the court, in the presence and hearing of the jury, asked the question whether the witness was appearing as attorney or as a witness, stating that the court was just at this point unable to see.' To the foregoing remark of the trial judge the defendant excepts, which is defendant's fifteenth exception. Some difficulty has been experienced in arriving at a satisfactory conclusion as to what disposition should be made of this exception and assignment of error. But as it does not appear with certainty that the defendants have been prejudiced, or disadvantageously circumstanced before the jury, by the remarks of the judge, we must overrule the motion for a new trial based upon this portion of the record. 'Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption is against him.' *In re Smith's Will,* 163 N. C., 464. See, also, Michie Digest, 695, and authorities collected under title 'Burden of Showing Error.' "

In the instant case, the court told the jury that the putting the defendant in custody did not mean that the court thought he was guilty. I take it that the court told the jury the truth.

The majority opinion says:

(2) In the course of his Honor's charge to the jury he said: "The law used to be if a man had connection with a girl under 10, it was a capital felony, and if between the ages of 10 and 12, it was a felony, if she had never before had sexual intercourse. The Legislature later moved the age of consent up to 14 (and a few days ago one House of the Legislature passed a bill, I believe, moving the age of consent up to 16 years)."

The full text of the court's charge was as follows:

"It makes no difference whether the girl was willing or not, if she was between 12 and 14 years of age, and had never before had sexual intercourse with any person. The law says such a girl cannot consent. If such girl were under 12 it would be a capital offense. The law used to be if a man had connection with a girl under 10, it was a capital felony, and if between the ages of 10 and 12, it was a felony, if she had never before had sexual intercourse. The Legislature later moved the age of consent up to 14, and a few days ago one House of the Legislature passed a bill, I believe, moving the age of consent up to 16 years."

The charge, when considered as a whole, is very different from only the part which is excepted to. The Legislature did exactly what the judge said.

The majority opinion says:

(3) "Again in the charge: 'The defendant introduced certain character witnesses, the Rev. Mr. Black, the chief of police, a man named

Floyd, and several others. They all stated his character was good. You will remember who the witnesses were and what they said. In answer to this character evidence, the State contends that neither of these character witnesses said Hart didn't go out with Hicks to have connection with the girl, and did not testify as to what did or did not take place."

If the record is examined carefully, this is stated in the "contentions," not "again in the charge," as stated in the majority opinion. The full portion of the charge is: "Robert J. Hart testified as to meeting Hicks and Gill; that he went with Hicks to Mr. Mangum's home and got Deloris, and that they got in the automobile and went up College Street, and went out beyond the hospital; that Hicks asked him 'Where is the rubber?' that he said, 'If you want to do anything like that I am going to get out.' That he got out and loitered around; that he went back home in the car with them, got out and told Mr. Mangum he was a gentleman; that he thought Hicks wanted him to go with him to Mr. Mangum's house to introduce the girl to him; that Hicks did not give any other reason for asking him to go. The defendant introduced certain character witnesses, the Rev. Mr. Black, the chief of police, a man named Floyd, and several others. They all stated his character was good. You will remember who the witnesses were and what they said. In answer to this character evidence, the State contends that neither of these character witnesses said Hart didn't go out with Hicks to have connection with the girl, and did not testify as to what did or did not take place."

The judge's erroneous statement of a contention of a party must be called to his attention at the time. It cannot be taken advantage of by an exception to the charge after verdict. *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633; *S. v. Lance,* 149 N. C., 555; *S. v. Kincaid,* 183 N. C., 710; *S. v. Baldwin,* 184 N. C., 789. In this case it was not erroneous.

The majority opinion says:

(4) "Still again in the charge: 'Every case of this nature, if the defendant's guilt be established, which results in an acquittal, tends to injure society.' "

The record on this is as follows: "The defendant contends that he never attempted to have connection with the girl, and that he did not know Hicks' intention; that he has fully explained the matter, has shown his character to be good, and that the jury should acquit him. In reply to that the State contends that if it had not been upon a concerted plan to get her out there and for one or the other to have intercourse with her that Hart could and would have prevented it. The State contends that by getting her out he aided Hicks, and if he had

not aided Hicks he would have told Mr. Mangum upon his return. Among other statements by the judge, he remarked: 'Every case of this nature, if the defendant's guilt is proven, which results in an acquittal, tends to injure society.' "

This was said in reference to the State's contention (there is no error unless called to the attention of the court. Cases *supra*).

(5) And again in the charge: "I am not appearing for either side; I am not interested in Mr. Hart's acquittal, and I am not especially interested in his conviction, but I am interested in seeing that both the State and the prisoner have a perfectly fair trial."

The record on this is as follows: "At this point counsel for the defendant asked the court, in stating the contentions of the defendant, to call attention to Hart's evidence that when the automobile turned down College Street instead of toward the drug store that he, Hart, asked them to go to the drug store; with which request the court complied. The court then stated that both the State and the prisoner were entitled to an absolutely fair and impartial trial, and added, I am not appearing for either side. I am not interested in Mr. Hart's acquittal, and I am not especially interested in his conviction, but I am interested in seeing that both the State and the prisoner have a perfectly fair trial."

The majority opinion says:

(6) "The defendant also excepted because in the charge his Honor repeatedly called the attention of the jury to the contentions of the State, while but slight reference was made to the contentions of the defendant." The entire charge shows he gave the contentions of both sides.

The majority opinion says:

(7) "Finally, the defendant excepted for that his Honor failed to instruct the jury as to the law relating to aiding and abetting, but simply charged the jury that the defendant Hart would be guilty if he aided or abetted Hicks, without any explanation or instruction as to what constituted aiding and abetting."

Webster defines *aider* "one who, or that which, aids"; and defines *aids* "help, support, succor, assistance, relief"; *abettor* "one who abets, an instigator of an offense or an offender"; *abet* "to instigate or encourage by aid or countenance." The simple words, aiding and abetting, and what constitutes the explanation, are the words themselves. The contentions given by the court showed what was aiding and abetting, without actually defining so common and well-known words. The law was given in the contentions.

The majority opinion does not single out one particular error made in the court's charge. It is a broadside attack to the court's conduct below in the trial of this cause.

Judge Ruffin, in *S. v. Angel,* 29 N. C., 27, said: "His Honor, undoubtedly, did not transcend his powers and duty, under the act of 1796, in delivering his charge to the jury. The 'facts,' on which the act restrains him from expressing an opinion to the jury, are those, respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends. But the act does not prohibit the judge from drawing attention to things that occur in court and speaking of them as having actually occurred there." In that case the charge was affirmed in what was excepted to. "In the course of the charge to the jury, the presiding judge remarked 'that the witnesses differed in their accounts of the transaction,' and then recapitulated their testimony as to the manner in which the reëncounter took place; and after some instructions upon matters of law he remarked further that, 'according to the testimony of the prisoner's witnesses, the mortal blow *was given* at or about the commencement of the reëncounter.' The judge informed the jury that they were the judges of the truth and weight of the testimony of the witnesses."

Chief Justice Smith, in *S. v. Robertson,* 86 N. C., 628, said: "Another witness had testified to the disorderly character of the house, and to his having come to the solicitor at the instance of another to report a case of retailing liquor without license, against the defendant, and had then mentioned the disorderly conduct of the defendant, and was cross-examined at great length upon those matters, in order to prove his ill-will and prejudice towards the accused, when his Honor remarked that the counsel had carried the examination in that direction far enough, and that it was the duty of a good citizen to report crime when inquired of by the solicitor. The exception is to the latter part of the remark, as violating the act of 1796. We think the expression used was pertinent and proper, and correct in itself. It certainly becomes a law-abiding citizen to convey, not to withhold, any information he may possess, when interrogated by the prosecuting officer of the State, and the act is not to his discredit."

The same *Chief Justice* said, in *S. v. Brown,* 100 N. C., 524: "The exception to the inquiry of the judge, addressed to counsel of defendant, if it would be fair to permit a declaration of an absent person, imputing criminality to the prosecutrix, to be given in, and refuse to hear his subsequent denial of the truth of the charge, was but an expression of a wish and purpose to have a fair trial, the natural impulse of an impartial and just judge conducting the trial. It is argued here as an indication of an opinion upon the merits of the controversy forbidden by the act of 1796, The Code, sec. 413. It does not appear to us susceptible of any such interpretation, and, at most, as but an inti-

mation to counsel that such a course, if pursued, would not be sustained in the ruling upon the matter."

In *S. v. Jacobs,* 106 N. C., 695, the following was held: "A remark of the judge made before trial begun, that the jailer had informed him the prisoner 'would escape if he had the opportunity,' is not an expression of opinion upon the facts prohibited by the act of 1796." *Clark, J.,* in that case said: "It is difficult to see how the remark of the judge violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proven.' No facts had been shown in evidence. Indeed, had the jury been impaneled, the statute prohibited the judge 'from expressing an opinion only upon those "facts" respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.' "

In *S. v. Crane,* 110 N. C., at p. 535, it is said: "If juries should be deemed incompetent to comprehend, or unable to obey, so plain a direction as that a paper read in their hearing is 'not to be considered as evidence, and that it had only been admitted to make the defendant's reply to it (when read to him) intelligible'—if so low an estimate should be placed upon juries, then the jury system is a failure, and should have no place in our jurisprudence. If unable to comprehend this, why so often contention whether instructions, frequently far more abstruse, should be given to the jury. But such a view is an unjust one; the jury is an essential part of the judicial system among every English-speaking people, and while not perfect, the experience of ages and the observation of the present are that it performs fairly well its part. Certainly no better substitute has ever been found. To underrate the intelligence of twelve honest impartial men who try the questions of fact submitted to them is a mistake. When aided by a just and intelligent judge, their verdicts are generally correct. Jurors are not expected to possess legal training. Their province is not to pass on questions of law. But their grasp of the facts is usually just and accurate, and probably not a court passes that upon the jury there are not men of equal mental capacity with the judge who presides, or the counsel who addresses them. Jurors are not in their nonage, and it is not just to underrate their intelligence."

In *S. v. Baldwin,* 178 N. C., 687, upon the following facts, the remarks of the judge was found to be not improper: "Where a large quantity of spirituous liquor was found in the possession of two persons, separately indicted under the statute making such possession evidence that it was for the unlawful purpose of sale, a remark of the judge in sentencing one of them, upon his conviction, that he thought

both persons accused had been selling and delivering the liquor at a certain town, is not in the contemplation or meaning of Rev., 535, prohibiting the judge from giving an opinion whether a fact is fully or sufficiently proven on the trial of the other defendant." See cases cited. See, also, *S. v. Laxton,* 78 N. C., 564; *S. v. Robertson,* 121 N. C., 551; *S. v. Dewey,* 139 N. C., 560; *McDonald v. McArthur,* 154 N. C., 11; *S. v. Rogers,* 168 N. C., 116; *Long v. Byrd,* 169 N. C., 659; 16 C. J., secs. 2311 *et seq.*

The cases cited in the majority opinion are not applicable to the court's conduct of this cause. If they were applicable, I would take it that what the court said was the truth, which would cure any intimation on the facts, if there was any, and the court was honest when it told the jury "I am not appearing for either side. I am not interested in Mr. Hart's acquittal, and I am not especially interested in his conviction, but I am interested in seeing that *both the State and the prisoner have a perfectly fair trial.*"

In commencing the charge to the jury, the able, conscientious judge who tried this case (I want to commend it) said:

"Gentlemen of the jury, men are never called upon to perform a more sacred duty than that of serving upon juries. In this day of unrest and criticism of the courts and of government agencies generally, it behooves you and me and all who participate in the conduct of our courts to conduct ourselves upon such a high plane that no one may find room to criticize us or our government. *It is absolutely essential that every man who is being tried and every man who is being sued shall have an absolutely fair and impartial trial.* Any other sort of trial is a farce and a fraud. It is your duty to hear the evidence and the instructions of the court in this case, or any other case in which you may be called upon to serve as a juror, and then march up like men and under your oath render your verdict according to the evidence, guided by instructions of the court, regardless of public sentiment or your own personal inclinations or wishes. When jurors try cases upon such a high plane there is no room left for the anarchist to criticize our government and our courts. I am not going to require that you be kept together during the progress of this trial because in my long experience on the bench I have observed that jurors are mindful of the oath they have taken, and I have never yet had one wilfully commit a wrong. They sometimes make mistakes, as I do, but I have never known a jury to wilfully violate its oath. Let me repeat: be careful that you discuss this case with no one and that you permit no one to discuss it in your presence or hearing. If any one attempts to discuss the case with you, tell him that you are on the jury, and if then he insists upon discussing it, you report the fact to me."

In almost the final words of the charge he told the jury, "I am interested in seeing that both the State and the prisoner have a perfectly fair trial." I take it that the twelve jurors of Granville County who tried this case were selected according to law. The board of county commissioners did what the law said they should do. "The board of county commissioners . . . shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence." C. S., 2312. That they were men of *"good moral character and sufficient intelligence."* That they could understand what a court said, that both the State and prisoner should have a *perfectly fair trial.* The trial should be *perfectly* fair. Can there be any misunderstanding what that meant? The language is clear and explicit, more than a "perfect" fair trial but perfectly. What is Webster's definition of "perfect"? "Without flaw, fault, blemish; without error, mature, whole, pure, sound, right, correct."

The last thing the court told the jury was this: "The court stated to the jury that *they were the sole judges of the facts, that the judge did not intend by anything said by him to intimate that the court had any opinion as to whether the prisoner was guilty or not guilty,* that it was for them to say how they found the facts to be from the evidence in the case under instructions given as to the burden of proof."

It has been often said by this Court, but I repeat it again: "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 complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376; *Wilson v. Lumber Co., ante,* 56.

This is my first written dissent. I feel impelled by the facts as appear in the record to do so. I do so with all respect for those who disagree with me.

> "To thine own self be true;
> And it must follow, as the night the day,
> Thou can'st not then be false to any man."

I believe that the courts are made to administer law; no man, or set of men, have any right to take the law in their own hands.

This commonwealth has seen fit to make a law to restrain the vileness of men and protect girlhood. This young man has been tried by an upright judge and a jury of "good moral character and sufficient

intelligence," and convicted. He has been defended by able and brilliant counsel. He has been, in my opinion, fairly tried and convicted. I can see no prejudicial or reversible error. I commend most heartily the conduct of those concerned in this case in the orderly procedure—appealing to law. It is the only safe course. The courts are for the redress of wrongs—there is nowhere else in a land of law.

CLARK, C. J., concurring in the dissenting opinion of *Clarkson, J.*: The facts and the law in this case are so clearly and fully stated in the opinion of *Judge Clarkson* that they need not be repeated.

On defendant Hart's statement alone, discarding all others, he was clearly guilty of aiding and abetting in the kidnapping and ravishing of a girl 13 years of age. On his own statement, with the reasonable inference to be drawn therefrom, the other defendant, Hicks (who has fled the State), came to him and suggested the conspiracy by which Hicks was to furnish the automobile and he was to go to call on this girl, whom Hicks did not know, at her home and take her to the drug store to get ice cream or soda water. They went about dusk, and the defendant Hart, who knew the girl, went into the house and overcame her mother's reluctance by promising to bring her back in a few minutes. When the girl went out to the automobile she found Hicks also, a man of 23 or 24 years of age. The defendant Hart himself was 17 or 18. Instead of taking her to the drug store the automobile quickly turned off and she was taken off into the night into the woods or a deserted place two miles from town and there, in consequence of a remark which Hart says Hicks made to him, he got out of the car, he says, "knowing what Hicks intended to do," and walked off a few steps. He made no attempt to prevent it by persuasion or otherwise, and the deed was done. The girl of 13 could not consent even if, in the darkness of a sleety night, two miles off in a desolate place, and dominated by the two lustful men, she had dared make a hopeless cry for help, which no one could have heard. Hart soon returned to the automobile, and the girl says that he himself then proposed to ravish her but she repulsed him, having found out what it meant and doubtless suffering from pain, as the doctor says on examination he found the parts had been recently lacerated.

The doctor also testified that she had never previously had any intercourse with a man, and there was uncontradicted testimony that she was a respectable girl of good character and that her family stood well in the community. The girl's testimony of the whole brutal deed is clear and convincing in all its pathetic details.

The act of carrying her off was necessarily kidnapping, because it was accomplished by the lying statements of Hart to the girl's mother

that they were going to the drug store and that he would bring her back in a few minutes. Instead of that she was taken off in the cold and sleet two miles away, where her screams and appeals for help could have been heard by no mortal ears except the two men who had brought her there, in all the ignorance of her 13 years, to commit this foul wrong upon her.

Hart on his return made no statement of the crime that had been perpetrated, no denunciation of Hicks' deed; and his conduct from beginning to end shows not only a previous conspiracy but the acquiescence in it, both at the time and afterwards, until, upon the statement of the girl which, on her return home, she immediately made to her mother, legal proceedings were promptly taken out. Hicks at once fled the State.

In the long annals of this Court there is no case that is more atrocious in all its features. Two men conspire to take an innocent girl—for such the uncontradicted evidence shows she was—13 years of age from her home upon the lying representations of this defendant, to be ravished, C. S., 4209, by the older man and attempted by the younger, for a girl of that age could not give consent. It was really a case of rape, which in this State is properly a hanging offense.

As *Mr. Justice Clarkson* justly says, there is not a single error of law on the part of the judge pointed out or even alleged in the trial—neither in the omission nor admission of evidence nor in the charge. The appeal has been treated by defendant's counsel rather as an impeachment trial of the judge to divert attention from the two criminals charged by a grand jury, one of whom has confessed his guilt by flight and the other has been convicted by a jury. Even if there had been any errors alleged or shown they would have been harmless, because, on the defendant's own testimony, he was guilty to the deepest degree. He admits the previous agreement between himself and Hicks, the older man; he made no protest to the car going to this remote place instead of to the drug store, as he had promised the mother; he says that when he got out of the car he "knew what Hicks intended to do and made no opposition," and he made no subsequent admission until forced into court himself. He was an aider and abettor both before and after the fact, upon his own testimony.

The matter most strenuously charged as error of the judge, to give color to the claim that the defendant might have been acquitted, was that at the close of the evidence the solicitor moved that the defendant, who was under bond, should be taken into custody, and the motion was granted. That was a matter which rested solely in the discretion of the trial judge. He was a lawyer of distinction, a man of judgment and ability, who had been placed in that position by the votes of the

people, and it was not necessary that his action should be submitted to a vote of the bystanders or the approval of the defendant's counsel. At the end of the testimony, as the court was about to adjourn for the night, it being apparent that a conclusive case of guilt as to the defendant had been shown, and it being also known that his partner in guilt, Hicks, had fled the State, there was such ground for doubt that the defendant that night might follow the same course by passing over the State border, less than a half-hour's distance in an automobile, the judge of his own motion should have placed him in custody. Most certainly, when the solicitor moved for his being taken into custody, if the judge had refused and the defendant had escaped that night, the judge would have been the subject of just censure by all good citizens.

There are two or three allegations that the judge expressed an opinion upon the facts, but an examination of the record will show that he was stating the contentions of the State, as he also stated the contentions of the defendant, fairly and fully, and the same is sufficient answer to the charge that the judge stated the contentions of the State more fully than those of the defendant. The charge as set out by *Judge Clarkson* in his opinion is fair and full and an admirable and impartial statement of the law.

It is also charged as error on the part of the judge, which ought to set aside the verdict, notwithstanding the facts admitted by the defendant upon the trial, that the judge stated, in reciting the progress of the law, which originally did not make this offense a felony at common law, if the female child was beyond 12 years, that our statute had raised to 14, the age at which a seducer could ravish her with impunity, and that the Legislature then sitting had passed a bill in one House raising the age of consent to 16. In fact, the Legislature at that very time, at the instance of the women of the State, had passed such bill in one House, which has become chapter 140, Laws 1923, ratified 3 March, and the judge stated the law correctly, and it could have had no influence on the jury in this case, who understood the fact that the girl who had been thus kidnapped and ravished, C. S., 4209, was under 14 as charged in the bill.

An appeal also has been made that if this defendant undergoes the punishment which the law denounces for this nefarious crime, and for which the judge has not imposed the full penalty of the law, it would be to ruin him; but to acquit a man guilty of a crime against a 13-year-old girl, of which he is guilty on his own testimony, is injurious to society and to the State, and the jury were not improperly told by the judge that they should do their duty with impartiality. Even then, when he put the defendant in custody upon motion of the solicitor, the judge was careful to tell the jury, though it was not required

of him to do so, that this act was no expression of opinion on his part as to the guilt or innocence of the prisoner. A Granville County jury of 12 honest, intelligent men upon this testimony could not possibly have acquitted the defendant upon his own showing, and it is a serious reflection upon the intelligence of jurors to allege that such act of the judge biased their verdict. The remarks of the judge were not error. It was the defendant who had committed a crime for which he stood charged by the grand jury and of which the unanimous verdict of the jury has convicted him.

The American Bar Association, headed by *Chief Justice Taft,* has recently addressed to the American people a statement that there was a "growing want of respect, not to say a growing hostility, to the courts," and among a free and intelligent people, such as those in North Carolina and in this Union, this cannot occur when the courts are doing their full duty. If it is not a punishable offense for these two men, one 24 and the other 17 or 18 years of age, to conspire to kidnap the respectable 13-year-old daughter of a respectable citizen and one ravish her and the other aid and abet in the act, even if he did not attempt to also perpetrate it (as the girl testifies that he did), what citizen of North Carolina, what mother or brother can feel sure that the honor of his little child will be protected by the courts?

Such men as these two defendants should be made to know that the law is prompt and certain in infliction of punishment when guilt is clear as here. Criminals should be made to feel that justice can grasp with a hand of iron and wring with an arm of steel. When this is done, secret societies to enforce the law will disappear and the courts will not, as *Chief Justice Taft* says, be the subject of increasing disrespect and of growing hostility. As *Lord Chancellor Erskine* said on a memorable occasion in English history, "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers."

On his own showing the defendant was guilty of one of the most dastardly crimes that appears on the records of this Court. Upon the verdict of 12 good and true men, against whom the defendant made no objection, he was found guilty. On a trial, in which there appears not a single legal exception to the evidence or to the charge of the court, he has been found guilty. The judge did nothing but his duty. He charged the evidence and the law fairly and impartially, and there is no ground on which this defendant should be excused from the penalty of the law which he has brought down upon his own head.

MERCHANTS AND FARMERS BANK v. CLIFTON PEARSON, W. S. WHITING, ET ALS.

(Filed 12 December, 1923.)

1. **Corporations—Deeds—Mortgages—Chattel Mortgages—Probate—Statutes—Common Law—Signature of Officer.**

   While it is the better course to follow the suggested methods of C. S., sec. 3326, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law.

2. **Same—Lands—Interest—Chattel Mortgages.**

   The execution of a deed or contract by a corporation concerning lands, or an interest therein, is required by our statute of frauds to be signed, as well as in writing, but this does not extend to the execution of a corporate chattel mortgage, and it is sufficient as to the latter, in the absence of charter provisions to the contrary, that the subscribing witness testify in the probate that he knows the common seal of the corporation, that he saw the presiding member attach it thereto, and that he became a subscribing witness in his presence, the same being in accordance with the general law relating to instruments of this character.

3. **Same — Registration — Liens — Judgments — Execution — Sales — Purchaser.**

   Where a corporation has executed its chattel mortgage in accordance with the general law, and it has been regularly admitted to probate, and accordingly registered in the proper county, the lien thereof is superior to that of levy under a later judgment, and the purchaser at the execution sale acquires the personalty subject to the prior registered mortgage.

4. **Mortgages—After-Acquired Property—Corporations—Lumber.**

   A mortgage will be held to extend to and include after-acquired property when it so states in express terms, or it clearly appears from the language used, that such was its manifest intention; and where a corporation has mortgaged lumber on certain of its yards, and shall keep thereon a certain quantity during the life of the mortgage, with the mutual agreement that the mortgagor replace it when sold to its customers, the successive replacements of the lumber fall within the terms of the mortgage and are subject to its lien, in the absence of allegation and proof of fraud.

5. **Pleadings—Admissions—Deeds and Conveyances—Mortgages—Execution of Instrument.**

   Where the plaintiff claims certain lumber under a corporate chattel mortgage, the question of its due execution is not presented, where the answer admits it was properly executed.

APPEAL by defendant, Clifton Pearson, from *Ray, J.*, at April Term, 1923, of AVERY.

Civil action. The action is one of claim and delivery for thirty or forty thousand feet of lumber situate on the yard at Minneapolis, N. C.,

same being at the time in the possession of defendant, Clifton Pearson, asserting ownership thereto, and was seized and delivered to plaintiff bank under ancillary process in the cause. There was evidence on the part of plaintiff tending to show that the Elizabethton Flooring Company, a corporation, in 1918 became indebted to plaintiff in the sum of $6,000 for borrowed money, executed three promissory notes, two for $2,500 each and one for $1,000, due, respectively, 29 April, 1918, and 7 July, 1918, and the thousand-dollar note due 29 May, 1918, defendant J. S. Whiting being endorser, and to secure payment executed to plaintiff a mortgage of date 7 March, 1918, on certain lumber belonging to the company, and that the lumber seized in the present action was embraced in the terms and conditions of said mortgage. That one thousand dollars had been paid on said indebtedness, leaving a balance due of $5,000 and interest.

There was also evidence to the effect that defendant Pearson bought and took possession of the lumber in controversy pursuant to execution and levy under two judgments against the flooring company, the sale taking place in July, 1920, or 1921, and while said mortgage was existent, with the debt thereby secured being unpaid to the amount as stated. That the mortgage in question, purporting to be by the Elizabethton Flooring Company, of Elizabethton, Tenn., party of the first part, and plaintiff bank as party of the second part, conveyed to such party of the second part as security of said indebtedness "500,000 feet of lumber owned by the mortgagor, and being the lumber of said party was stacked three-quarters of a mile from Spear on the Toe River in Avery County, on the land known as the W. H. Ollis land, and being all the lumber on that mill yard; also, all the lumber at the railroad yard in Minneapolis, N. C., and also all the lumber at the mill and at the railroad owned by the party of the first part." The instrument contained further stipulation as follows: "The said party of the first part agrees to keep not less than 500,000 feet of lumber at said points above described during the life of the mortgage; and further, that as said notes are paid off and taken up the party of the second part (plaintiff) shall release so much of said lumber as shall equal in value the amount of the indebtedness so paid off." The mortgage then concludes and purports to be executed as follows:

"In testimony whereof, the said party of the first part has hereunto placed the signature of the corporation by C. K. Haywood, its presiding member, and affixed its corporate seal, this the day and year first above written.

ELIZABETHTON FLOORING COMPANY. (Seal.)
By C. K. HAYWOOD, *Presiding Member.*
L. M. LACY,
WILL H. DONNELL,
Directors."

Attest: R. S. FIFE.

And the probate and adjudication thereon, also the certificate of registry, being as follows:

STATE OF TENNESSEE—CARTER COUNTY.

This, 18 March, 1918, personally came before me, J. Frank Siler, a notary public of Carter County, State of Tennessee, R. S. Fife, who, being by me duly sworn, says that he knows the common seal of the Elizabethton Flooring Company, and is also acquainted with C. K. Haywood, presiding member of said corporation, and also with J. M. Lacey and Will H. Donnell, two other members of said corporation, and that he, the said R. S. Fife, saw the said C. K. Haywood, presiding member of said corporation, affix said seal to the foregoing instrument, and that he, the said R. S. Fife, became a subscribing witness to said instrument in their presence.

Witness my hand and notarial seal, this 18 March, 1918.

J. FRANK SILER,
(L. S.) *Notary Public.*

STATE OF NORTH CAROLINA—AVERY COUNTY.

The foregoing certificate of J. Frank Siler, notary public of Carter County, with his official seal attached of Carter County, Tennessee, is adjudged to be correct.

Let the instrument and the certificate be registered.

Witness my hand and official seal, this 29 March, 1918.

J. L. BANNER,
Clerk Superior Court.

Filed for registration on this 29 March, 1918, and registered.

J. F. PUCKETT,
Register of Deeds.

And same is on the registry as certified.

It further appeared that all the lumber on hand and placed on the yards specified in 1918, the date of the mortgage, had been sold and other lumber placed on these yards instead thereof. That the lumber had never at any time exceeded the 500,000 feet, usually much below that, and the lumber seized being, as stated, thirty to forty thousand on the railroad yard at Minneapolis, etc., and which, as stated, had been levied and sold to defendant Pearson as the property of the Elizabethton Flooring Company.

On issues submitted, verdict was rendered that there was due on the notes the sum of $5,000 and interest, and that plaintiff was the owner of the lumber taken in the claim and delivery papers in the cause. Judgment on the verdict for plaintiff, and defendant Clifton Pearson appealed, assigning errors.

Chas. E. Green, G. F. Washburn, and Watson, Hudgins, Watson & Fants for plaintiff.

J. W. Ragland, W. C. Newland, S. J. Ervin, and S. J. Ervin, Jr., for defendants.

HOKE, J. It is chiefly urged for error by appellant that his motion for nonsuit should have been allowed:

1. Because the mortgage under which plaintiff claims the property was not properly executed.

2. That there was no sufficient probate justifying its registration in that the subscribing witness does not testify to the signing by the officials.

3. That all the evidence shows that the lumber on hand and in the yards specified at the time the mortgage was executed has been disposed of, and the mortgage therefore did not extend to the lumber seized under process in the present cause.

As to the first objection, it is admitted in the answer that the mortgage was properly executed, and the question is not therefore presented. On the second objection, it appears that the instrument purporting to be signed for the corporation by C. K. Haywood, the presiding member, and two of the other directors, has the corporate seal attached, and the proof of the subscribing witness is to the effect "That he knows the common seal of the Elizabethton Flooring Company, and is acquainted with C. K. Haywood, presiding member of the corporation, and with L. M. Lacey and Will H. Donnell, the two other members of the corporation, and that said witness saw the said C. K. Haywood, presiding member, affix said seal to the foregoing instrument, and the said R. S. Fife became a subscribing witness in their presence."

Thereupon the instrument was registered on proper adjudication of J. L. Banner, clerk of Superior Court of the county, and in our opinion this was a sufficient probate to uphold the registration of the mortgage, without further proof as to signing by the officers. Our statute on this subject provides for a form of probate where a deed or contract of a corporation, requiring registration, has been signed by the president or presiding member and two others of the corporation, etc., and where signed by the president or subscribing member, and witnessed by the secretary or assistant, etc. C. S., sec. 3326. And it has been held that these suggested methods of executing corporate instruments shall not be considered as exclusive, but other methods of conveyance adequate and duly recognized by the law will be upheld. *Bason v. Mining Co.*, 90 N. C., 417. And in establishing these forms of probate, the statute itself expressly provides that "These forms of probate set out in the statute shall not exclude other forms deemed sufficient in law."

While it is now the usual and better method of executing a corporate deed or mortgage that it should be properly signed as well as sealed, and under our statute of frauds requiring deeds and contracts concerning land to be in writing and signed, both of these acts may be considered as necessary in instruments concerning land, etc.

In the absence of any contrary provision in the general law, or charter, the affixing of the corporate seal by proper authority was fully recognized at common law as a proper and adequate method of executing corporate instruments. And when a subscribing witness, as in this instance, testifies under oath that he knows the common seal of the corporation and that he saw the presiding member attach the corporate seal to the mortgage, and that affiant became a subscribing witness in his presence, etc., this is a sufficient proof of the due execution of the instrument, the same concerning only personal property and having been properly so adjudged. *President and Bridge Co. v. R. R.*, 7 Lansing, 240; *Lovett v. Steam Sawmill,* 8 Paige (N. Y.), 54 and 57; *Isham v. Bennington Co.,* 19 Vt., 230-243; 3d Cook on Corporations (7th Ed.), sec. 722, p. 2549; 10 Cyc., 1012-13; Angel and Aines on Corporations (11th Ed.), sec. 225.

On the third objection it is the approved principle in this jurisdiction that a mortgage will be held to extend to and include after-acquired property "when it so states in express terms, or it clearly appears from the language used that such was its manifest intention." *Lumber Co. v. Lumber Co.,* 150 N. C., 282; *Dry Kiln Co. v. Ellington,* 172 N. C., 481-484.

And this being true, while all the lumber that was on the specified yards at the time of the execution of the mortgage had been sold or disposed of, it is the clear intent of the instrument that it should apply to and include all lumber placed on these yards by the mortgagor at any time during "the life of the mortgage"; and it appearing that the lumber in controversy here had been placed and was in one of these yards at the time of its seizure and sale by the sheriff, in the absence of any allegation or proof of fraud, such lumber had come and was there, under the provisions of the mortgage, and so giving plaintiff the first claim thereon.

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

No error.

W. R. BELTON ET UX. v. THE FARMERS AND MERCHANTS BANK AND TRUST COMPANY AND F. B. KEMP, TRUSTEE.

(Filed 12 December, 1923.)

Banks and Banking—Bills and Notes—Collaterals—Equity—Intent—Mortgages—Substitution—Redemption.

A general provision of notes given to a bank by the same borrower that collaterals held by the bank may be applied to the surety of each or all of them so held will not be held to apply to an indebtedness not coming within the contemplation of the parties; and where the maker has given his note to the bank in substitution for one given by himself to another, who had placed it as collateral for her own note to the bank, carrying a mortgage on his lands as security, with provision in his mortgage that the title would revest in him upon its payment, the mortgage security will not, under the general provision, inure to the benefit of other indebtedness he may owe to the bank; and *held further*, there being no further consideration for the note given in substitution, it would not be inequitable to permit him to redeem the land by paying the original debt secured by the mortgage.

APPEAL by defendants from *Shaw, J.*, at June Term, 1923, of ROCKINGHAM.

Civil action, to restrain the sale of certain lands under power of sale contained in a deed of trust, and to have the said deed of trust canceled and surrendered to the plaintiffs.

From a judgment rendered on admissions in the pleadings and agreed statement of facts, granting the relief sought, the defendant Farmers and Merchants Bank and Trust Company appealed.

Manly, Hendren & Womble for plaintiffs.
Glidewell & Mayberry and Leland Stanford for defendants.

STACY, J. The essential facts upon which the case pivots are as follows:

1. On 15 December, 1919, the plaintiff W. R. Belton gave his note of $200 to Mrs. L. E. Coleman, representing a part of the purchase price of certain lots, and, to secure the payment of said note, executed a deed of trust, conveying said lots to F. B. Kemp, trustee.

2. Prior to 5 May, 1921, this note was, by partial payment, reduced from $200 to $100; and on said date Mrs. Coleman assigned the note in question, and deed of trust securing it, to the defendant.

3. At this time the plaintiff W. R. Belton was indebted to the Farmers and Merchants Bank and Trust Company in the further sum of $3,593.33, which represented the balance of a loan made in 1919, and the defendant had demanded of Belton that he place with the bank additional security to protect said loan.

4. At the request of the defendant, and as a renewal and in lieu of the Coleman note, the plaintiff executed to the bank a new note for $100, bearing same date as the original Coleman note, and containing the following pertinent provisions:

"$100. STONEVILLE, N. C., 15 December, 1920.

"On 15 December, 1921, after date, I promise to pay to the Farmers and Merchants Bank and Trust Company, or its order, at the office of said company at Stonesville, N. C., the sum of $100, with interest thereon at the rate of 6 per cent per annum, for value received.

"I herewith deposit with the said company the following securities and properties, to wit:

"Deed of trust attached, same being renewal in part of note $200 due to Mrs. Coleman; and agree that the above-named properties and securities, and any others added to or substituted therefor, shall be held as collateral security for the above obligation, and for any other obligation or liability of the undersigned to the said company now existing or which may hereafter be contracted and due or to become due."

5. There was a clause in the deed of trust which provided that, upon the payment of the note secured thereby, the said lands "shall be reconveyed to W. R. Belton, or the title thereto revested in him according to the provisions of law."

6. On 22 December, 1921, plaintiff tendered to the defendant, in cash, the amount then due on the above note, but the bank declined to surrender the deed of trust, claiming the right to hold it as security for the other debt due by the plaintiff.

The plaintiff thereupon paid into court the sum tendered, and brought this action to restrain the defendant from attempting to foreclose under the said deed of trust. From a judgment in favor of plaintiff the defendant has appealed.

The question presented is whether the bank, by virtue of the foregoing provisions in the renewal note of $100, given in lieu of the balance due on the Coleman note, can now sell the land, conveyed by the deed of trust, to satisfy plaintiff's other indebtedness to the defendant, arising out of other transactions, after plaintiff has tendered payment in full of the note secured by the deed of trust. We think not, under the facts of the present case. *Straeffer v. Rodman,* 146 Ky., 1, Ann. Cas., 1913 C, 549, and note; Jones on Mortgages (6th Ed.), sec. 357; 19 R. C. L., 393.

It is provided in the deed of trust that, upon the payment of the Coleman note of $200, the title to the property therein conveyed shall revert immediately to the plaintiff by operation of law. *Stevens v. Tur-*

lington, ante, p. 194; *Barrett v. Hinkley,* 124 Ill., pp. 46-47; *Carpenter v. Longan,* 16 Wall., 271, 21 L. Ed., 313; *Bank v. Mowry,* 13 L. R. A., 294, and note. We are sure the minds of the parties never met on the proposition that the land conveyed in the deed of trust should stand as security for the payment of any debt other than the debt originally due Mrs. Coleman, and which she assigned to the bank after the payment of $100 had been made thereon. In this respect, as well as in others, the case at bar is distinguishable from *Upton v. Bank,* 120 Mass., 153, a case strongly relied on by the defendant.

An agreement to secure one or more obligations must be confined to those intended to be secured by the parties to the contract, for nothing not within the contemplation of the parties will be included in any such agreement. *Huntington v. Kneeland,* 187 N. Y., 563, 102 App. Div., 284.

There was no new or additional consideration passing from the bank to Belton at the time of the execution of the renewal note, or the one given in lieu of the balance due on the Coleman note. Hence, there is nothing inequitable in allowing the plaintiff to redeem the land by paying the original debt secured by the deed of trust. *Hayhurst v. Morin,* 104 Me., 169; *Carpenter v. Plagge,* 192 Ill., 82.

Upon the record, we think the correct judgment was entered below.

Affirmed.

T. W. AUSTIN v. HARRY CRISP.

(Filed 12 December, 1923.)

1. Landlord and Tenant—Contracts—Deeds and Conveyances—Equity.

The relation of landlord and tenant rests upon contract between the parties and does not exist without their mutual intent and the mutuality of consideration, as in other contracts, nor preclude the supposed tenant from showing there was no such tenancy, or from invoking the interposition of a court of equity for his equitable relief, in proper instances.

2. Same—Estoppel.

Where a supposed tenant has rented a tract of land included in the boundaries of several tracts in a deed he has theretofore received from his supposed landlord, in his action to correct his deed for mistake he is not estopped to show that because of his illiteracy and ignorance of the description of the lands in the deed he has taken, he has afterwards leased the *locus in quo* by mistake.

3. Appeal and Error—Objections and Exceptions—Questions and Answers.

Exception, on appeal, to the exclusion of an unanswered question is untenable unless it is properly made to appear what the answer would have been.

4. Appeal and Error—Objections and Exceptions—Records—Briefs—Rules of Court.

Exceptions of record on appeal not mentioned in appellant's brief are deemed as abandoned on appeal, under the Rules of Court.

APPEAL by plaintiff from *Finley, J.*, at June Special Term, 1923, of CALDWELL.

Civil action. On 5 May, 1917, the plaintiff executed a deed to the defendant purporting to convey four tracts of land. In his complaint he alleges that by mutual mistake one of these tracts (the second in the deed) was erroneously inserted, and that it is necessary to correct the deed in this respect in order to make it conform to the intention of the parties. He further alleges that in the fall of 1917 the defendant leased from the plaintiff the land in dispute for an annual rental of $60.

The defendant denied any mistake, and alleged that the plaintiff claimed to be the owner of five tracts and sold him four; that the defendant was unable to read and write, did not know the boundaries of the land, and, relying upon the plaintiff's representations, leased the tract in dispute without knowing that it was included in his boundaries.

The following verdict was returned:

"1. Was the second tract in the deed of 5 May, 1917, from the plaintiff to the defendant, included therein by reason of the mutual mistake of the plaintiff and defendant? Answer: 'No.'

"2. If so, what damages is the plaintiff entitled to recover of the defendant? Answer: '.....'"

Judgment, and appeal by the plaintiff.

W. A. Self and Lawrence Wakefield for plaintiff.

W. C. Newland, J. H. Burke, and Mark Squires for defendant.

ADAMS, J. The seventh, eighth, and ninth exceptions involve, directly or indirectly, the alleged estoppel of the defendant to deny the plaintiff's title, but in our opinion neither of them can be sustained.

It is established as a general rule of law that a tenant who is in the undisturbed possession of the demised premises may not dispute the title of his landlord; but as the relation of landlord and tenant is the result of a contract, the rule is based on the assumption that such relation exists by the mutual agreement of the parties. Unless there is "an agreement which creates an obligation," there is no contract. There must be mutuality of obligation as well as mutuality of agreement. *Clapp v. Coble,* 21 N. C., 179; *Davis v. Davis,* 83 N. C., 71; *Dixon v. Stewart,* 113 N. C., 410; *Shew v. Call,* 119 N. C., 450; *Shell v. West,* 130 N. C., 171; *Hargrove v. Cox,* 180 N. C., 360; *Hobby v. Freeman,* 183 N. C., 240.

The doctrine of estoppel applies to the simple relation of lessor and lessee, unaffected by other complications, and does not preclude the tenant from showing there was no contract of tenancy, or from invoking the interposition of a court of equity for his relief. *Timber Co. v. Yarbrough,* 179 N. C., 340. The defendant alleges, in substance, that he relied upon the plaintiff's representations, and was misled by reason of his ignorance of the boundary lines; and his evidence tends to show that he leased his own land through inadvertence and mistake. By reason of such mistake, the jury evidently concluded that no contract had been made. One is not permitted to accept a promise when he knows the other party understands it in a sense different from that in which he understands it, for in such case there is no agreement. Mistake may be such as to prevent any real agreement, and in such case the agreement is not merely voidable, as in the case of fraud, but is absolutely void, both at law and in equity. A meeting of the minds is essential. *Freeman v. Croom,* 172 N. C., 524.

It is also worthy of notice that the plaintiff does not plead the estoppel, but seems to depend on the lease as evidence of the alleged mistake in the execution of the deed. In fact, the object of the action is the correction of the deed, the plaintiff in express terms praying the court to reform the conveyance so as to make it speak the truth and comply with the agreement, and his Honor's instruction upon this phase of evidence was certainly not unfavorable to the plaintiff.

The third and sixth exceptions have reference to excluded evidence, but the record does not show what the answer would have been or what evidence was proposed, and we must follow the ruling in several familiar precedents and hold that these exceptions also are without merit. The others are not discussed in the appellant's brief. *Schas v. Assurance Society,* 170 N. C., 420; *Fulwood v. Fulwood,* 161 N. C., 601. We find

No error.

BESSIE F. RECTOR v. J. BAYLES RECTOR.

(Filed 12 December, 1923.)

1. Divorce—Venue—Husband and Wife—Alimony Without Divorce—Statute.

When the acts and conduct of the husband make the wife's condition so intolerable and burdensome as to compel her to leave home and remain therefrom, and, after he has refused to contribute to her support, they eventually enter into a contract of separation, with an allowance to her of a certain sum of money to be periodically paid, and then the husband

breached his contract by refusal to pay, she may maintain her action in the county wherein she had been forced to reside by the conduct of her husband, under the provisions of C. S., secs. 1667, 1657.

2. Same—Transfer of Causes—Removal of Causes—Motions—Procedure.

Venue is not now a matter of jurisdiction of the courts, and when the suit has been brought in the wrong county, the defendant should therein move to have it transferred to the proper one, and failing therein he will lose his right thereto.

APPEAL by defendant from *McElroy, J.*, at November Term, 1923, of BUNCOMBE.

The plaintiff and defendant were married in 1906 and lived together until February, 1923. The plaintiff alleges in her complaint that the conduct of the defendant had rendered her condition intolerable and burdensome; and in February, 1923, while visiting friends in New Jersey, she became ill; the defendant was notified of her sickness and need of aid, but not only refused to give her the required aid, but sent to defendant her personal belongings and effects, and abandoned her; she returned to Greensboro in May, 1923, where defendant lived, but he refused to see or talk to her, and she thereupon went to her sister's home in Asheville, where she has ever since resided.

On 24 May, 1923, she went to Greensboro from Asheville, and while there articles of separation were prepared and executed, by which the defendant was to pay her $85 per month, subject to termination by death or divorce. Three of these monthly payments were made, beginning 24 May, 1923, but defendant refused to make payments due 24 August and thereafter, and this suit was instituted 24 November, 1923, for support and counsel fees.

At November Term, 1923, the defendant entered a special appearance and moved to dismiss the suit, and also to remove it to Guilford County. Both motions were denied, and defendant appealed.

Mark W. Brown for plaintiff.

H. W. Cobb, Jr., Harkins & Van Winkle, and Roberson, Jerome & Haworth for defendant.

CLARK, C. J. The plaintiff's right of action is based upon C. S., 1667, for alimony without divorce, which specifies that "the wife *may* institute an action in the Superior Court of the county in which the cause of action arose." C. S., 463, provides for actions to be tried where the property is situated; C. S., 464, sets forth certain causes of action which must be tried where the cause of action arose; and C. S., 465-468, provides for venue of certain other actions; but C. S., 469, provides that "*in all other cases* the action must be tried in the county in which plaintiffs or defendants reside at its commencement."

The word "may," as used in statutes, in its ordinary sense, is permissive and not mandatory. 20 A. & E. (2d Ed.), 237; 26 Cyc., 1590; Black on Statutes (2d Ed.), sec. 529. "'May' is construed 'must' or 'shall' only where public rights or interests are concerned." 26 Cyc., 1592. *Johnston v. Pate,* 95 N. C., 70.

Suits for alimony without divorce are within the analogy of divorce laws. Bishop Marriage and Divorce, sec. 1412. Plaintiff can maintain an action for divorce in Buncombe. C. S., 1657. Formerly, an action for divorce had to be brought in the county where the husband resided and venue was jurisdictional. *Smith v. Morehead,* 59 N. C., 360.

The defendant having failed to pay the installments as provided under the agreement, the plaintiff can maintain this action. *Cram v. Cram,* 116 N. C., 288; *S. v. Beam,* 181 N. C., 597. A wife who is forced for any cause to leave her husband, as in this case, may acquire a separate domicile. *S. v. Beam, supra; Sneed v. Sneed,* 40 L. R. A. (N. S.), 99.

The Legislature cannot reasonably be supposed to intend that a wife who is forced to go elsewhere than her husband's domicile to obtain food and shelter must bring an action in the county where her husband resides, and which she was forced to leave, and which he could change at will. She had a right, even under the agreement, to live where she desired. The defendant was to furnish subsistence and support to his wife wherever she lived, which in this case was Buncombe County. Her means are limited, and the cause of action actually arose in Buncombe, for it is the duty of a debtor to make payment at the home of the creditor, and on failure to do so, the cause of action arose there.

Under the former system of pleading, venue was jurisdictional, and if an action was brought in the wrong county, the plaintiff was forced to go out of court and, with expense and loss of time, bring a new action in the proper county. This has been changed, under the more practical procedure of the present day; and even if the action is brought in the wrong county, it can, nevertheless, be tried there unless the defendant in apt time files a petition to remove. In like manner, under the former procedure, there were probably fifty or more forms of action, and if the plaintiff did not guess the right one, he had to go out of court and bring another and another until he could guess right. Under the former procedure, also, there was distinction between law and equity, and a man who happened to sue in the wrong forum—that is, if he should have brought his action at law, but sued in equity, or *vice versa*—he was dismissed and required to pay costs, and guess again. The Constitution abolished all distinctions in forms of action, and the distinction between law and equity and the statute in the spirit of the Constitution has also

made venue not jurisdictional, but simply a ground of removal. These changes have greatly simplified procedure in the courts and reduced the expenses of litigation.

C. S., 1667, having provided that the wife may bring an action for "alimony without divorce" in the county where the cause of action arose, the judge properly refused to remove it.

Affirmed.

F. C. RANDOLPH v. THOMAS ROBERTS AND WIFE, NANCY ROBERTS.

(Filed 12 December, 1923.)

1. Evidence—Boundaries—Declarations—Interest — Ante Litem Motam.

Declarations bearing upon the true placing of dividing lines in controversy in an action between adjoining owners of lands are competent if made by a disinterested declarant, since deceased, *ante litem motam*—*i. e.*, before the controversy arose resulting in the suit, and in such case the lapse of time is not always controlling.

2. Same—Affidavits.

A dispute between a deceased declarant, a predecessor in title, and a witness at the trial, concerning the location of a fence line between them, when not bearing upon the location of a divisional line, between the present owners, the subject of the action, is not such interest on the part of the witness as will exclude his testimony of the declarations from the evidence; and this position is not changed merely because the declaration had been made by affidavit.

PROCEEDINGS to establish a dividing line between plaintiff and defendants, adjoining proprietors, instituted before the clerk and transferred, on issues raised, to docket of Superior Court of YANCEY, and there tried before *Ray, J.*, and a jury, at August Term, 1923.

The jury rendered a verdict for plaintiff, in terms as follows:

"1. Where is the proper location of the plaintiff's beginning corner and the first line in his deed? Answer: 'Black circle at 6, with black line to 3.'

"2. Where is the proper location of plaintiff's line running from figure 5? Answer: 'From 5 with the top of the ridge to black circle 6.'"

Judgment on verdict, and defendants excepted and appealed.

Watson, Hudgins, Watson & Fouts for plaintiff.

Charles Hutchins for defendants.

HOKE, J. The location of plaintiff's beginning corner at the "black circle at 6," as described in the surveyor's plat and found by the jury, is directly and naturally affected by the proper placing of a corner some

distance south on the same line at a "white-oak" corner. With the view of showing that the true location of this white-oak corner was at the point claimed by the plaintiff, a witness for plaintiff, Malone Randolph, was permitted, over defendant's objection, to testify that one Green Woody, disinterested, and dead at the time of trial, had pointed out the white-oak stump as claimed and alleged by plaintiff; this witness, Malone Randolph, also saying "that there was a controversy between him and Mr. Gouge."

It is the accepted rule in this State that unsworn declarations as to the placing of a given corner may at times be received in evidence on questions of private as well as public boundaries, and that under proper circumstances common reputation is also admissible. In *Lamb v. Copeland,* 158 N. C., 136, the requirements for the proper admission of this kind of evidence is stated as follows:

"Parol evidence of declarations as to the placing of the corner of private lands, of which the title is in dispute, is allowed when made *ante litem motam* by a declarant who was disinterested at the time, and dead at the time of the trial; and in such case the lapse of time is not always controlling.

"Parol evidence of common reputation as to the placing of a corner, on the question of private boundary, is also admissible in this State when the same is shown to have existed from a remote period, and direct evidence of its origin is not likely to be procurable. Such reputation must always be shown to have existed *ante litem motam,* and should attach itself to some monument of boundary, or natural object, or be fortified by testimony of occupation and acquiescence tending to give the land some definite and fixed location."

And the position is in accord with numerous decisions dealing with the subject. *Hoge v. Lee,* 184 N. C., 44 and 50, citing *Hemphill v. Hemphill,* 138 N. C., 504; *Bland v. Beasley,* 140 N. C., 628, and other cases.

It will be noted as an essential to the proper reception of such declarations in both cases that they should have been made *"ante litem motam,"* that is, not only before the suit brought, but before the controversy arose resulting in a suit. *Tripp v. Little, ante,* 215; *Rollins v. Wicker,* 154 N. C., 560. And it is contended for appellant that under this principle the testimony of Malone as to the declarations of Green Woody were improperly received. True that the witness, Malone Randolph, states that there was a controversy at the time between him and Mr. Gouge, under whom defendant claimed, but the record does not show that this controversy between witness and Gouge had any necessary bearing on the present controversy either before or since the suit. On the contrary, Malone states at the time that he had

no interest in the land where the white oak stood, and David Gouge, the former owner, testifying for plaintiff, says: "The dispute was between him and Malone about where a fence should be placed. They had the line run, and when it ran to this white oak they dropped it." And to our minds it sufficiently appears that the controversy was between Gouge and Malone Randolph, and was rather a debate or discussion between them as to the proper placing of a pasture fence, and in no sense a controversy which contemplated or developed into the subsequent litigation. Nor is the competency of the evidence in any way affected because Green Woody, the declarant, seems to have sworn to his statement. Not being in the form of a deposition or other evidence receivable in this or any former suit between the parties, it is no more nor less than a declaration of Woody, and as such, under the authorities cited, it was competent evidence on the issue.

We find no reversible error, and the judgment on the verdict is affirmed.

No error.

STATE v. ESLEY EDMONDS.

(Filed 12 December, 1923.)

1. **Courts—Discretion—Verdict Set Aside—Criminal Law.**

The granting or refusal to set aside a verdict by the trial judge in a criminal prosecution on the ground that the verdict is contrary to the weight of the evidence is discretionary with him, and not reviewable on appeal.

2. **Intoxicating Liquor—Spirituous Liquor—Statutes—Federal Statutes—Turlington Act—Defenses.**

The legislative purpose in the enactment of chapter 1, Public Laws of 1923 (Turlington Act), was to make the State statutes in the matter of unlawful manufacture or sale and transportation of intoxicating liquor, etc., conform to the Federal statute on the subject, and both are liberally construed to prevent, as a matter of public policy, the use of intoxicating liquor, as defined, for beverage purposes; and the defense is untenable that the defendant should not be convicted of violating our prohibition law because the Turlington Act became effective on the day he was tried in the Superior Court.

APPEAL by defendant from *Bryson, J.*, at February Term, 1923, of MADISON.

Criminal prosecution tried upon an indictment charging the defendant with violations of the prohibition law.

From a conviction and judgment pronounced thereon, defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Reynolds, Reynolds & Howell for defendant.

STACY, J. Defendant moved to set aside the verdict because, he alleges, it was against the overwhelming weight of the evidence. Motion overruled and exception. The granting of a new trial in a criminal prosecution, or its refusal, on the ground that the verdict is contrary to the weight of the evidence, is discretionary with the trial court and not reviewable on appeal. *S. v. Hancock,* 151 N. C., 699.

Defendant moved in arrest of judgment because he was indicted under the old law, and the "Turlington Act" went into effect the very day he was tried and convicted. This exception is fully met by what was said in *S. v. Foster,* 185 N. C., 674.

As indicated by its title, "An Act to Make the State Law Conform to the National Law in Relation to Intoxicating Liquors," chapter 1, Public Laws 1923, the purpose of the Legislature, in the passage of the Turlington Act, was to make the State law conform to the National law on the subject of prohibition. The two statutes, as now written, contain, in the main, exactly similar or practically similar provisions. And the chief purpose of each enactment is to prohibit and, as far as possible, to prevent, except as authorized by each statute, the manufacture, sale and transportation, for beverage purposes, of any and every kind of "intoxicating liquor"; and this is expressly defined to be any spirituous, vinous, malt or fermented liquor or liquid, fit for use for beverage purposes and containing one-half of one per centum or more of alcohol. *U. S. v. Dodson,* 268 Fed., 397. Accordingly, in each statute, Federal and State, the courts are enjoined to give a liberal construction to all the provisions of the act, to the end that the use of intoxicating liquor as a beverage may be prevented. *Rose v. United States,* 274 Fed., 245; *U. S. v. Crossen,* 264 Fed., 459. This is "appropriate legislation," calculated to aid in the enforcement of the Eighteenth Amendment to the Constitution of the United States, and hence it must be regarded by us as the established public policy on the subject. *S. v. Harrison,* 184 N. C., 762.

There is no error appearing on the record.

No error.

A. J. CHESSON v. S. L. LYNCH AND J. P. LYNCH.

(Filed 12 December, 1923.)

Slander—Pleadings—Evidence—Nonsuit—Appeal and Error.

The complaint in an action alleging that while the plaintiff was manager of the business of a corporation in which the two defendants were interested they falsely represented that he had wrongfully appropriated its funds; that he was "a low-down, sneaking, grand rascal," and had pretended to be sick on a certain occasion in order to avoid facing its board of directors at a directors' meeting, etc., is sufficient to admit of plaintiff's evidence to that effect in his action for slander, as to each or both; and it was reversible error for the trial judge to hold as a matter of law that a recovery was permissible only against one for wrongful interference with plaintiff's trade or business, and enter a judgment of nonsuit as to the other.

APPEAL by plaintiff from *Calvert, J.*, at February Term, 1923, of LENOIR.

Civil action to recover damages for an alleged wrongful and unlawful conspiracy and for slander.

There was a judgment of nonsuit as to the defendant J. P. Lynch, and a verdict and judgment in favor of the defendant S. L. Lynch. Plaintiff appeals, assigning errors.

Rouse & Rouse, Shaw & Jones, and Cowper, Whitaker & Allen for plaintiff.

Geo. M. Lindsey, J. G. Anderson, and Sutton & Greene for defendants.

STACY, J. Plaintiff brings this suit against S. L. Lynch and J. P. Lynch, father and son respectively, and stockholders of the A. J. Chesson Agricultural Company, of which plaintiff was general manager, alleging a wrongful and unlawful conspiracy between the two to do the plaintiff an injury in his business; and it is further alleged in the complaint "that among other things the said defendants asserted of and concerning the plaintiff that he was a low-down, sneaking, grand rascal; that the plaintiff had wasted and stolen a large amount of money belonging to the company and had appropriated it to his own benefit; that the plaintiff had refused to permit an inspection of the company's books or records; that the plaintiff had played off sick and had under the pretense of being sick declined to attend a meeting of the stockholders of the company, and that the plaintiff had been guilty of other wrongful acts in the management and conduct of the corporation's business, and other untruthful and disparaging assertions which were calcu-

lated to and intended to destroy the confidence of the stockholders i the plaintiff as manager of the company."

His Honor held (1) that there was no evidence of any conspirac between the defendants, and directed a nonsuit as to J. P. Lynch (2) that the complaint failed to allege a cause of action for slande and permitted the case to go to the jury as against S. L. Lynch for a alleged wrongful interference with plaintiff's trade or business. 1 R. C. L., 41 *et seq.*

Under the above holdings, plaintiff was not allowed to offer any evi dence tending to support his allegation of slander. In this we think there was error. The evidence offered was sufficient to establish such a cause of action, but his Honor held that the same had not been prop erly pleaded. It is the established rule with us, under our present Code system, that a liberal construction must be given in favor of the pleader "with a view to substantial justice between the parties." C. S., 535 *Hartsfield v. Bryan,* 177 N. C., 166. We think the facts alleged in the complaint are sufficient to establish a cause of action for slander. Newel on Slander and Libel (3d Ed.), 37.

"The uniform rule prevailing under our present system is that, fo the purpose of ascertaining the meaning and determining the effect o a pleading, its allegations shall be liberally construed, with a view t substantial justice between the parties. C. S., 535. This does not mea that a pleading shall be construed to say what it does not, but that i it can be seen from its general scope that a party has a cause of actio or defense, though imperfectly alleged, the fact that it has not bee stated with technical accuracy or precision will not be so taken agains him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As corollary of this rule, therefore, it may be said that a complaint canno be overthrown by a demurrer unless it be wholly insufficient. If i any portion of it, or to any extent, it presents facts sufficient to con stitute a cause of action, or if facts sufficient for that purpose can b fairly gathered from it, the pleading will stand, however inartificiall it may have been drawn, or however uncertain, defective, or redunda may be its statements, for, contrary to the common-law rule, ever reasonable intendment and presumption must be made in favor of th pleader. It must be fatally defective before it will be rejected as i sufficient." *Walker, J.,* in *Blackmore v. Winders,* 144 N. C., p. 215.

The nonsuit as to J. P. Lynch will be reversed and the entire cau remanded for a general

New trial.

STATE v. OSBORNE WILLIAMS.

(Filed 12 December, 1923.)

1. Criminal Law—Assault Upon a Female—Statutes—Evidence.

Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town, with *improper solicitation*, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, *is held* to be such evidence of violence, *begun to be executed* with ability to effectuate it, as will come within the intent and meaning of C. S., sec. 4215, making it a crime for a man or boy over eighteen years of age to assault any female person.

2. Same—Instructions—Constitutional Law—Equal Rights—Races.

Where there is evidence, upon the trial of an assault by a negro man twenty-three years of age upon a white girl fifteen years of age sufficient for conviction under the provisions of our statute (C. S., sec. 4215), the recitation thereof by the judge in his instructions to the jury is not objectionable as coming under the inhibition of Article XIV, sec. 1, of the Federal Constitution, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty, or property without due process of law, or of the equal protection of the laws.

APPEAL by defendant from *McElroy, J.*, at March Term, 1923, of HENDERSON.

Criminal action. This was an indictment against the defendant, as follows:

"The jurors for the State, upon their oath, do present: That Osborne Williams, in Henderson County, on 29 November, 1922, did unlawfully and wilfully assault, beat and wound one Dora Justus, a female person, said Osborne Williams being a man, or boy, over eighteen years of age, to the great damage of the said Dora Justus, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

Dora Thompson testified: "My name is Dora Thompson; was Dora Justus before I married. On the morning of the 29th of last November I was starting to school, was on Main Street, and Osborne Williams was coming from the school. He brushed past me and said, 'Give me some of your——,' and I went home and told my mother that evening, and my sister, and I was so nervous. When he said that to me, I walked on. It happened at another time when I was coming out of Foster's grocery store and he was coming in. He repeated the same thing, and I went and told my mother again. It frightened me. It happened another time. The third time it was in front of the Royal Café. I had started there. I did not do anything, only went on; I went on into the Ten-

Cent Store, where I had started. He repeated the same thing—used the same words—in front of Livingston's store, and I ran back. I was afraid of him."

On redirect examination she testified: "When he brushed by me and made this proposition, he did not touch me. I did not go to school, as I had before. In the morning I would go with my girl friends. When I would go back to dinner my brother-in-law would take me back, as I was afraid, and he would take me to school every day at dinner."

Emma Justus testified: "I am the mother of Dora Thompson, who has just been on the stand. I remember when she came home and reported to me what took place in regard to this defendant, Osborne Williams. She said that he asked her to give him some of her——. She made that report to me five times. She was nervous and everything. She was so badly scared she could not rest at night. She got with her girl friends going to school when she could, and I made arrangements about her going. She got with my son-in-law, Mr. Hollingsworth. He would go with her."

It was in evidence that Dora Justus (now Thompson) is a white girl, fifteen years of age, and the defendant a negro man about twenty-three years of age.

The court charged the jury, in part, as follows:

"He (defendant) further contends, gentlemen of the jury, that, as a matter of law, taking what the prosecuting witness said as true, that it does not amount in law to an assault, as there was no apparent demonstration or effort to do her violence. Now, gentlemen of the jury, the law presumes that the defendant is innocent, and the burden is upon the State to satisfy you, beyond a reasonable doubt, of his guilt—that is, the burden is upon the State to satisfy you to a moral certainty. The question will arise in your minds, gentlemen, as to what it takes to constitute an assault. To constitute an assault, there must be a hostile demonstration of violence which, if allowed its apparent course, would do hurt or injury to another. I will read that over to you again, gentlemen: 'That to constitute an assault there must be a hostile demonstration of violence which, if allowed its apparent course, would do hurt or injury to another." It is not necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury, but if by threats and a display of force he causes another to reasonably apprehend danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful pursuit, constitutes an assault. (Therefore, if the jury should find, beyond a reasonable doubt, that the defendant spoke the words, 'Give me some of your——,' or words similar to those, to the prosecuting witness; and if

you shall further find, beyond a reasonable doubt, that the defendant is a negro man, about twenty-three years of age, and that the prosecuting witness is a white girl, about fifteen years of age; and if you shall further find, beyond a reasonable doubt, that the language used by the defendant to the prosecuting witness, under all the facts and circumstances, amounted to such a display of force as would, and did, cause the prosecuting witness reasonably to apprehend that she was about to receive injury or hurt, and that, as a result of such apprehension or fear, caused her to run, or to do otherwise than she would have done, then, gentlemen of the jury, the court charges you that the defendant is guilty, and it is your duty to so find.)" The defendant excepted to that part of the charge commencing at "Therefore" and ending with "find." This was defendant's fourth exception.

At the close of all the evidence the defendant made a motion to nonsuit, which was refused, and defendant excepted.

The jury returned a verdict of guilty. Judgment was rendered, to which defendant excepted.

The defendant filed six assignments of error, and appealed to this Court. The assignments of error will be grouped and considered under the motion to nonsuit and the fourth assignment of error, which will present all the defendant's exceptions that are material for a decision of the case.

Attorney-General Manning and Assistant Attorney-General Nash and Michael Schenck for the State.

Shipman & Justice and Frank Carter for defendant.

CLARKSON, J. We think, from all the evidence, taken in a light most favorable for the State, that the court below did not err in submitting the case to the jury.

"In all cases of assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person." C. S., 4215.

In *S. v. Hampton,* 63 N. C., 13, the following were the facts: "As the prosecutor was going in a crowd down one of the staircases leading out of the courthouse in Greensboro, and was stepping down the first step, the defendant, who was in front of him, and in striking distance,

stopped, turned about and, with right hand clenched, his right arm bent at his side, but not drawn back, said, 'I have a great mind to hit you'; that before this, and as the crowd was leaving the courthouse, the defendant had said, 'If the crowd will go along to see, I will cowhide Lindsay'; that Lindsay had no way to go down that staircase but by pushing past the defendant, and that he turned away from defendant and went down another staircase." *Reade, J.,* held this to be assault, and said: "An assault is an offer to strike another. . . . In the case before us the defendant placed himself immediately in front of the prosecutor, assumed an attitude to strike, within striking distance, in an angry manner, and turned the latter out of his course. This was an offer of violence and constituted an assault, unless there was something accompanying the act which qualified it and indicated that there was no purpose of violence. The only accompaniment of the act was the declaration, 'I have a great mind to strike you.' If the declaration had been, 'I intend to strike you,' that would not have qualified the act favorably for the defendant. Nor if he had said, 'I have a mind to strike you.' It is suggested, however, that the expression, 'I have a great mind to strike,' is used to express indecision." *S. v. Myerfield,* 61 N. C., 108; *S. v. Church,* 63 N. C., 15.

In *S. v. Rawles,* 65 N. C., 336, *Settle, J.,* says: "The prosecutor swears that he was put in fear and made to hasten home by the language and conduct of the defendants. His Honor instructed the jury that 'if parties use such insulting and threatening language to another as is calculated to intimidate him, and is thereby put in fear and caused to deviate from the course he was pursuing, they are guilty of an assault; and if they were satisfied that the defendants assembled themselves together with a common design, they were all equally guilty.' "

In *S. v. Jeffreys,* 117 N. C., 746, *Avery, J.,* says: "But the fact that the defendant followed her to the fence, after using the threatening language and assuming the posture which the prosecutrix described, and there took such a position that he could intercept her if she returned to her home with the water, as she had contemplated doing and induced her, through fear of his touching her, to go in the opposite direction, tended to show that he was guilty of a simple assault. This evidence, if believed, brought the case within the principle to which we have adverted, as stated in *S. v. Hampton,* 63 N. C., 13."

Punishment for simple assault is now made greater when on a female by a man over eighteen years old.

In *Humphries v. Edwards,* 164 N. C., 158, *Walker, J.,* says: "We extract the following principle from *S. v. Daniel,* 136 N. C., 571: 'The principle is well established that not only is a person who offers or

attempts by violence to injure the person of another guilty of an assault, but no one, by the show of violence, has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton,* 63 N. C., 13; *S. v. Church,* 63 N. C., 15; *S. v. Rawles,* 65 N. C., 334; *S. v. Shipman,* 81 N. C., 513; *S. v. Martin,* 85 N. C., 508; 39 Am. Rep., 711; *S. v. Jeffreys,* 117 N. C., 743.' It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. *S. v. Jeffreys* and *S. v. Martin, supra.* It is sufficient if the aggressor, by his conduct, lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Pr., Pl. and Ev. (8th Ed., by Pomeroy), 907, 908." *Trogdon v. Terry,* 172 N. C., 542.

In the *Daniel case, supra, Walker, J.,* only decides, "The cursing of a person and ordering him to come to defendant, and he obeying, through fear, is not an assault."

There is difficulty sometimes to draw the line between "violence begun to be executed" and "violence menaced." "In general, there must be something more than mere menace or threat; and unless there is ability, at least, apparent to carry it out, there is no assault whatever. If there is apparent ability, so as to cause fear on the part of the person assailed, then, under the doctrine of the preceding section, an assault is committed." McClain's Criminal Law, secs. 233-234.

We have to be governed, to a great extent, by the facts as they appear in each particular case, to determine whether, to constitute the assault, there was "violence begun to be executed." In the instant case the prosecutrix, Dora Justus (now Thompson), was a young school-girl, about fifteen years of age, living in the town of Hendersonville. The public streets and sidewalks belong to all alike. This school-girl had a right to go anywhere on those streets, and no one, white or black, had any right to intentionally block her way and turn her from the course she was going, by actual force or by such language and show of violence that would put her in fear and make her afraid to go, or make her turn back and go some other way on account of such language accompanied with the show of violence. Four times before, the defendant had used unspeakable language to her on the streets, and the conduct of this negro, who was twenty-three years of age, was such as to terrify her to

such an extent that she was nervous and so badly frightened that she could not rest at night. The young girl was so affected by the conduct of the defendant that she had to have protection in going to school. The last time, as it appears from the evidence of the prosecutrix, she was on the streets, in this nervous, frightened condition (a place she had a right to be), and as she was passing "he repeated the same thing, used the same words in front of Livingston's store, and I ran back; I was afraid of him." By his conduct, previous acts and language, the final act terrified the prosecutrix to such an extent that she fled and changed her course in going along the public streets (a place she had a right to go). We think, from all the facts and circumstances in this case, the defendant, by his obscene language and request, repeated as many as five times, this conduct at different times that so terrified the young girl, and his conduct and ability to carry out the obscene request, the terror impressed on the prosecutrix, the condition of the parties—a young white girl and a negro man—the last repetition and apparent ability to carry it into effect, made the young girl flee and leave a place she had a right to be, would in law constitute an assault.

The learned attorneys for the defendant, in their fourth assignment of error, in their well-prepared brief, say: "We think this instruction is erroneous, for two reasons: (1) The instruction places emphasis upon the fact that the prosecutrix is a white girl and the defendant a negro man, but the difference in the color of the parties, as we understand the law, can make no difference. The fact that the prosecutrix was a white girl and the defendant a negro man does not affect the legal principles involved. The law would have been the same if the prosecutrix had been a negro girl and the defendant a white man, or if both had been white or both black; and, we think, the charge of the court must be considered as conveying to the minds of the jury that the difference in the color of the parties was a matter material for their consideration, and the less evidence would be required to convict the defendant because he is a negro than would have been required if he had been a white man. (2) There are no 'facts and circumstances' other than the language used by the defendant and the immaterial fact that the prosecutrix was white and the defendant black; and the instruction is the equivalent of a direction by the court to convict the defendant if the jury found that the defendant used the language, and that the use of the same 'amounted to such display of force as would, and did, cause the prosecuting witness reasonably to apprehend that she was about to receive injury or hurt, and that as a result of such apprehension or fear, caused her to run, or to do otherwise than she would have done.' We, therefore, think that the instruction is erroneous, under the authorities above cited."

We think that the court below was justified, in the charge to the jury, in charging them in regard to the difference in race, "that the defendant is a negro man about twenty-three years of age, and the prosecuting witness a white girl about fifteen years of age," etc.

Constitution of U. S., sec. 1, Art. XIV, in part, is as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This charge did not, nor was it intended to, "deny to any person within its jurisdiction the equal protection of the laws." To constitute an assault—to make a person leave a place he had a right to be, or change his course, or compel him to turn back or change his route, which he had a right to go—it must be done with such a show of violence and conduct as will indicate "violence begun to be executed," and put a person in fear, or cause a person to have a reasonable apprehension that harm or injury would be done if he did not change his course and desist from going the way he had a right to go. With this view of the law applicable to the facts in this case, the court left it to the jury to find if fear and apprehension would not be greater in a white girl fifteen years of age meeting a negro man twenty-three years of age, using such foul, indecent proposals and language to her, and make a reasonable apprehension in her that "violence was begun to be executed," that she feared she was going to be injured or hurt, he having the apparent ability to carry it into effect. No one is going to meet a lion as he would a lamb, nor a tiger as he would a cat. One creates fear, the other does not. A negro man, using this foul, indecent language towards a young white girl, as a matter of common knowledge, would create apprehension and fear, and the fact that he used such language would plainly indicate "a heart regardless of social duty and fatally bent on mischief."

We believe, in this State, that the negro has "the equal protection of the laws." In fact, the best friends that the negro has are his white neighbors. The negro has been in many respects a chosen people—brought here, the land of opportunity, among civilized people, without any effort on their part, from Africa. The burden "imposed, not sought," has been on the white people of this State to civilize and Christianize them. The trust has been and is being faithfully performed. The race is making great strides. It is a matter of common knowledge that if in a trial of a case before a jury that involves a moneyed transaction between a white man and a negro man, if there is the least evidence that the white man has overreached or cheated a negro, the

juries invariably decide for the negro. The best element of the negroes in this State are in full accord with law enforcement and the punishment of the negro who would overstep the bounds of race and be guilty of rape or kindred crimes. North Carolina is now spending approximately $4,000,000 a year on negro education, including nearly $2,000,000 in salaries for teachers and $1,000,000 for new and better schoolhouses. This does not include money used for the support of negro colleges and normal schools. The last Legislature of 1923 appropriated for permanent improvement and equipment $445,000 for the negro agricultural and mechanical college. The cities and towns are doing their part. The Legislature of North Carolina, at its last session, 1923, appropriated $50,000 to start a colored reformatory and training school, and approximately $10,000 for maintenance. Four hundred acres of land has been bought and directors (three white and two colored) have been appointed to manage the institution. There are institutions for the negro insane, and other institutions for the afflicted in the State.

The policy of the legislative branch of the government is to have separation of the races—in the railroads, street cars, schools, public institutions, etc., of the State—with equal accommodations. The same policy has been pursued in the cities. When a white library is built, a colored library is built. The same applies to parks and such like. In all of the cases the expenditure of money to give equal accommodations, etc., has far exceeded the taxes paid by the negro in proportion to that paid by the white people.

Our State Constitution, Art. XI, sec. 7, says: "Beneficent provision for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian State," etc. This State through the legislative branch of the government is trying to meet this obligation to the white and negro population alike, in that station of life that each has been called.

The exception by defendant to the court's charge in this case may seem to imply a lack of duty by the white race to the negro race. We give the legislative conduct in this matter to show that those to whom a sacred duty is imposed are performing this duty through other branches of the government. It is important in the administration of law that all the citizens of the State feel that the courts will do equal and exact justice.

For the reasons stated, there is

No error.

AVERY COUNTY BANK, S. G. SMITH, AND G. L. TUTTLE v. C. W. SMITH, A. S. ABERNATHY, AND F. A. ABERNATHY, TRADING AS A. S. ABERNATHY & SON.

(Filed 12 December, 1923.)

1. Mortgages — Subject to Prior Mortgage — Registration — Statutes — Notice.

A chattel mortgage stating that it was made subject to a prior mortgage on the same property to secure the payment of a certain sum of money is, by its express terms, in recognition of the existing prior mortgage, and only purporting to convey the mortgaged property to that extent, does not require registration of the prior mortgage, or the notice therein required by statute (C. S., sec. 3311), to make the obligation more effective between the parties to the agreement and the prior encumbrancer.

2. Same—Instructions—Appeal and Error.

Where a chattel mortgage is given and accepted subject to a prior mortgage, an instruction in an action thereon that makes registration of the first mortgage in the proper county necessary to the enforcement of the condition upon which the later mortgage was given, is reversible error.

3. Instructions—Prayers for Instructions—Rules of Court—Appeal and Error.

It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by the statute. C. S., sec. 565.

4. Appeal and Error—Briefs—Rules of Court.

Exceptions not embraced in the brief of appellant, or where the brief does not conform to the rules of court regulating appeals, will be deemed as abandoned. Rule 28, 185 N. C., 798.

APPEAL by defendants, interveners, A. S. Abernathy & Son, from *Ray, J.*, at April Term, 1923, of AVERY.

This was a civil action commenced by the plaintiffs against C. W. Smith for the recovery of $353.75, note dated 23 December, 1920, and due 23 March, 1921, with interest, the note payable to plaintiffs S. G. Smith and C. L. Tuttle, and by them transferred to the Avery County Bank. The note was secured by a chattel mortgage of even date, recorded in Avery County in Book No. 3, p. 232, on the following personal property, viz.: "1 pair of bay mares, 5 years old, known as the Abernathy mares; 1 brown horse, 8 years old; 1 black horse, 8 years old; 1 bay horse, 9 years old, and 1 sorrel horse, 10 years old."

The plaintiffs sued out the ancillary remedy of claim and delivery, gave bond, and took possession of the above-described property. The defendants, A. S. Abernathy & Son, filed in the suit an interpleader, gave bond, and the property was turned over to the interveners, J. D.

Braswell, sheriff of Avery County, making the following return: "The said E. C. Guy (agent of Avery County Bank) delivered to me the said horses, and they were turned over to the said A. S. Abernathy & Son."

In the interpleader of A. S. Abernathy & Son they allege that they claim a superior right to that of the plaintiffs to the following personal property: "1 pair of bay mares, known as the Abernathy mares, now about 6½ and 7½ years of age, and 1 black horse, now about 8½ years old, by virtue of a chattel mortgage executed to them by the said C. W. Smith on 7 December and registered on 9 December, 1920, in Burke County, N. C. Said mortgage was given to secure the purchase of a part of said property (with other described in said mortgage), which said property was sold to the said C. W. Smith by your petitioners; and that there is now due and owing to your petitioners by the said C. W. Smith, as the balance of the said purchase price thereof, the sum of $562.50, with interest from 7 December, 1920."

The interpleader further alleged: "That at the time of the sale of the said property to the said C. W. Smith, as aforesaid, and the execution and registration of said mortgage to secure said purchase price as aforesaid, the said C. W. Smith was residing and working in Burke County, N. C., and kept said property there."

On the trial of the cause in the court below there was a dispute as to which county C. W. Smith was a "resident" of, bearing on the question as to which county the chattel mortgage should be registered in. Evidence was introduced by plaintiffs and interveners to show which county he lived in. The contentions, taken from the court's charge, is as follows: The plaintiffs contend "that the mortgagor, Smith, was a resident of this (Avery) county; that he lived in Avery for a number of years; lived in what is called the 'Lost Cove' section, owning considerable property," etc.

The interveners contend: "He declared that he was a citizen of Burke County, and argues to you extensively that as a moral matter that it would not be right to allow the plaintiff to prevail in this action, for that in the mortgage made by the defendant Smith to the plaintiff bank that it was recited in said mortgage that the mortgage made to it was subject to a prior mortgage on the same property, to secure the payment of a certain amount due A. S. Abernathy & Son, and contends this was notice to the plaintiff that there was a mortgage made prior to the conveyance of the property to the bank to secure the debt."

Both chattel mortgages were introduced in evidence.

The chattel mortgage given by C. W. Smith to S. G. Smith and C. L. Tuttle, plaintiffs, and transferred by them to plaintiff bank, which conveyed the property in controversy, has, after the description of the property, this provision: *"This mortgage is made subject to a prior*

mortgage on same property to secure the payment of $448 due A. S. Abernathy." (Italics ours.)

The chattel mortgage given by C. W. Smith to defendants A. S. Abernathy & Son has this provision: "I, C. W. Smith, of the county of Burke, in the State of North Carolina, am indebted to A. S. Abernathy & Son, of Catawba County, in said State, in the sum of five hundred and sixty-two and 50-100 dollars, for which they hold my notes to be due on 7 June, 1921, and 1 November, 1921; and to secure the payment of the same I do hereby convey to him these articles of personal property, to wit: One pr. bay mares, 5 and 6 years old, weighing about 1,250 lbs. each; one 2,500 lbs. Spach wagon, two sets double harness with collars, lines and bridles, all this day bought of them; one brown horse, eight years old, one black horse, seven years old, weighing 1,230 lbs. and 1,240 lbs. It is agreed that if I pay $281.25 7 June, 1921, I am to pay balance 1 November, 1921."

Without objection, the defendant C. W. Smith testified: "When I gave the mortgage that the Avery County Bank is suing on, I told them I had given a mortgage to Mr. Abernathy."

Without objection, S. L. Shell, a witness for interveners, testified: "I live at Hickory; am employed by A. S. Abernathy & Son, a partnership consisting of A. S. and F. A. Abernathy. I trade in horses and mules and cattle for them. I know C. W. Smith. He is indebted to A. S. Abernathy & Son, according to the notes, in the sum of four hundred and some odd dollars, I think about $80; something along there. These instruments are the notes secured by the mortgage, each one being for $281.25, and there is unpaid on the two notes four hundred and eighty some dollars. The credits on here appear, it looks like, for the sale of some of this stock. I can't say from my own knowledge. The property taken by the interveners under the bond filed herein are not at the barn; they have been sold, and the amounts realized from the sale of that stock have been credited on those notes."

The interveners, A. S. Abernathy & Son, in due time requested the following special instructions to the jury:

"If you shall find from the evidence that the property taken from the plaintiffs by interveners was property covered by defendant's mortgage to interveners, dated 7 December, 1920, and that the mortgage given plaintiffs by defendant, dated 23 December, 1920, was made subject to the prior mortgage given interveners by the defendant, then you shall find that the interveners are the owners and entitled to possession of said property." This the court refused to give, assigning as a reason therefor that it was not signed by counsel. To the refusal to give the above instruction the interveners, A. S. Abernathy & Son, excepted. This was the interveners' fourth exception.

The court below charged the jury as follows: "So it comes down to this question, there is no dispute, and the court charges you that this reservation in this second mortgage is not notice to the plaintiff of the prior conveyance to Abernathy—so it comes down to this question of fact: Was Smith a resident of Burke County at the time of making the mortgage to Abernathy & Son? If he was, the mortgage was properly registered there, and the property can be held under that mortgage anywhere in the State it may be found; but if he was not a resident of Burke County, and the plaintiff contends he was not and the interveners contend that he was, if he was not such resident, then the registration there would be a nullity, and the registration here would prevail, and the plaintiff would have the right to have the issue answered yes, that he was a resident of Avery County."

The interveners, A. S. Abernathy & Son, excepted to the above charge, which was their fourteenth exception.

The issues submitted to the jury were as follows:

"1. What amount, if any, is the defendant, C. W. Smith, indebted to plaintiff? Answer: '$353.75, with interest from 23 March, 1921.'

"2. Was the defendant Smith a resident of Avery County at the time of making the mortgage to Abernathy & Son, and has he continued such residence? Answer: 'Yes.'

"3. Is the intervener the owner of the property described in the mortgage from C. W. Smith to Abernathy & Son? No answer."

The court below gave judgment on the verdict against the defendant, C. W. Smith, for $353.75 and interest from 23 March, 1921, and judgment against the interveners, A. S. Abernathy & Son, as follows: "And it further appearing to the court that at the date of the execution of the promissory note offered in evidence by the plaintiff that the defendant C. W. Smith, in order to secure the prompt and faithful payment of said note, executed to the plaintiff's assignors a certain chattel mortgage on the property described in the plaintiff's affidavit filed in its action of claim and delivery, and that said plaintiff, in order to enforce the payment of said note, had advertised the said property for sale under the power of sale contained in said chattel mortgage, and has caused claim and delivery proceedings to be instituted against the defendant C. W. Smith and delivered to the plaintiff for the purpose of sale. And it further appearing to the court that prior to the day of sale of said property the interveners, A. S. Abernathy & Son, intervened in said action and set up claim of title to said property, and upon giving the bond required by law in the sum of $1,200, signed by A. S. Abernathy & Son, F. A. Abernathy, S. L. Shell and J. F. Abernathy, as sureties; and it further appearing to the court that, upon the filing of said bond before the clerk of the Superior Court of Avery County,

the said property was taken from the possession of the plaintiff and delivered to said interveners, and that said property has been removed from the county of Avery and converted by the interveners: It is considered, ordered and adjudged by the court that the said plaintiff recover of the interveners, A. S. Abernathy & Son, and the sureties on their detention bond the sum of $1,200, according to the tenor and condition of the detention bond filed in said action, the said bond of said interveners and the sureties paying into court $353.75, with interest thereon from 23 March, 1920, together with all the costs and expenses incurred by the plaintiff in taking and keeping of said property described in the affidavit of the plaintiff in the sum of $91.20, as shown by itemized statement, and costs of this action, to be taxed by the clerk." The signing of the judgment is the interveners' nineteenth exception.

In the brief of the interveners, appellants, there are eleven assignments of error. The fourth exception in the record is not considered in the brief of the interveners, appellants, as one of the assignments of error.

The brief of interveners, appellants, consider, in their assignments of error, exception 14 in the record under 8th assignment of error and exception 19 of the record (the signing of the judgment) under their 11th assignment of error.

We do not think for a decision of this case any other assignments of error are necessary to be considered.

R. W. Wall and Love & Lowe for plaintiffs.
J. W. Ragland and Self, Bagby & Aiken for interveners.

CLARKSON, J. The fourth exception by interveners, the appellants, is as follows: "The interveners, A. S. Abernathy & Son, in due time requested the following special instructions to the jury: 'If you shall find from the evidence that the property taken from the plaintiffs by interveners was properly covered by defendant's mortgage to interveners, dated 7 December, 1920, and that the mortgage given plaintiffs by defendant, dated 23 December, 1920, was made subject to the prior mortgage given interveners by the defendant, then you shall find that the interveners are the owners and entitled to possession of said property.' " The court declined to give this prayer for instruction, assigning as a reason therefor that it was not signed by counsel. This was in the sound discretion of the court below.

"Counsel praying of the judge instructions to the jury must put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They must be filed with the clerk as a part of the record." C. S., 565; *Pritchett v. R. R.*, 157 N. C., 88.

The fourth exception is deemed abandoned. "The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignments of error, with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application." Rules of Practice in Supreme Court, part of Rule 28 (185 N. C., 798).

The contention is considered later under the eighth assignment of error, exception 14 of the record.

The plaintiffs in their brief succinctly state the real contentions in the case. "As the mortgage held by plaintiff was registered in Avery County, where the mortgagor resided, and the interveners' mortgage was registered in Burke County, where the mortgagor, C. W. Smith, was temporarily engaged on a logging contract, there are only two points involved in the case: (1) whether the plaintiffs are protected by the registration of their mortgage in the county where the mortgagor resided and had his home; (2) whether this clause in the mortgage executed by the mortgagor to plaintiff at a later date, "This mortgage is made subject to a prior mortgage on same property to secure the payment of $448 due A. S. Abernathy," created a lien in favor of the interveners, "A. S. Abernathy & Son."

The first contention need not be considered, in view of the position taken by the court in this case.

The second contention is to the charge of the court as to the legal effect of the clause in the mortgage to S. G. Smith and C. L. Tuttle, which reads as follows: "This mortgage is made subject to a prior mortgage on same property to secure the payment of $448 due A. S. Abernathy."

The interveners, under their eighth assignment of error in their brief, to the fourteenth exception in the record, is entitled to have this matter passed on, as the court below charged the jury as a matter of law: "So it comes down to this question, there is no dispute, and the court charges you that this reservation in the second mortgage is not notice to the plaintiff of the prior conveyance to Abernathy." We think the court below erred in the charge.

The mortgage given to S. G. Smith and C. L. Tuttle, which was assigned to Avery County Bank, was made "subject to a prior mortgage," etc. Webster defines the word "subject" to mean "to bring under control, power or dominion; to make subject; to subordinate; to subdue." This means more than a mere notice to protect the mortgagor (C. W. Smith) of conveying mortgaged property or incurring liability by giving a mortgage to plaintiffs S. G. Smith and C. L. Tuttle, when there was an existing lien on the property. The language means what it says, that the Smith and Tuttle chattel mortgage is subject to, brought under control of, subordinate to, a prior mortgage on the same property to secure the payment of $448 due A. S. Abernathy. It is contended by plaintiffs that the mortgage would give notice that only A. S. Abernathy held a mortgage, whereas there was a prior mortgage to A. S. Abernathy & Son. We think this immaterial from the facts in this case. Without objection, the defendant C. W. Smith testified: "When I gave the mortgage that the Avery County Bank is suing on I told them that I had given a mortgage to Mr. Abernathy." The plaintiffs were not misled. In fact, S. L. Shell, witness for interveners, testified, without objection, "He is indebted to A. S. Abernathy & Son according to the notes"; without objection he stated the ownership of the notes and amount due on same. If the ownership and amount were material, the plaintiffs should have objected to Shell's testimony as varying or adding to a written matter. It will be noted that the mortgage which plaintiffs claim under states, in the description, "1 pair of bay mares, 5 years old, known as the Abernathy mares." The clear intention of the parties, from all the evidence, is that the plaintiffs S. G. Smith and C. L. Tuttle took the second mortgage from C. W. Smith subject to the Abernathy mortgage.

Where the registration of an instrument is required, no notice to purchaser, however full and formal, will supply the place of registration. "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor, or mortgagor resides out of the State, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence." C. S., 3311. See *Door Co. v. Joyner,* 182 N. C., 521; *Fertilizer Co. v. Lane,* 173 N. C., 184; *Tremaine v. Williams,* 144 N. C., 116, and cases cited.

In the instant case this language was more than actual notice. It was an agreement between C. W. Smith, the maker of the chattel mortgage, and S. G. Smith and C. L. Tuttle, the plaintiffs, that what right and title they obtained to the personal property mortgaged to them was subject to the Abernathy mortgage. *"This mortgage is made subject to a prior mortgage on same property to secure the payment of $448 due A. S. Abernathy."*

The present case is in all respects similar to *Bank v. Vass,* 130 N. C., 592. In that case, following the description in the mortgage, was this clause: *"Said 239¾ acres is subject to a mortgage or deed in trust for about $1,650, balance of purchase-money on land."* (Italics ours.) *Montgomery, J.,* said: "We think those words establish a trust in equity in favor of defendant for the security of the debt mentioned in the deed of trust upon the property, or the proceeds which may arise upon a sale of the same by the mortgage. And this benefit, as we have seen, is in no way derived by title acquired through the deed of trust, but it comes by virtue of the charge and trust set out in the mortgage." *Hinton v. Leigh,* 102 N. C., 28; *Brassfield v. Powell,* 117 N. C., 141; *Bank v. Redwine,* 171 N. C., 569.

We do not think that the facts in the case of *Piano Co. v. Spruill,* 150 N. C., 168, applicable to this case. In that case the words (in the mortgage to Spruill & Bro.) was "clear of all encumbrances except $115 due the piano company." This language was held merely notice to avoid any charge against the mortgagor of conveying mortgaged property or incurring liability to the grantees for removal by them of the encumbrances.

We think that in *Blacknall v. Hancock,* 182 N. C., 373, *Hoke, J.,* draws the right distinction. He says there: "Again, it is insisted that plaintiff's claim to the extent of the purchase-money debt paid to the Edwards heirs should be held superior because the deed of trust under which defendant claims is in recognition of the Edwards lien, and under the principle approved in *Hinton v. Leigh,* 102 N. C., 28, but on the facts presented, this exception also must be overruled. In *Hinton v. Leigh, supra,* the Court held that the claim under a later registered mortgage should be preferred to claims secured by a subsequent deed of trust, but which had been first registered, but this was on the ground that by correct interpretation the deed of trust fully recognized the validity of the mortgage and conveyed the land to the trustee only as subject to the mortgage lien. But the position does not prevail from the fact that in the instant case the deed of trust to defendant in the covenant against encumbrances merely excepts the claim then existent in favor of the Edwards heirs. The present case comes clearly within *Piano Co. v. Spruill,* 150 N. C., 168, and that class of cases which hold

that a mere reference to the existence of a prior encumbrance does not recognize its validity as a superior lien except as it may comply with requirements of our registration laws."

For the reasons given, there was error in the court's charge. The eleventh assignment of error, nineteenth exception in the record, was to the court signing the judgment. From the view taken of this cause, there was error in the judgment as rendered so far as it applied to the interveners.

For the reasons pointed out, there must be a

New trial.

SCHOOL COMMITTEE OF SEVENTY-FIRST CONSOLIDATED SCHOOL DISTRICT ET AL. v. BOARD OF EDUCATION OF CUMBERLAND COUNTY AND BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

(Filed 12 December, 1923.)

1. Schools — Districts — Consolidation — Taxation—Bonds—Elections—Counties—Board of Education—Discretion.

Where, prior to an election of a school district to vote upon the question of issuing bonds and levying a special tax for the location and erection of public school buildings, assurance is given by the county board of education that the buildings would be located in the geographical center of the district, and upon this assurance the bonds and special tax were approved, the change in the location of the school buildings is a matter within the discretion of the board, when it is further made to appear that another district had since been added to the original one, with its approval, by consolidation according to law, which had voted to contribute their proportional part of the expenses of the district thus consolidated.

2. Same—Courts.

The courts will not interfere with the exercise of its discretion by the county board of education in locating public school buildings within a school district therein, when not in abuse of the discretion vested in the board.

3. Same—Referendum.

Where the county board of education has by referendum ascertained the approval of a school district as to the relocation of a place previously proposed by it for its public school buildings, it will be received as evidence of its good faith in the exercise of its discretion, notwithstanding the referendum was not made in strict accordance with law.

4. Appeal and Error—Schools—Findings of Fact—Review.

The findings of fact upon the evidence by the judge of the Superior Court, upon which he bases his conclusions of law as to the abuse of its discretion by the county board of education in locating or relocating a place for the erection of its public school buildings, is not conclusive on the Supreme Court on appeal.

5. Schools—Taxation—Bond Issues—Constitutional Law.

Where a school district has been consolidated with another having valid authority to issue bonds for public school purposes, and levy a special tax therefor, and has complied with Article VII, section 7, of the Constitution as to the payment of its proportionate part, the bonds when issued will be a valid obligation upon both of the districts so consolidated.

6. Schools—Taxation—Bonds—Statutes.

Where two school districts have been consolidated and have voted for bonds and a special tax levy for public school purposes under the provisions of chapter 87, Public Laws, Extra Session of 1920, but have not issued the same or incurred obligations thereunder, the bonds to be issued should be in the name of the consolidated district, under the provisions of the Public Laws of 1923, ch. 136, sec. 266.

APPEAL from *Sinclair, J.*, at September Term, 1923, of CUMBERLAND.

Prior to 1 October, 1921, several districts having an equal rate of special school tax were consolidated and designated Seventy-first Consolidated School District. By virtue of Public Laws, Extra Session 1920, ch. 87, the board of commissioners on the first Monday in October, 1921, ordered an election to be held in the consolidated district on the question of issuing serial bonds not exceeding $40,000 and levying an annual tax for the purpose of erecting, enlarging and equipping a school building or buildings in said district; but before the election was held a controversy arose among the voters as to the location of the proposed building, and thereupon the board of education expressed its purpose to place the building as near the geographical center of the district as was practicable, all things considered.

The election was carried in favor of the bonds and the special tax, but it would have failed if the board of education had not given assurance as to the location of the building. After the election, Clifton was chosen as the site, and R. H. Owen, a taxpayer residing in said district, brought suit against the board of education and the school committee, alleging that Clifton was not near the geographical center of the district, that the preëlection agreement had been disregarded, and that the board had abused its discretion in fixing the location. A preliminary restraining order was issued but was dissolved at the hearing. Upon appeal the Supreme Court affirmed the judgment vacating the injunction but retained the cause for final hearing. See 184 N. C., 267. At the February Term, 1923, Owen took a nonsuit as to the school committee. A tract of ten acres at Clifton, selected as a site, was conveyed to the board of education, the special tax was levied and collected for 1921 and 1922, and a notice was published that sealed bids would be received for the erection of the schoolhouse.

After the election was held, as herein set out, the board of education thought that Galatia School District should be included in the Seventy-first, and in order finally to determine the question, called into consultation the school committee of the Seventy-first Consolidated District, and the committee unanimously recommended the consolidation of the two districts; whereupon the board of education, in the exercise of its discretion, effected the consolidation. After doing so, the board submitted a referendum to the taxpayers of the Seventy-first Consolidated District as to the location of the building, and 201 votes were cast in favor of Glendale and three in favor of Clifton.

Before taking final action in the matter the board of education caused an election to be held in the Galatia District to ascertain whether the taxpayers therein would assume payment of their part of the taxes necessary to maintain the school and pay the bonds and interest, and said election resulted in favor of assuming the debt and consolidating the districts. This outline is not intended to represent all the facts found by the lower court.

The object of the present action is to determine whether the proposed bonds may be issued and by whom; to enjoin the board of education from changing the location of the school site from Clifton to Glendale; and to require the immediate sale of the bonds and the erection of the building.

Judge Sinclair issued a temporary restraining order, and the case was heard by him at the September Term, 1923. By consent, this case and *Owen v. Board of Education* were consolidated, a jury trial was waived, and the presiding judge found the facts and rendered the following judgment:

It is ordered, adjudged and decreed:

(1) That a bond issue in the amount of $40,000 of Seventy-first Consolidated School District, in denominations of the terms, etc., as specified in the order and notice of election hereinbefore set out, has been legally authorized, and when issued will be and constitute a valid and binding obligation upon the Seventy-first Consolidated School District as described in said order and notice, and the subjects of taxation therein can thereafter, in the manner provided by law, be taxed for the payment of said bonds and the interest thereon.

(2) The board of education is estopped from changing or attempting to change the location of the proposed school building from Clifton to Glendale, and its attempt so to do under the facts in this case is in excess of any authority vested in it by law, and is so unreasonable as to amount to an oppressive and manifest abuse of discretion, is of no effect and void, and said board is hereby perpetually restrained and enjoined from attempting to locate or erect said building at Glendale.

(3) Clifton has heretofore been selected, determined upon and designated by the board of education in the judicious exercise of its discretion as the location of the proposed building, and the board of education and the board of trustees of the district are hereby directed in the manner required by law to immediately erect and equip said building at Clifton as soon as the money can be realized from the sale of said bonds.

(4) The Board of Education of Cumberland County is hereby adjudged to be the proper body to issue and sell said bonds, and it is hereby directed forthwith to do all things needful and proper in the immediate issuance and sale of said bonds, and sell the same and apply the proceeds therefrom as above directed to the erection of said building at Clifton.

(5) The cost of this action, to be taxed by the clerk, is adjudged against the defendant board of education.

Dye & Clark for plaintiffs.

Rose & Rose, Attorney-General Manning, and Assistant Attorney-General Nash for defendants.

ADAMS, J. The cardinal question presented in the argument here is whether the board of education had the legal right to change the site of the proposed schoolhouse from Clifton to Glendale. His Honor found as a fact that in making the change the board was actuated by no improper motive, but he held as a legal inference that upon the facts in the case the change was *ultra vires,* or if not, that it amounted to an oppressive and manifest abuse of discretion. This conclusion, we presume, was based chiefly on the finding that the potential factor in the election of 17 November, 1921, was the board's assurance that the building should be erected at or near the geographical center of the district, and that a majority of the qualified voters would not have voted for the bonds if such assurance had not been given. If the record showed nothing more in regard to the change of site these facts would raise the serious question whether approval of the bond issue had not been submitted as a conditional proposition by which the defendants are bound (*McCracken v. R. R.,* 168 N. C., 62); but there are other facts which must be considered. It appears from the record in the Owen suit that there was serious objection to Clifton as a site for the school, and the board of education endeavored to allay the dissatisfaction. On 30 April, 1923, certain citizens of Seventy-first District filed with the board of education a petition requesting that the Galatia District be included in the Seventy-first School District and that the selection of a site for the building be reconsidered. The school com-

mittee of the Seventy-first District recommended such consolidation. The board of education then decided that a referendum or test vote should be taken on 18 May to ascertain the wishes of the qualified voters of the two districts as to the location of the school building; and the returns made by the judges of election show that 201 voters favored Glendale and three favored Clifton. It is true that a new registration was not required, and the three pollholders or a majority of them were authorized to decide who were qualified to vote; but the names of the voters were preserved and there is no suggestion that any one voted who was not qualified or that any qualified voter was rejected. His Honor found that a large proportion of the voters of the Seventy-first District did not take part in the referendum for the reason that they considered the location settled; that Galatia at that time was not a part of the consolidated district, and that the referendum was not authorized by law. But we are not now dealing with the legal efficacy of the test vote as a binding obligation, but with the question whether the board of education grossly abused its discretion or whether it intended primarily to subserve the educational interests of the two districts. Moreover, the defendants contend that in the bond election the total registered vote of Seventy-first District was 199, the total registered vote of the Galatia territory 63, making a total combined registration of 262, and that a majority of the qualified voters residing in the original Seventy-first District favored the proposed change of site.

While his Honor's findings of fact are comprehensive and in the main supported by the evidence, they are subject to review in a suit of this character (*Lee v. Waynesville,* 184 N. C., 565), and our understanding of the facts precludes approval of the ruling that changing the schoolhouse site from Clifton to Glendale was beyond the power vested in the board of education or was so unreasonable as to amount to an oppressive and manifest abuse of discretion. If, as we have intimated, the doctrine in *McCracken's case* is not applicable to the facts here presented the board of education was remitted to the exercise of its sound discretion in determining the matter of a change in the location of the building (P. L. 1923, ch. ..., sec. 60 *et seq.*), and the familiar principle (recognized by his Honor) is firmly established, that in the absence of gross abuse the courts will not undertake to supervise or control the discretion conferred by law upon public officers in the discharge of their duties. In *Venable v. School Committee,* 149 N. C., 120, the *Chief Justice* said: "The rebuilding of the school and the change of site are matters vested by the statute in the sound discretion of the school committee, and is not to be restrained by the courts unless in violation of some provision of law or the committee is influenced by improper motives or there is misconduct on their part." *Peters v.*

Highway Com., 184 N. C., 30; *Person v. Watts*, 184 N. C., 506; *Davenport v. Board of Education*, 183 N. C., 570; *Dula v. School Trustees*, 177 N. C., 426; *Newton v. School Committee*, 158 N. C., 187; *Brodnax v. Groom*, 64 N. C., 244.

His Honor adjudged that the bonds when issued will be a valid obligation upon the Seventy-first Consolidated School District as described in the order and notice of election, and that the subjects of taxation therein shall be taxed for the payment of the bonds and interest. To this extent the judgment is correct; but if at an election duly held a majority of the qualified voters in the Galatia District pledged the faith and loaned the credit of the district for their proportionate part of the tax necessary to pay the bonds and interest, as provided in the Constitution, Art. VII, sec. 7, the bonds when issued will be a valid obligation upon the Seventy-first Consolidated School District, including Galatia.

In substance, the plaintiffs have also applied for a mandatory injunction to compel the immediate issuance of the bonds, and a question has arisen as to the body by whom they are to be issued. It is admitted that the election upon the bond issue was held under the provisions of chapter 87 of the Public Laws of the Extra Session of 1920. In the second section of that act it was provided that bonds authorized for a school district should be issued in the corporate name of the school district as provided by chapters 143 and 308 of the Public Laws of 1919. At the session of 1923 the General Assembly repealed chapter 87 of the Public Laws of 1920 (Extra Session) and made the following provision for bonds previously authorized: "If bonds or indebtedness have heretofore been voted under any act, and have not yet been issued or incurred, they may be issued or incurred pursuant to the provisions of the act under which they were voted." P. L. 1923, ch. 136, sec. 265. This section seems to be controlling.

His Honor's judgment as it appears of record is set out in the statement of facts. The first section thereof is modified to the extent of including Galatia District since its consolidation with Seventy-first Consolidated District, and as thus modified is affirmed. The second, third, and fifth sections are reversed, and the fourth section is reversed as to the corporate name in which the bonds are to be issued and sold and as to the direction that the schoolhouse be erected at Clifton; but the bonds should be issued and the proceeds applied as provided by law.

In part reversed.

In part modified and affirmed.

EUGENE B. GRAHAM, JR., v. THE CITY OF CHARLOTTE.

(Filed 20 December, 1923.)

1. Municipal Corporations — Cities and Towns — Damages — Notice — Statutes—Action.

A statutory provision that written notice shall be given to the board of aldermen of a city, of an injury, in order to render it liable in damages for its negligence therein, stating the date and place of the happening or infliction of such injury, its manner and the amount of damages claimed, within a certain time thereafter, requires only a substantial compliance therewith, without the technical nicety necessary to pleadings; and the notice given in this case is held sufficient.

2. Same—Discretionary Powers—Negligence.

Where a city, under the provisions of special and general statutes is authorized to open new streets, erect bridges therefor, etc., and required to keep them in proper repair, and permitted to pass laws for abating public or private nuisances of any kind, and preserving the health of its citizens, the authority is also conferred on them to properly construct the approaches of the streets to the bridges they may construct; and the city is liable in damages, as in case of maintaining a nuisance, for an injury to one driving an automobile across one of these bridges caused by the negligence of the city in leaving concrete pilasters extending into the road intended for the travel of vehicles. C. S., secs. 2675, 2676.

3. Same—Contributory Negligence—Ordinances.

Where there is evidence that the defendant city was guilty of negligence in constructing concrete pilasters at the approach of its street to a bridge, insufficiently lighted at the place at night to be observed by one traveling across the bridge in an automobile as a passenger, the fact that the one so injured was violating an ordinance of the city prohibiting him from sitting on the side of the truck with his feet hanging over, is not such contributory negligence as will bar his recovery, as a matter of law, but leaves to the jury to determine under the evidence, as an issue of fact, whether the defendant's negligence was, notwithstanding, the proximate cause of the injury.

4. Same—Nonsuit—Questions for Jury—Trials.

In this action to recover damages against the city for a personal injury, evidence that the injury was caused by the defendant's letting two concrete pilasters remain in the way for vehicles to travel, at the approach of a bridge on its street, and that the plaintiff's injury was caused thereby on a dark night, with insufficient light provided there by the city, and that the plaintiff at the time was being carefully driven in an automobile as a passenger by another, with the other evidence in this case, *is held* sufficient, upon defendant's motion as of nonsuit, to take the case to the jury.

APPEAL by defendant from *Webb, J.*, at May Term, 1923, of MECKLENBURG.

Civil action. The material facts are as follows:

Eugene B. Graham, Jr., the plaintiff, testified, in part, as follows:

"I am plaintiff in this action; was 22 years old on 18 June, 1919. I was a clerk at the Charlotte Supply Company after I returned from France. I worked for Burwell & Dunn Company about three years; was working there when I went to France, at a salary of $15 or $20 per week. I was learning the drug business. I went to France on 8 May, 1918, remaining there between ten and eleven months. I got back from France on 2 April, 1919. I was with the Thirtieth Division, Machine Gun Company, practically all the time, except when I was in machine-gun school. I was sergeant, and they sent three sergeants from the company to this school at Langres. I was honorably discharged from the Army when I got back. After I got back I loafed a month, trying to get back to civilian life, and then went to work at the Charlotte Supply Company at a salary of $15 a week. I was injured on 11 July, 1919. I was on a truck on Seventh Street. The truck was the property of Sloan Sherrill's father. It was a straw ride. Sloan Sherrill was driving. I was called on the phone and invited to go. I had nothing else to do with the ride, except to go by invitation. I was injured at night. We had gone to Rhyne's Park. Sloan Sherrill and Laura Alexander invited me to go. The ride was given in honor of Miss Helen Fewell, of Rock Hill. Dr. J. R. Alexander and his wife were chaperoning the party. They accompanied us back to town in a separate car. The sides of the truck were taken off and cushions placed around the sides, so we could sit that way. I mean the uprights were taken off. Had automobile cushions. There were about fifteen or sixteen people on the ride. As we sat on the cushions on the side of the truck our feet were hanging over the side of the truck. Immediately before the injury, we came up toward the Elizabeth section to take the guests home, and were coming back towards Charlotte, on Seventh Street. Sloan Sherrill was driving. The truck had a closed cab. That (referring to the photograph) is the kind of cab the truck had on it, and the kind of truck, with the exception that the sides were off. As we were coming into Charlotte, on East Seventh Street, I was riding on the right-hand side, coming into Charlotte. I was the first on that side, immediately behind the cab. Sloan Sherrill and Laura Alexander were in the cab. Miss Helen Fewell sat next to me; E. Y. Marsh sat next to her. Fred McCall and J. R. Alexander, Jr., were also on the right. Some of the others were sitting in positions similar to mine, on the left-hand side. The moon had been up, but I think it was going down. It was either going down or it had gotten cloudy. It wasn't as light as it had been when we started. It was not pitch-dark, but it was not very light. As to the first notice I had of

being in danger, I don't know whether I heard some one holler or not. I had my head back, talking to this lady, and when I turned I was hit. I was looking back towards the rear of the truck. The lady was between me and Mr. Marsh. I do not know anything about the fact that we were crossing this bridge. I could not see the outlines of the bridge. I was mashed between the fourth post and the side of the bridge. By the fourth post I mean the farthest toward Charlotte. After I was hit I was knocked off—about 10 feet, I guess; and I must have been stunned, and when I came to I was lying on the street or sidewalk. I tried to stand up and go after the truck, and couldn't stand up. I looked up, and my foot was practically off—just hanging by a little piece of flesh. I sat down and waited until the party came back. My right foot was hurt. It has a scar where it was hurt. My left foot was amputated. The X-ray showed a fracture of the large bone of my right leg, but it knitted back together by itself. The ankle was twisted, and it was about two months before it got straight, and at times now, when I walk a great deal, it bothers me. It hurts in the arch. I was taken to the hospital shortly after I was injured. Dr. Gibbon amputated my left leg, and Dr. Scruggs assisted him. I was suffering immensely by the time I got to the hospital. I had one foot off and one great big piece of flesh out of the other. They amputated the leg that night. After I came from under the influence of the anesthetic I suffered immensely. I could not sleep in the day or at night. I had to put both legs in a certain position in the bed, and could not move. Every time I moved the nurse had to move me. I was under the influence of narcotics for a long time. I was in the hospital from 11 July to 5 September, and was then taken home. I was confined to the bed about two months after I got home, and confined to the house after that for several weeks. After I finally got out, for the first few weeks, I couldn't even use crutches. I had to be carried to the office and back. They would take me in the morning and get me again at night. Then I walked on crutches for about a year and a half. Then I got this artificial leg. After I got home I suffered pain. My medical and hospital bills aggregated about $1,000. The fact that I lost one of my legs interferes with my ability to get about and attend to my business, especially during the hot weather. Year before last, during the hot weather, I had to take off this artificial leg for about two months, on account of the heat. It galled the leg, and pus formed, and I couldn't wear it. I am still working for the Charlotte Supply Company as a clerk. I have suffered humiliation and mental anguish on account of being crippled. I would say the truck was going at a speed of between 15 and 18 miles an hour."

S. S. Sherrill testified, in part, as follows:

"I am a mechanical engineer; graduate of Clemson College. I was driving the truck in question, which belonged to my father. On that night I happened to be driving the truck, as Miss Alexander and I had arranged to give a party for Miss Helen Fewell, of Rock Hill. I furnished the truck, at the request of Miss Alexander, and drove it. She invited the guests. The seats were just automobile seats placed around the edge. I put them there—placed on either side and behind. I have a diagram of the truck, and also the dimensions of this bridge, railing and posts, as they existed at the time of this injury, and also as to the location of the parties on this truck at the time of the injury. The blueprint you show me is a correct diagram and truly represents the place where the truck struck the westerly post. (Witness here draws a diagram on the floor.) The line nearest the jury box is the outside railing; there is a hand-railing along there; that is on the northerly side. I took the measurements on 15 October, 1921. The conditions were the same immediately after the injury. Before the night of the injury I didn't know anything particular about the relative location of the pilaster and side-railing with reference to the curb of the street. The line nearest the jury box is the hand-railing on the north side of the bridge. The railing is concrete, with a 4-inch channel brace under it. If the curbing on the easterly and westerly sides of the street were to continue, the street line would run parallel to this line—that is, parallel to the outside line. The westerly pilaster extends from the curb, if it were extending in a straight line, 22 inches, plus or minus, into the street. By plus or minus I mean that the measurement is not exact. On the easterly end of the bridge the post extends out beyond the curb line into the street 15 inches. The dimensions of the pilasters are approximately 18 inches square. The rail between the pilasters is approximately 12 inches wide. The diagram here represents the truck at the point I suppose it struck. I examined it the next day after the injury. Figure 1 represents myself, driving; number 2, Miss Alexander; number 3, Mr. Graham; number 4, Miss Fewell; and number 5, Mr. Marsh. I had kerosene lights on the truck—standard lights for trucks. The bed was 6 feet 1 inch wide. There is a standard. They make them even wider than that. I put those cushions on it. As we approached the Seventh Street bridge the truck was running about 15 or 18 miles an hour. The truck is regulated to a maximum speed of from 16 to 18 miles. It will not run any faster than that. The motor will be cut off if it exceeds that speed. The motor was running at that time. As we approached that bridge, there were no lights there. You could just see a bridge, and that was all, and you just assumed that the railing was there. On account of the condition of the night, and the

lights, or the lack of them, I couldn't see the location of these pilasters. I didn't know that the pilasters on that bridge, next to the traveled way of the street, extended out into the street beyond the curb line. I was not able to ascertain that fact that night. As I was driving along I was just using ordinary precautions of driving, watching the road and seeing if there were any rough places, to get out of them. I was looking ahead. It was rough. The street had a hole in it, and I turned to miss it. I can't say exactly what the dimensions of that hole were. I would say it was eight or ten inches wide, about a foot or two feet long, and one and one-half or two inches deep. When I saw that hole I swerved to the right; I don't think it was but very little. I can't say whether I missed the hole. At the time I did not discover that any part of the car had struck the westerly pilaster. Somebody hollered to me to stop. The bed of the car extends further out than the fender. The corner of the bed actually hit the pilaster. No other part of the car struck it that I know of. I did not discover any evidence of it (witness marks the corner of the west pilaster at this point where the bed of the truck struck). There was a clamp here (indicating right side of truck near the front) to hold the stakes and that was just sheared off and there was a mark on the pilaster where it hit. There was no mark, due to the truck, on any of the other pilasters. From the curb line to the outside or southerly line of the westerly pilaster is twenty-three inches."

J. B. Spratt, testified, in part, as follows:

"I have been in the profession of engineering and surveying for about thirty years. We call the direction coming into Charlotte west. There is a railing on the left-hand side coming into Charlotte. There are four concrete posts and two concrete railings. They are located on the property line — located on the outside of the edge of the cement sidewalk. The curb line is next to the street. There is nothing there except the curb line. As you come into Charlotte, from the left-hand curb the line to the nearest street-car line is eleven and one-half feet. There are two street-car lines there. These first two parallel lines above the curb line of the left-hand side represents one street-car line. Between the left-hand street-car line coming into Charlotte and the right-hand street-car line there is a space of five and one-half feet. From the right-hand track or the northerly side of the right-hand car line coming into Charlotte, to the westerly post on the bridge on the right-hand side as you come into Charlotte, there is a space of about ten feet. The nearest street light east of the bridge was 565 feet from the west post or line on the north side of the street. The nearest light from the westerly post of the bridge was 162 feet. The northerly line parallel to the curb represents the property line. The four white squares along, or near this curb line, represents concrete posts and railings on the

curb. The easterly post extends out into the street south of this curb line one and three-tenths feet. The westerly post extends out into the street south of the curb line two feet. The curb line there is well defined. It is about six inches above the surface of the street. Coming to the westerly post of the bridge, that curb line, if it had been extended in a straight line to the easterly side, would have been four-tenths of a foot north of the north side of the west post. If that curb line had been extended in a straight line and parallel with the property line on the northerly side, from the easterly to the westerly post, the south side of the westerly post would have projected two feet into the street. From the outside line of the easterly post to the outside line of the westerly post is thirty-one and eight-tenths feet. The width of that post as it fronts on the street is one and six-tenths feet. It is a square post. The other posts are of the same dimensions, constructed of concrete, sand and gravel, kind of brown in color. As to coming down this street here going west, the street is thirty-eight and four-tenths feet wide from one curb to the other. I don't think the original bridge as constructed there had any sidewalks. The guard rails on either side of the bridge were originally on the outside of the bridge. Subsequently, under the administration of Mr. Lee, who was city engineer, the city undertook to construct two sidewalks, one on either side of the bridge. The one on the south side, they left the original guard rail, and post, as they were constructed; and then they built a sidewalk with an ordinary curbing some six inches above the traveled way of the street. When they went to the north side, they left the original guard rail and posts where they were, and undertook to build the sidewalk on the north side of the original guard rail; and in so doing, they changed the general direction of the street, thereby leaving this guard with an ordinary curbing some six inches above the traveled way of the street. I stated that in my opinion this bracket sidewalk on the north side of the street was not strong enough to hold up vehicles. It could be made strong enough."

E. L. Mason, testified, in part, as follows:

"Have lived in Charlotte about 23 years. Was an alderman of the city for eight years. I remember the time that the city constructed the sidewalks on the north and south sides of this Seventh Street bridge. I was an alderman at that time, being chairman of the finance committee. While that work was being done I sometimes drove across that bridge, going to and from home, and observed what was being done. As this work of construction of the sidewalk across the bridge progressed I noticed that the pilasters and guard rails on the north side of the bridge were left out in the street. I took that up with the board at its next meeting and stated to the board that work was being allowed

to be done—that those pilasters and columns were extending out in the street. After I gave the board that information no order was made for the removal of those pilasters and guard rails from the traveled way of the street. The pilasters and guard rails are located, and were located at the time this young man was injured, just as they were when I notified the board of the facts that I have narrated."

Osmond L. Barringer, testified:

"I was an alderman of the city of Charlotte. I think it was 1914, 1915 and 1916. Prior to the time Mr. Graham was injured at this Seventh Street bridge I had knowledge of the condition or location of the pilasters and guard rails on the north edge of the traveled way of that bridge. I observed that the west end abutted about 24 inches into the traveled way of the road; extended out beyond the straight curb line, if it had been extended; that the east end of it was about flush. In consequence of that observation on my part I notified Mr. Wearn, who was at that time Commissioner of Buildings, or Commissioner of Public Works. I told him the guard rails on Seventh Street bridge projected out into the street. I don't remember if I told him exactly how far. That was in the fall of 1917."

Dr. Jas. R. Alexander, testified, in part:

"Before this accident I noticed the position of the pilasters and the guard rail on the north side of the street to this extent, in passing there, I came near running into it. The pilasters are on the right-hand side of the street. After the accident I made an examination of the premises, the next day. The west pilaster is about twenty-four inches into the street. The east pilaster is about twelve to fifteen inches from the curb into the street. There were holes in the street between the car tracks, between the two car tracks, way up on the east side of the bridge. As you get down to the bridge there was a large hole in this right-hand track. It extended from track to track about three feet long and four or five inches deep; along by the car track was a small hole; there were some other holes right near the car track and some near the cement. There were also holes in the bitulithic. The holes in the north side of the track were right by the cement. There was one that I could call a hole, then a sink for draining the water. The next day I observed the traveled way on the north side of that street with reference to those holes; the traveled way was on the north side of that street with reference to those holes; the traveled way was on the north side of the hole that I have described."

There was other testimony for the plaintiff corroborating the evidence before set forth.

The defendant, the city of Charlotte, introduced the following evidence:

Ordinance of the city of Charlotte, section 408, subsection 40, reading as follows: "That no one shall ride or jump onto any vehicle without the consent of the driver thereof; and no person, when riding, shall allow any part of his body to protrude beyond the limits of the vehicle, nor shall any person hang onto any vehicle whatsoever."

The notice of claim to the city of Charlotte is not set out in full, as we think it is a substantial compliance with the law.

The defendant introduced section 133 of chapter 342 of the Private Laws of 1907, which conferred upon the Board of Public Service of Charlotte the following power: "That said board of public service shall have full power and authority, under the ordinances of the board of aldermen, to grade, pave, macadamize and otherwise permanently improve for travel and drainage, any street, sidewalk and public alley of said city; to put down curbing, cross drains and crossings on the same; to lay out and open any streets, or widen those already opened, and make such improvements thereon as the public convenience may require."

It also introduced section 219 of its City Code, which abolished the board of public service and transferred all of its power and authority to the Executive Board, to consist of five. The defendant introduced two members of this board, to wit: Dr. J. A. Austin and Mr. J. E. Morris.

Dr. Austin, testified, in part:

"At the time that spot was taken into the city, and that street widened, I was on the executive board. I had something to do with the supervision of the work of putting this sidewalk down on the north side, it was put down during our administration. Those things were ordered by the board of aldermen, were laid out by the city engineer, and the board of aldermen made the order and we, just as a set of commissioners, executed that order. I know how the sidewalk on the north side was constructed. Mr. Lee, the city engineer, made a plan of the bracket that extended from the end of the bridge. This end of the bridge stopped here. The bridge goes practically with that sidewalk, or the inside curbing. That leaves those barriers standing up. There was nothing over that to support the sidewalks, and they put in some brackets to support that for pedestrians. The brackets on the north side were put into the cement. We left those concrete posts and railings in the same position they were in before the street was widened. As to why we left those posts and railings in their position on the north side, I will say I went down there while they were putting in the construction of that sidewalk. Just as they finished it, Mr. Morris and myself went down, and we saw the barriers there, and they are very nearly on the curb line—eighteen inches off on the west

line, and thirteen inches on the east end, and we, knowing that the flimsy sidewalk was there, and in that day, horses were very scary of automobiles and street cars, and there was a considerable amount of travel at the intersection of Seventh Street and Central Avenue, which made a heavy travel, and we thought for the safety of the public, we better leave them there. They were large, and very easily seen. If a horse got scared of a street car, and we knew if a horse jumped over on the sidewalk, it would break, and that was our idea in leaving them there."

Mr. Morris, testified:

"We didn't do anything in reference to those posts and railings. We didn't move them because we thought it would be safer to leave them there, than to take them away, for the traveling public. We thought that on account of the way the sidewalk is constructed. That is about all I know of that. The sidewalk was built on brackets, and that is the condition we found, and to have taken down these posts, in our opinion—someone else might have thought different—it was safer to leave them."

The jury was permitted to go out and examine the premises in the day-time, in company with the sheriff and nobody else to be present but the jury and sheriff, to make such examination as they desired. Then they were permitted to go there in the night-time, about eleven o'clock, in a truck, situated as nearly as possible as the plaintiff was on the night of the injury, and approach the bridge from the east, and make such examination and investigation as they desired, with reference to the conditions as they obtain in the night-time, with reference to the location of the lights, and being able to see the posts, etc., with the understanding that it was admitted that if the jury should find as a fact that there were holes in the street at the time of the injury as described by the plaintiff's witnesses, or any of them, and that they are not there now, that they have since been filled up by the city.

The issues submitted to the jury and answers were:

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

2. Did the plaintiff, by his own negligence, contribute to his said injuries, as alleged in the answer? Answer: No.

3. What damages is the plaintiff entitled to recover? Answer: $6,000."

The plaintiff moves the court to set aside the verdict on the third issue upon the ground that from the undisputed evidence it is manifestly grossly inadequate; so much so that it is contrary to all the evidence in the case, and is unsupported by any of the evidence in the case. Motion overruled. Exception.

The court signed the judgment in the cause tendered by the defendant to which the plaintiff excepted.

Usual appeal entries.

To the foregoing judgment the defendant excepted and appealed.

Usual appeal entries.

Attorney for the defendant, after the judgment was signed, stated he understood that the attorney for the plaintiff would not tender a judgment upon the verdict. With this understanding, the attorney for the defendant did prepare a judgment upon the verdict for the convenience of the court and in order to get the record complete presented it to the court, but understood that in so doing he would not prejudice his rights of appeal and the court was of the same opinion.

The defendant assigned as error:

"1. That his Honor erred in overruling the defendant's motion, for nonsuit, made at the close of the plaintiff's evidence.

"2. That his Honor erred in overruling the defendant's motion for judgment of nonsuit, made at the conclusion of all the testimony."

Cansler & Cansler for plaintiff.

C. A. Cochran and John M. Robinson for defendant.

CLARKSON, J. Before bringing an action for damages against the city of Charlotte, the following is necessary to be done, under the amended charter: "No action for damages against said city of any character whatever, to either person or property, shall be instituted against said city unless within six months after the happening or inflicting of the injury complained of, the complainant, his executors or administrator, shall have given to the board of aldermen of said city notices of such injury in writing, stating in such notice the date and place of happening or infliction of such injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running." Private Laws 1911, chapter 251, section 15.

The notice was filed in the time limit and all requisites substantially complied with, except on the argument, it was contended that the details as to such injury "the manner of such infliction" was not sufficient, that in the pleading there were more allegations as to the "manner of such infliction" than set out in the notice. The notice states: "Which injuries were caused and produced by reason of the negligence of the city of Charlotte in permitting and maintaining a permanent obstruction in Seventh Street in said city, where the same crosses Little Sugar

or Town Creek, which obstruction consisted of a large concrete post or pillar, which the said city built and permitted for a long time to remain entirely in the traveled way of said street beyond the curb line of the sidewalk. By reason of which construction, plaintiff while riding an auto truck, being driven by a third party, has his legs crushed, broken and mangled."

"*The provisions of the statute* prescribing the terms and contents of the notice, such as the time and place of the accident, the nature of the injury, the defect in the street or highway, or the cause of the injury, *must be substantially complied with;* otherwise, the condition precedent to the right to maintain the action has not been performed and the action will not lie." 4 Dillon on Municipal Corporations, p. 2819.

"Generally, the notice must set forth the time, place, cause, and character of the injuries sustained. But a substantial compliance with the statute is all that is required, and the notice need not be drawn with the technical nicety necessary in pleading." McQuillan on Municipal Corporations (Vol. VI), section 2718.

We think the statute was substantially complied with. The notice was sufficient to the governing body of the city, which had ample notice of the cause of the injury, and there was nothing to mislead them as to the basis of the action.

On all the evidence, taken in a light most favorable to plaintiff, is he entitled to recover in this case? We are of the opinion that he can.

The defendant states: "In this appeal, as advancing a single proposition, that under well-settled principles of law the plaintiff's own evidence shows that this is not a case of liability. They are not seeking a new trial. No error is assigned in the admission or rejection of evidence, and none in the charge of the court."

For a better understanding of the contentions of the parties, we will have to make repetition of the salient facts as we conceive them to be on the record, so as to apply the law to the facts.

The plaintiff was permanently injured on the night of 11 July, 1919, about 11 o'clock, while on a "straw ride" with a party of about 16 young people. Sloan (S. S.) Sherrill was driving the truck. The upright sides of the truck were taken off and automobile cushions were placed around the sides to sit on. As they sat on the cushions on the side of the truck their feet hung over the sides of the truck. Sloan Sherrill and Miss Laura Alexander were riding in the closed cab of the truck, Sherrill was sitting on the left side of the cab coming into the city on East Seventh Street, and Miss Alexander was sitting on the right. The truck was coming into Charlotte on East Seventh Street. The plaintiff was riding on the right-hand side of the truck. He was the first one on that side, immediately behind the cab, sitting on the side of the truck

with his feet hanging down over the side of the truck. The side of the truck extended over the wheels 6 or 8 inches on each side. The bed of the truck was 6 feet 1 inch wide, the truck was 11 feet and 6 or 8 inches long. Sherrill was driving about 15 or 18 miles an hour, and had had 15 years experience running trucks. It was the first time he had driven this truck; it was a new truck. It had kerosene lights, located at the end of the cab, standard lights for trucks, and gave light enough for careful driving on country roads. He had no license to operate a truck. It was dark; the moon had gone down. The nearest street light east of the bridge was 565 feet, and from the westerly post of the bridge was 162 feet.

The place where the injury occurred was on Seventh Street bridge, on the right-hand side of the bridge as the city is approached from the east. On the bridge there are four concrete posts and two concrete railings. From the outside line of the easterly post to the outside line of the westerly post is 31.8 feet. The pilasters, or posts, are all square and of the same dimensions, and the width as it fronts on the street is 1.6 feet. The two rails between the posts are about a foot wide, and the posts and railings are constructed of concrete, sand and gravel, kind of brown color. The concrete posts and foundations jut out into the street beyond the curb line, that is the fixed or marked line that separates the sidewalk for pedestrians' travel from the street or vehicle travel. The easterly posts and foundation juts, or extends, out into the traveled street 1 foot and 3 inches, the westerly post and foundation 2 feet. The street at the bridge is about 38.4 feet wide, with double track for street cars. From the right-hand track, or the northerly side of the right-hand car line coming into Charlotte, to the westerly post on the bridge on the right-hand side as you come into Charlotte, there is a space of about 10 feet. The street had a hole in it 8 or 10 inches wide about a foot or two feet long and about 1½ or 2 inches deep. The truck was going along East Seventh Street on the right side of the street, down grade towards the bridge. The first post that the truck had to pass jutted out into the street 1 foot and 3 inches and the last it had to pass, as the truck was going west, the fourth post, jutted out into the street 2 feet. To the left of the truck was a double car-line track, the hole was opposite the posts that jutted out into the street. The sidewalks on either side were raised some 4 to 6 inches above the level of the street between the curbs. Sherrill said: "As I was driving along, I was just using the ordinary precautions of driving, watching the road and seeing if there were any rough places, to get out of them. I was looking ahead. It was rough. The street had a hole in it, and I turned to miss it. I can't say exactly what the dimensions of the hole were. I would say 8 or 10 inches wide, about a foot or two feet long, and 1½ or 2 inches deep.

When I saw that hole I swerved to the right; I don't think it was but very little. I can't say whether I missed the hole. At the time I did not discover that any part of the car had struck the westerly pilaster or post. Somebody hollered to me to stop." No other vehicle was in sight.

Dr. Jas. R. Alexander testified: "As you get down to the bridge there was a large hole in the right-hand track. It extended from track to track, about 3 feet long and 4 or 5 inches deep; along by the car track was a small hole; there were some other holes right near the car track and some near the cement. There were also holes in the bitulithic. The holes in the north side of the track were right by the cement. There was one that I would call a hole, then a sink for draining the water."

The positions taken by the defendant in its brief are: "(1) The matters complained of rested in the discretion of the city officials and cannot be made the basis of an action; (2) the barrier was not such a defect of construction as to render the city liable for failure to remove."

What is the legislative power given to the city of Charlotte in reference to streets? Under "Municipal Corporations" we have C. S., sec. 2675, which is as follows: "The board of commissioners shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best; may cause such improvements in the town to be made as may be necessary," etc.

"The board of commissioners may pass laws for abating or preventing nuisances of any kind and for preserving the health of the citizens." C. S., 2676.

Private Laws of 1907, ch. 342, sec. 133, amended charter of city of Charlotte, is as follows: "That said board of public service shall have full power and authority, under the ordinances of the board of aldermen, to grade, pave, macadamize, and otherwise permanently improve for travel and drainage any street, sidewalk and public alley of said city; to put down curbing, cross drains and crossings on the same; to lay out and open any streets, or widen those already open, and make such improvements thereon as the public convenience may require." This power was transferred by legislative enactments to an executive board to consist of five, and is now under authority of the governing body of the city of Charlotte, consisting of three officials.

The defendant contends that its only duty under the statute is to repair, and it is not liable for methods of construction, as the city officials must exercise their judgment and discretion. The power given by the law relating to the city is in the general State law above to "provide for keeping in proper repair the streets . . . may cause such improvements in the town to be made as may be necessary." In the special act above "permanently improve for travel and drainage any

street, . . . to put down curbing," etc. Under the above law it is the duty of the city to "repair," to make necessary "improvements," "permanently improve for travel," etc. The duty imposed by the statutes, in clear inference, is to both *construct* and *repair*. The city has the right to put down curbing, open streets, widen those opened, and nowhere in the above statute does it permit *obstructions*.

Black in his Law Dictionary defines the word "improvement" a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than *mere repairs or replacement of waste,* costing labor or capital, and intended to enhance its value and utility or to adopt it for new or further purposes.

In the instant case the heavy obstructions jutted out into the street beyond the curb line on the east side one foot and three inches and on the west side two feet. Nowhere in the acts is discretionary power given to the city to put obstructions in the street—power is given to "put down curbing," etc. The contention of defendant is not borne out by the meaning and language of the legislative power given.

In *Dillon v. Raleigh,* 124 N. C., 184, the North Carolina Railroad, with knowledge of the city of Raleigh, "was permitted to enter the corporate limits of defendant city and to cross its streets, and it did cross said street about fifteen feet above the level of the street. The railroad runs diagonally across the street, and its stringers are supported by four sets of upright posts or benches standing in the street. These benches are ten or twelve feet long and about twelve feet apart. They stand at right angles with the railroad stringers and form an acute angle of forty-five degrees with the direct course of the street. The plaintiff, with another lady, was driving a gentle horse along said street in the direction of the railroad crossing, when suddenly the horse became frightened, without any known cause, and dashed through said benches, and the buggy struck the far-off corner of one of them, and the injury complained of was the result." *Faircloth, C. J.,* said: "The main question presented to this Court is, 'Is the city defendant liable in damages to the plaintiff for alleged injury?' In some jurisdictions liability in such cases is implied at common law, but in many of the different States, perhaps in all, we find the matter regulated by special or general statutory provisions. In our State, The Code, sec. 3803 (now C. S., 2675) enacts that the commissioners of towns and cities 'shall provide for keeping in proper repair the streets and bridges in the town, in the manner and to the extent they may deem best,' etc. And section 3802 (now 2676) says 'They may pass laws for abating or preventing nuisances of any kind, and for preserving the health of the citizens.' The duty and power of the municipality thus appear to be ample and complete. If any person shall unlawfully erect an obstruction or nuisance

in the streets of a city, and the town authorities shall permit it to remain an unreasonable length of time, the town and the tort-feasor are jointly and severally liable to the traveler for an injury resulting therefrom, without any fault on his part. The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party shall have his remedy against either, as they fall under the rule as to joint tort-feasors. Burwell on Personal Injuries, sec. 190."

"*Entire highway belongs to public—Purpresture—Nuisance per se.*

"Public highways belong, from side to side and end to end, to the public, and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the taxpayers and the traveling public as well. Thus expediency forbids any other rule. But even if it did not, the rule is well founded in principle, for it is well settled that the public is entitled not only to a free passage along the highway, but to a free passage along any portion of it not in actual use of some other traveler." Elliott on Roads and Streets, 2d Vol., sec. 828.

The city authorities of Charlotte, under its charter and C. S., 2675, *supra*, are given discretionary power to lay out and open streets, widen those opened, improve them as the public convenience may require, to grade, pave, drain, macadamize and otherwise permanently improve for travel any of the streets, and *to put down curbing*. The governing body of the city, in carrying out this discretion, cannot, when they improve the streets and construct the bridges and drains, fix the curb lines, leave an obstruction or nuisance which materially encroaches on the *travel way*. The general public is entitled to the entire way unobstructed. This does not mean that in opening the streets or improving them in their discretion they cannot make necessary center plots or parks, but when this is done, and the curb lines established, the way for travel must be left in a condition that is reasonably safe, so as not to unnecessarily endanger or impede travel. At common law any unnecessary or unauthorized obstruction that unreasonably incommodes or impedes the lawful use of a street or highway is a nuisance. These traveled ways must be made and kept in repair and made reasonably safe and convenient for the public. In the present day this duty is more incumbent,

as the highways and streets are now used for quicker travel by truck and automobile, and obstructions are necessarily more dangerous.

We think the position taken here is borne out by a long line of decisions in this State. *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720; *Fitzgerald v. Concord,* 140 N. C., 112; *Brown v. Durham,* 141 N. C., 252; *White v. New Bern,* 146 N. C., 449; *Revis v. Raleigh,* 150 N. C., 353; *Johnson v. Raleigh,* 156 N. C., 271; *Bailey v. Winston,* 157 N. C., 252; *Styron v. R. R.,* 161 N. C., 78; *Darden v. Plymouth,* 166 N. C., 492; *Bell v. Greensboro,* 170 N. C., 179; *Sehorn v. Charlotte,* 171 N. C., 541; *Dowell v. Raleigh,* 173 N. C., 202; *Ridge v. High Point,* 176 N. C., 421; *Bailey v. Asheville,* 180 N. C., 645.

As was said by *Hoke, J.,* in *Fitzgerald v. Concord, supra:* "The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town 'knew or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.'"

The defendant contends that the present case is analogous to the *Rollins* and *Sandlin cases.* We do not think that the facts and law, as set forth in the case of *Rollins v. Winston-Salem,* 176 N. C., 411, are in conflict with the position taken in the instant case. In that case, a water hydrant—something for the protection of all the inhabitants of the city—a public necessity, with nowhere else convenient to be located, was not put on the traveled street-way for vehicles, but the "evidence discloses that this hydrant, like other hydrants in this city, was placed in the edge of the sidewalk next to the curb and just far enough from the curb so that the part of the hydrant to which the hose was to be attached would clear the driveway." The sidewalk at this point is some 7 or 8 feet wide and is paved from property line to curb with concrete. The hydrant was 8½ inches thick and the side of the hydrant farthest from the outside of the curb was 15½ inches. A space of 6 to 7 feet of sidewalk was left for pedestrians. It was also in evidence that at Peterson Avenue, 316 feet away, and at White Street, 468 feet away, there was a high-power electric light. There was evidence that the injury was at night and on account of the presence of a tree near the hydrant and the distance from the street lights it was dark. *Allen, J.,* in that case said: "Persons using the sidewalk are required to take notice of these conditions and of the uses to which the sidewalks may legitimately be put. They 'must take notice of such structure as the necessities of commerce or the convenient occupations of dwelling-houses' require. *Russell v. Monroe,* 116 N. C., 727."

We do not think the position taken by this Court in *Sandlin v. Wilmington,* 185 N. C., 257, is in conflict with the case at bar. That case holds "A municipal corporation is not authorized to maintain a nuisance (defective sewer causing vile and sickening odors), and an action will lie against it for damages to property resulting therefrom, regarded and dealt with as an appropriation of the property to the extent of the injury that he has thereby received." Injury to health not allowed in that line of cases are distinguishable from the instant case.

The most serious contention of the defendant is found in its third reason why the plaintiff should not recover:

"The plaintiff's own evidence shows him guilty of such contributory negligence as to bar his recovery. It is admitted that the plaintiff was riding with his feet and legs hanging over the side of the truck. It is also conceded that the following ordinance was in effect in the city of Charlotte:

" 'That no one shall ride or jump onto any vehicle without the consent of the driver thereof; and no person, when riding, shall allow any part of his body to protrude beyond the limits of the vehicle, nor shall any person hang onto any vehicle whatsoever.' "

The bed of the truck, which extends further out than the fender, struck the heavy post, and the first person sitting on that side was the plaintiff and he was crushed. His foot was practically cut off, he lost a limb, and, from the evidence, is a cripple for life. The upper post that he was crushed against is nearly a foot further out from the curb line into the street than the first post that juts out one foot and three inches into the street beyond the curb line, which the truck first passed on its way going west. Under all these facts and circumstances in this case, under proper instructions to the jury by the court below, and there being no exceptions to same (the instructions are taken to be without error), the jury found that the plaintiff was injured by the negligence of the defendant, and that the plaintiff, by his own negligence, did not contribute to his injuries. Conceding that Sherrill, the driver of the truck, was negligent, which the evidence does not show, it has been repeatedly held by this Court, and stated as a general rule, "that the negligence of the driver of an automobile will not be imputed to one who is a passenger therein, unless such passenger be the owner of the car, or unless he exercise some kind of control or authority over the driver." *White v. Realty Co.,* 182 N. C., 538, and cases cited.

The facts disclosed in this case show that Sherrill was driving the truck; the plaintiff was a passenger; that Sherrill was driving within the speed limit allowed by law and about 11 o'clock at night, for the lack of lights at the obstructions, it was dark, the moon had gone down. One city light was 565 feet away, the other 162 feet away. He could

not see the posts or obstructions on the bridge. He was coming along East Seventh Street, down hill, towards the city to cross the bridge where the heavy obstructions were located. Could not see the posts or pilasters, did not know they extended into the traveled way of the street beyond the curb line. The way he was going the first post was one foot and three inches in the street and the last one was two feet. He passed the first and hit the last one furthest into the traveled way. He was driving on the right-hand side of the road, the way the law required. The posts were kind of brown color. Two car tracks extended across the bridge. Hole in the street between the car tracks on the east side of the bridge. As you get down to bridge, large hole in right-hand track, extended from track to track, 3 feet long and 4 or 5 inches deep, also alongside track a small hole, other holes and a sink for draining the water. These holes were on the traveled way of Sherrill near the posts or pilasters of the bridge. As he drove over the bridge, Sherrill turned to miss the hole and the truck struck the westerly post or pilaster.

The defendant contends that, as a matter of law, the plaintiff was violating a valid town ordinance—"No person, when riding, shall allow any part of his body to protrude beyond the limits of any vehicle"; that this made the plaintiff guilty of negligence *per se,* and he could not recover. The plaintiff says if that be true, it is for the jury, under all the facts and circumstances, to say if this violation of the ordinance was the proximate cause of the injury.

We think the position taken by *Brown, J.,* in *Taylor v. Stewart,* 172 N. C., 204, is the correct one: "The plaintiff sues to recover for the death of his child, who was run over and killed by an automobile belonging to the defendant J. W. Stewart. At the time the car was being operated by James Stewart, the son of said J. W. Stewart, a lad of thirteen years of age. A colored chauffeur, who had been sent out with the car by the owner, was sitting beside the lad. His Honor charged the jury that under the law of North Carolina it was a misdemeanor for a person under the age of sixteen to drive an automobile upon any highway or public street, and that it is a circumstance from which the jury may infer negligence, and that it does not necessarily follow that the jury shall conclude it was negligence, but that it is a circumstance to go to the jury. In this his Honor erred. He should have instructed the jury that it is negligence *per se* for the defendant James Stewart to have driven the machine in violation of the statute law of the State. *Zageir v. Southern Express Co.,* 171 N. C., 692; *Paul v. R. R.,* 170 N. C., 231; *Ledbetter v. English,* 166 N. C., 125. It does not follow, however, that the defendant is liable in damages, for the plaintiff must go further and satisfy the jury by a preponderance of the evidence of the fact that such negligence was the proximate cause of the death of the child. This

question of proximate cause has been much debated, and a very helpful and enlightening opinion upon the subject has been written by *Mr. Justice Allen* in *Paul v. R. R., supra.* Where the facts are all admitted, and only one inference may be drawn from them, the Court will declare whether an act was the proximate cause of the injury or not. But that is rarely the case, and, as is said by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469: 'What is proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it.' "

"The mere fact that the speed of an automobile exceeded that allowed by chapter 107, Laws 1913, at the time of collision with a railroad train at a public crossing, does not of itself prevent a recovery by the owner, where there is evidence of negligence on the part of the railroad, because it would, among other things, withdraw the question of proximate cause from the jury." *Shepard v. R. R.,* 169 N. C., 239.

"Where the owner of an automobile is driving her car upon the streets of a city in violation of an ordinance requiring a license, and the machine is injured by the backing of an express wagon onto the street in such negligent manner as to damage the car, without contributory negligence on the owner's part and which the care of a skillful chauffeur would not have avoided, *it is held,* that the violation of the ordinance will not bar the plaintiff of recovery in her action for damages, there being no causal connection between the unlawful act and the damages sustained." *Zageir v. Express Co.,* 171 N. C., 692.

"Where a railroad company has provided a gate at a public street crossing of a town to be let down for the protection of vehicles, etc., from passing trains, and it has been shown that the employee in charge has negligently let down his gate in front of an automobile too suddenly for the driver and owner to stop, and has caused him to deflect his course to the damage of the machine and his own injury, without negligence on his part, the fact that the driver was at the time exceeding the statutory speed limit, and was therefore guilty of a misdemeanor, does not alone bar his recovery, such being dependent upon the question as to whether his act was the proximate cause of the injury. *Lloyd v. R. R.,* 151 N. C., 536, where the statute itself is made the basis of the injury, cited and distinguished." *Hinton v. R. R.,* 172 N. C., 587.

Defendant had abundant notice of the obstruction. The obstruction jutting out into the travel-way was called to the attention of the proper officials of the city of Charlotte at the time the street was being improved. They were allowed to remain after notice. The obstructions jutting out into the travel-way from the curb line was in itself notice.

From a careful review of the entire record, we can find

No error.

SOUTHEASTERN EXPRESS COMPANY v. CITY OF CHARLOTTE.

(Filed 20 December, 1923.)

1. **Taxation—Payment—Protest—Statues.**

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of C. S., 7979.

2. **Taxation—Municipal Corporations—Cities and Towns—Express Companies—Statutes—Automobiles—Motor Trucks—Privilege Tax.**

The tax imposed upon express companies by the provisions of sections 79, 79a, chapter 34, Public Laws of 1921, being an act to raise revenue, payable to the State upon a percentage of their mileage, and in certain sums of money to municipal corporations according to population, and also a privilege tax to the latter, prohibiting municipalities from collecting additional taxes thereon, does not include within its intent and meaning the tax imposed by section 29, chapter 2, Laws of 1921, in favor of municipal corporations for the privilege of operating a motor vehicle therein and in transporting property for hire.

3. **Same.**

Where an express company delivers goods to the consignee in cities, this service is in addition to that in smaller places, where deliveries are not so made, for which additional service compensation is included in its general express charges, and comes within the intent and meaning of chapter 2, section 29, Public Laws 1921, authorizing a tax of not exceeding $50 for each motor truck operated within the municipality.

4. **Same—Courts—Judicial Knowledge.**

The courts will take judicial notice that express companies do not deliver freight to the consignees in small places as they do in larger cities, and that in the latter the large express trucks employed in this service are damaging to the streets, which the municipality is obliged by statute to keep in proper repair for the benefit of its citizens.

5. **Taxation—Constitutional Law—Commerce—Discrimination.**

A statute permitting a municipal corporation to impose a tax on all express companies alike for delivering goods by trucks to consignees in a city, is uniform in its application, comes within the police powers of the State, and is not contrary to the Constitution in relation to either intrastate or interstate commerce, and the imposition of a tax therefor not to exceed $50 on each motor truck is held to be reasonable.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1923, of MECKLENBURG.

This is a civil action. It was agreed by the parties to the action that the complaint, answer and judgment of the court below, exceptions and assignments of error, shall constitute the case on appeal to this Court.

The complaint alleges:

"First. That the plaintiff is, and was at the time hereinafter mentioned, a corporation organized and created by and under the laws of

the State of Alabama to conduct the business of an inter- and intrastate express company; and was at such times engaged in its business as an express company in the city of Charlotte, State of North Carolina, under the laws of the State of North Carolina.

"Second. That defendant was, and now is, a municipal corporation chartered and organized as such, by and under the laws of the State of North Carolina.

"Third. That defendant has levied and collected from plaintiff the sum of seventy-five dollars ($75), the maximum license and privilege tax provided for in 'An Act to Raise Revenue,' same being 'The Public Laws of North Carolina for the Year 1921,' sections 79 and 79a.

"Fourth. That in addition to the license and privilege tax levied and collected as aforesaid, the defendant, under section 4, subsection b, of an ordinance known as The Revenue Ordinance, and entitled:

" 'An ordinance—levying, assessing, imposing, and defining the license and privilege taxes of the city of Charlotte for the fiscal year beginning 1 June, 1922, and ending 31 May, 1923.' Read, approved and adopted 13 June, 1922—has levied and collected a license tax of $25 on each of seven motor vehicles used and operated by the plaintiff in the conduct of its business as an express company in the city of Charlotte, making a total additional tax of $175.

"Fifth. That plaintiff has paid the additional license tax of $25 on each motor vehicle so used by it in the city of Charlotte, a total tax of $175, and notified defendant's agent, in writing, at the time that said tax was paid under protest, and within thirty days thereafter plaintiff demanded, in writing, from the defendant the return of said tax and that said tax has not been refunded within ninety days from the time of payment; the defendant is still in possession of said tax and refuses to repay or to refund said tax.

"Sixth. The plaintiff alleges and contends that the levy and collection by the defendant of the license tax of $25 on each of the seven motor vehicles used by plaintiff in the conduct of its business, as an express company, in the city of Charlotte is unlawful and void, for that chapter 34 of the Public Laws of 1921, entitled, 'An Act to Raise Revenue,' defines and limits the power and authority of the defendant to levy license and privilege taxes, and defendant is and was without lawful power to levy and collect said license tax."

The answer admits all of the allegations of the complaint except paragraph 6, which is denied.

The judgment of the court below was as follows:

"This cause coming on to be heard before his Honor, W. F. Harding, at the September Term, 1923, of the Superior Court of Mecklenburg County, and being heard upon the pleadings and the arguments of the

counsel for plaintiff and for defendant, and it appearing to the court that the tax in question is authorized by law and that the plaintiff is not entitled to recover: It is, therefore, ordered, adjudged and decreed that the action be dismissed and that the defendant recover of the plaintiff its costs."

To the foregoing judgment the plaintiff excepts. The exception was overruled, and the plaintiff assigns as error the judgment rendered, for that it is contrary to law, and appeals to this Court.

After the argument of this case in the court here, it was agreed between the parties that the Revenue Ordinance for the city of Charlotte for the year 1 June, 1922, to 31 May, 1923, referred to in the pleadings, be a part of the record of the case.

F. M. Shannonhouse and T. W. Hawkins, Jr., for plaintiff.
Carrie L. McLean and C. A. Cochran for defendant.

CLARKSON, J. The plaintiff paid the tax levied by the city, in accordance with the statute, and sued to recover the money. C. S., 7979.

This suit is brought on the ground that defendant has levied and collected from plaintiff the sum of seventy-five dollars ($75), the maximum privilege or license tax provided for in "An Act to Raise Revenue," same being "The Public Laws of North Carolina for the Year 1921," sections 79 and 79a. That in addition to the privilege or license tax levied and collected as aforesaid, the defendant, under an ordinance known as the Revenue Ordinance of the City of Charlotte, has levied and collected a license tax of $25 on each of seven motor vehicles used and operated by the plaintiff in the conduct of its business as an express company in the city of Charlotte, making a total additional license tax of $175.

Public Laws of North Carolina 1921, ch. 34, "An Act to Raise Revenue," is as follows:

"Sec. 79. That every express company doing business in this State shall, on or before the thirtieth day of July in each year, make and return to the Corporation Commission a statement of the total number of miles of railroad lines over which such express company operates in this State; the said Corporation Commission shall certify the same to the State Treasurer as a basis for assessment and collection of the tax levied in the following schedule:

"Sec. 79a. Each express company doing business in this State shall pay to the State Treasurer an annual privilege or license tax as follows: Any such company which earned from its express transportation business not more than six per cent upon its capital invested the previous calendar year shall pay at the rate of five dollars ($5) per mile. Any

such company which so earned as much as seven per cent and less than eight per cent upon its capital invested the previous calendar year shall pay at the rate of six dollars ($6) per mile. And any such company which so earned eight per cent or more upon its capital invested the previous calendar year shall pay at the rate of seven dollars ($7) per mile. Any such company not having had previous earnings shall pay at the rate of five dollars ($5) per mile: *Provided,* that no county shall levy any tax under this section. There may be levied and collected by every incorporated municipality in the State of North Carolina from each express company, for the privilege of doing business within the municipal limits of said incorporated municipalities, a privilege or license tax, to be computed and based on the population of said municipalities, as follows: Incorporated municipalities having a population of five hundred people or less, five dollars per annum; incorporated municipalities having a population of five hundred people and not exceeding one thousand people, ten dollars per annum; incorporated municipalities having a population of one thousand and not exceeding five thousand people, twenty dollars per annum; incorporated municipalities having a population of five thousand and not exceeding ten thousand people, thirty dollars per annum; incorporated municipalities having a population of ten thousand and not exceeding twenty thousand people, fifty dollars per annum; incorporated municipalities having a population of exceeding twenty thousand people, seventy-five dollars per annum: *Provided further,* that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce, or upon any business transacted for the Federal Government."

The above act says: *"There may be levied and collected by every incorporated municipality in the State of North Carolina, from each express company, for the privilege of doing business within the municipal limits of said incorporated municipalities, a privilege or license tax,"* etc.

Public Laws 1921, ch. 2, sec. 29, is as follows:

"Sec. 29. The foregoing fee shall be paid to the Secretary of State at the time of issuance of said registration certificates, permits, or licenses. They shall include all costs of registration, issuance of permits, licenses, and certificates, and the furnishing of registration plates, and shall be in lieu of all other State or local taxes (except *ad valorem*), registration or license fees, privilege taxes, or other charges: *Provided, however,* a county, city, or town may charge a license or registration fee on motor vehicles in the sum of one dollar ($1) per annum: *Provided further,* that no county, city, or town shall charge or collect an additional fee for the privilege of operating a motor vehicle, either as chauffeur's or driver's license: *Provided,* nothing herein shall prevent the governing authorities of any city from regulating, licensing, controlling

of chauffeurs and drivers of any such car or vehicle, and charging a reasonable fee: *Provided further,* that any city or town may charge a license not to exceed fifty dollars ($50) for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees, and licenses now charged."

The above act says: *"Provided further, that any city or town may charge a license not to exceed fifty dollars ($50) for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees, and licenses now charged."*

The municipalities that have paved or dependable streets are at heavy expense to make repairs and improvements. The Legislature, to reimburse the cities for their large outlay for repairs and improvements, made necessary from the use of the streets by motor vehicles, passed the above act. The owners of motor vehicles who charge for transporting persons or property, the municipalities are given a right to "charge a license not to exceed $50 for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees and licenses now charged."

The Revenue Ordinance of the city of Charlotte imposes the following tax:

EXPRESS COMPANIES

State Revenue Act ..... $ 75.00
And in addition, on each express wagon or truck operated on public streets of the city a tax of 25.00

From the State Revenue Act it is clear that the $75 tax is levied *for the privilege of doing business,* etc.

It will be noted that the Revenue Act makes the tax for doing business fixed according to population. In an incorporated municipality having a population of 500 or less $5, etc. The intent of this act above mentioned clearly indicates that the "privilege of doing business" of the express companies would ordinarily mean a delivery to the consignee at the place of business or depot of each express company in each municipality where they do business, and not by truck to the home or place of business of the consignee. The scale of tax according to population seems to be imposed with that intent.

"The courts take judicial notice of the general course of business and the usual method of transacting it. Judicial notice will be taken of the community's standard of prudent business methods, and of the ordinary rules and necessities of business, of such matters connected with a business which is one of the main enterprises within the jurisdiction as are common knowledge to all of the people of the jurisdiction." 23 C. J., 62.

In the smaller municipalities it is a matter of common knowledge that the express companies have no truck or delivery wagon. The delivery of goods, wares and merchandise are made to the express company, just like they are to a railroad company by the consignor; the express company and the railroad company, when the goods reach their destination, notify the consignee.

In the larger municipalities, where the express companies have to compete to some extent with the parcel post, and these municipalities have paved or dependable streets, the express companies at their option deliver by truck.

The ordinary "privilege of doing business" is confined under the statute to goods, wares and merchandise handled in the place of business in each locality of the respective express depots. To deliver the goods, wares or merchandise from the place of business or depot of each express company to the consignee requires the use of trucks. These trucks are a continual wear and tear to the streets of the municipality. As a matter of common knowledge the "hire" for this delivery by truck over the streets from the place of business or depot to the residence or business place of the consignee takes additional employment of labor, time and truck conveyance, and naturally an extra sum is put on the charge for carrying these goods, wares, and merchandise for this extra service.

The Legislature passed the act before mentioned allowing the municipalities to charge a license not to exceed $50 for any motor vehicle used in transporting property for hire. Black in his Law Dictionary defines "hire" as "compensation for the use of a thing or for labor or services." The express company gets extra compensation to pay the additional labor and use of the truck to deliver the goods, wares, and merchandise from the local place of business or depot of the express company to the consignee at his place of business or his home. It was stated on the argument of this case, and not controverted: "The two express companies doing business in Charlotte operate on the streets of the city more than a score of heavily built trucks, each weighing 4,800 pounds, and with carrying capacity of four or five thousand pounds. These trucks are operated almost continuously throughout the day, many of them practically all night, in delivering goods and in meeting trains that come in every day, including Sundays, and at practically all hours of the day and night. There is no limit to the number of such trucks they may operate. For this privilege the city is asking that the express companies pay a license tax of less than seven cents per day per truck, for registration, regulation, and the damage that is done to the streets, for such police supervision as is required," or $25 a year on each truck.

It is contended by the defendant that the service rendered by the express company is a unit, and in the conduct of interstate and intrastate business the tax on the trucks is unconstitutional and void. The State gave power to the city to levy a tax for "doing business," the uniform ordinary business of an express company. In the instant case the company goes beyond its ordinary business of having depots and places of business in municipalities and starts a new line of more efficient endeavor and, in this change from the ordinary "doing business," sees fit to deliver for compensation or hire the goods, wares and merchandise received by it in its place of business or depot to the consignee at his place of business or residence. In doing this it uses seven heavily built trucks, each weighing 4,800 pounds, with carrying capacity of four or five thousand pounds, and uses these heavy trucks day and night, including Sundays, and to pay for the wear and tear of these trucks on the streets, which the city is in duty bound to keep in repair, the city has imposed a tax of $25 a year on each truck *for the privilege of operating motor trucks upon the streets of the city.* This power is a police regulation and is constitutional.

Dalton v. Brown, 159 N. C., 175, lays down the following:

"The only constitutional restriction upon the power of the Legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification.

"An act authorizing a levy of a tax of two cents per mile on each 1,000 feet of mill logs, lumber, or other heavy material hauled by 'any lumber company, corporation, person or persons engaged in the lumber business' and using the public roads of a certain county, is not the levy of a property tax, which is required to be uniform and *ad valorem,* but a taxing of a particular vocation, which is uniform in its application to that class, is without discrimination therein, and not in contravention of the Fourteenth Amendment of the Federal Constitution, or of Article V, section 3, and Article I, section 17, of the Constitution of North Carolina.

"The levying of a tax upon those hauling mill logs, etc., upon a public road of a certain county is within the discretionary power of the Legislature, and comes within its police power, with which the Fourteenth Amendment to the Federal Constitution does not interfere." *S. v. Holloman,* 139 N. C., 648; *S. v. Bullock,* 161 N. C., 225; *S. v. Taylor,* 170 N. C., 695; *S. v. Kelly, ante,* p. 371.

In *Kane v. New Jersey,* 242 U. S., 160, *Mr. Justice Brandeis* says: "The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this Court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right

to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. And it is properly exercised in imposing a license fee graduated according to the horse-power of the engine. *Hendrick v. Maryland,* 235 U. S., 610; 57 L. Ed., 385; 35 Sup. Ct. Rep., 140."

The tax does not discriminate, it is on all express companies alike—"All feed out of the same spoon."

Clark, C. J., in an exhaustive and learned discussion in *Bickett v. Tax Commission,* 177 N. C., 436, says: "In *Mercantile Co. v. Mount Olive,* 161 N. C., 125, it is said: 'In *Lacy v. Packing Co.,* 134 N. C., 572, the above authorities and others are cited, the Court thus summing up the law: It is settled that a *license tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.*' It is pointed out that the constitutional provision requiring uniformity applies only to property, but as to license taxes, it quoted with approval the following from *S. v. Stephenson,* 109 N. C., 734 (26 Am. St., 595): 'It is within the legislative power to define the different classes and to fix the license tax required of each class. All he can demand is that he shall not be taxed at a different rate from others in the same occupation, as classified by legislative enactment. This is stated as a universal rule. 1 Cooley on Taxation (3d Ed.), 260.'"

In the instant case the Southeastern Express Company is using, night and day and Sundays, seven of its heavy trucks, weighing and carrying capacity of about 9,000 pounds, on the streets of the city of Charlotte. The city is bound, under the law, to keep its streets in repair. The city in its revenue ordinance imposes a yearly tax of $25 "on each express wagon or truck operated on the public streets of the city." For carrying on its large business, the express company only pays $75 a year under the State Revenue Act to the city of Charlotte. It is now contesting the payment of the $25 a year tax on each truck. It claims that the $75 tax for "doing business" covers all the tax they should pay. That the State act giving the municipalities of the State power to "charge a license not to exceed $50 for any motor vehicle used in transporting persons or property for hire" is not applicable to express companies, and if so, the act is unconstitutional and void. We cannot so hold. The tax is reasonable, does not discriminate and is constitutional. It is a just sum imposed to aid the city in keeping in repair the streets which the heavy trucks help to wear out and destroy. These companies should bear the equal burden of government like others in similar situations. They get the benefits; they should share in the burdens.

We can see no error in the court below giving judgment for defendant city of Charlotte.

Affirmed.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AND SOUTHERN RAILROAD COMPANY v. GREENSBORO WAREHOUSE AND STORAGE COMPANY.

(Filed 20 December, 1923.)

1. Railroads—Demurrage—Tariff — War — Case Agreed — Commerce—Judgments—Appeal and Error.

In an action by the Director General of Railroads under war control to recover demurrage charges against a shipper, the question does not arise as to whether the printed tariff applies to intrastate as well as interstate shipments, at law and in fact, when the tariff is set out in the case agreed as a fact proven, and it is therein so stated; and when the amount is likewise agreed upon, the judgment will be so entered by the Supreme Court on appeal.

2. Railroads—Demurrage—Notice to Consignee.

It is unnecessary to literally comply with the printed tariff requiring notice as a condition upon which a railroad company may recover its demurrage charges from a consignee, if the latter is substantially put upon notice thereof, as under the facts and circumstances of this case; nor under such circumstances could the railroad company be held to have waived its rights to enforce these charges.

3. Same—Waiver—Discrimination.

Demurrage charges are required to be collected by the railroad company without discrimination among consignees, and one of them who has received the shipments with notice of their accrual, is required to pay them.

4. Judgments—Appeal and Error.

When, upon the facts agreed, the plaintiff is entitled to judgment, it should be rendered, as a matter of law, without the intervention of a jury.

APPEAL by both parties from *Stack, J.*, at May Term, 1923, of GUILFORD.

This action was brought to recover demurrage amounting to $8,939.37 which it was alleged had accrued upon a number of carload shipments of cotton consigned to, or deliverable to, the defendant warehouse company upon their private tracks in Greensboro, North Carolina, during the month of April, 1918.

The plaintiffs and defendant, through their counsel of record, agreed that the following facts may be "considered as proven":

"1. That the statement set forth in the first five paragraphs of the complaint are true, and that James C. Davis has been duly appointed as director general, and substituted in the place of John Barton Payne, who was director general at the time of the commencement of this action.

"2. That throughout the month of April, 1918, there was in full force and effect a certain freight tariff on the Southern Railway Company

and participating carriers, on demurrage and storage rules, which had been issued 7 February, 1918, and which became effective 15 March, 1918, which said freight tariff had been promulgated and published by the Southern Railway Company and participating carriers, under the authority and with the consent and approval of the Interstate Commerce Commission, said freight tariff bearing the title 'Demurrage and Storage Tariff, No. 2,' and being identified by the symbols 'I. C. C., A-8050,' and being applicable at stations and sidings of Southern Railway Company and roads named on page two thereof, including the city of Greensboro and the private siding of defendant hereinafter mentioned. That said freight tariff promulgated and published as aforesaid, under the authority of said Interstate Commerce Commission, is hereto attached and made a part hereof.

"3. That prior to the month of April, 1918, the defendant had under contract with said Southern Railway Company established and throughout said month maintained a private siding constructed and used solely for the purpose of connecting its storage warehouse in said city of Greensboro with the tracks of said Southern Railway Company. That all of the cotton referred to in paragraph 6 of the complaint was consigned to said private siding, and that an agreement had been made and was then existing between defendant and plaintiff that cotton consigned to defendant was to be placed by plaintiff and unloaded by defendant upon said private siding.

"4. That the agent of the plaintiff did not deliver a written notice to the consignee of the carrier's inability on account of the condition of said private siding or track to make actual placement thereupon; and that actual placement was made on the respective dates set out in column G, on pages 2 to 9 inclusive, of the itemized statements referred to in paragraph 6 of the complaint. (The admission that the agents of the plaintiff did not deliver a written notice to the consignee of the carrier's inability on account of the condition of said private siding or track to make actual placement thereupon, is not to preclude the plaintiff from showing, if he can show and if in law the court is of the opinion that it is competent to show, that such written notice was by the conduct of the defendant, or its duly authorized agents, waived.)

"5. That if, under the provisions of the said tariff and the law bearing thereon, the plaintiff is entitled to recover demurrage, and to recover both upon interstate and intrastate shipments, then the amount set forth in the complaint, to wit, $8,939.37, is the amount due the plaintiff on account of said demurrage.

"6. That if, under the provisions of the said tariff and the law bearing thereon, the plaintiff is only entitled to recover demurrage on inter-

state shipments, then the amount of demurrage in intrastate shipments should be deducted from said amount of $8,939.37."

It was alleged in the pleadings and proven on the trial that all of the cotton, both intrastate as well as interstate shipments, was handled, shipped and delivered by the U. S. Railroad Administration during the month of April, 1918; and as the demurrage and storage rules set out in the tariff I. C. C., No. A-8050, upon the face thereof, were "applicable on interstate and intrastate traffic," the court, upon the agreed facts and the law bearing thereon, found correctly, that if the defendant was liable for demurrage during this period, the same liability would accrue under the facts and rules set forth in the tariff as to intrastate shipments and interstate shipments.

The defendant contended that it was not liable for any demurrage because of a failure on the part of the plaintiffs to comply with the provisions of the tariff, in that written notice of constructive placement had not been given as required by the tariff; and the plaintiffs contended that there had been a substantial compliance with this provision of the tariff by the written notices given the traffic manager of the defendant, as set out in the evidence, and that the notice of constructive placement, if required before demurrage could be collected, as contended for, was waived by its manager, and that when demurrage accrued and the defendant knew of its accrual, and thereafter unloaded and accepted the cotton, it was liable in law for said demurrage.

The jury brought in a verdict awarding the plaintiffs just half of the amount sued for, to wit, $4,469.68. The plaintiffs thereafter tendered judgment for the full amount as set out in the case on appeal which the court declined to sign, and the plaintiffs appealed. The court signed judgment for the amount found by the jury, and the defendants appealed.

Wilson & Frazier for plaintiffs.
Bynum, Hobgood & Alderman for defendants.

CLARK, C. J. Upon the facts agreed, the Southern Railway Company was duly incorporated, and prior to the time when the United States took possession and control of all the railroads for war purposes, it was engaged as a common carrier in the transportation of freight and passengers, and the United States Government took possession and was operating this and all other railroads by the Director General, his agents and employees in April, 1918, when this demurrage accrued.

The Director General was duly and legally appointed under the act of Congress, and the defendants were duly incorporated under the laws of this State, and were engaged in shipping and storing cotton, and the

plaintiff and defendant entered into the "average" agreement set out in the record. This is a condensed statement of the facts alleged in the first five paragraphs of the complaint and which are admitted to be true and proven.

As to the other facts set out in the case agreed, the only questions to be determined are as follows:

First, whether the demurrage and storage rules of the tariff in law, as in fact, applied both to intrastate as well as to interstate shipments.

Second, was the written notice of constructive placement substantially good as required by the tariff.

Third, if not, could such written notice in law be waived by the defendant company, and if so, was the same actually waived?

Fourth, whether the defendants, after receiving the written notices acknowledged to have been sent to them and received by their traffic manager, and after knowledge that demurrage had been incurred, could receive, unload and accept the cotton without being liable at law for the payment of said demurrage.

As to the first of these questions, the printed tariff, which has been made a part of the facts "considered as proven," states that it is applicable on interstate and intrastate traffic, and paragraph 2 of the facts "considered as proven" states that this tariff is applicable at stations and sidings on the Southern Railway Company and roads named on page 2 thereof, including the city of Greensboro and the private siding of the defendant hereinafter mentioned. This being so, it is not necessary to discuss whether the tariff applied to interstate shipments at law or fact, or whether the true and correct amount under the facts as proven was $8,939.37, especially in view of the further statement in paragraphs 5 and 6 of said facts "agreed to be taken as proven." It is therefore clear that if the plaintiffs are entitled to recover at all they are entitled to the sum under the agreement of facts to recover $8,939.37.

As to the second question, whether the written notice was substantially given as required by the tariff, T. B. Page, a witness for the plaintiffs, testified as follows: "I handled and conducted the business as to freight matter with the defendant, with Mr. Garland Clary, who held the position of traffic manager with the defendant, which position he had in 1918, held for several years. There was an agreement between Mr. Clary and myself that on the receipt of waybills at my office covering all the cotton shipped to them, or any cars for their warehouses, we were to call him up over the telephone at the office of the defendant and give him the car numbers and initials, the number of bales, and the marks on the cotton, and where from, if it was shown, or if he asked for it, and any other information that he asked for and we could give; but that was the principal information. It was to be

given each morning, over the phone, to Mr. Clary, and not to anybody else. This notice over the phone, in regard to all shipments of cotton coming into Greensboro to defendant in April, 1918, was given over the phone to him. He had a form, which I think he got up himself, upon which he entered all that information, in duplicate. He sent them down with the bill of lading, and I signed this form. These shipments were 'Order, notify shipments.' When he got all this information he knew which bill of lading to take up at the bank. Upon surrender of the bills of lading and the signing of the receipt, I issued an order that went to the yard master's office for the placement of those cars containing that cotton."

Mr. Clary, traffic manager of the defendant, testified as follows: "I was traffic manager and secretary-treasurer of defendant. Before I had made this connection I had been employed by the Southern Railway Company, and was familiar with the tariff in regard to shipments. One of my duties, when I was employed by the railway company, was to get possession of and follow tariffs in regard to shipments, and I was employed by defendant because of my peculiar knowledge in regard to tariffs. In the tariffs that have been promulgated by the railway company there had been for years the same provision with regard to constructive notice that was in force and operation in April, 1918. I was demurrage clerk at one time, and knew that under certain provisions demurrage accrued on cars that were detained by shippers. As soon as waybills were received by him in the morning, Mr. Page would call me up over the telephone and give me the number of the car, the time of its arrival, the contents of the car, where it was from, and the marks of the cotton, etc. It was not exactly an arrangement; he did that with practically all cars; it was only for the benefit of the railroad company, to expedite the business. I did not have what you might call an arrangement with him by which he was to do that, but he did it just the same, and I got that information every morning. If we did not already have the bills of lading, we went and got them, upon receipt of that information, and made out a receipt for the bill of lading for Mr. Page to sign. These receipts contained all the information that I had at that time. I filled the receipt out and took it, with the bill of lading, to Mr. Page to sign. After getting the information over the telephone, and after the railroad cashier had signed receipt containing information which I had put on it, I also got a postal card notice of arrival, containing marks of the cotton, the number of bales and the car numbers, and in some instances origin of the cotton, also the initials of the cars. I kept a book containing the arrival of the cotton, date of notification of arrival, and date it was placed and unloaded, by which I checked the railroads' statement, when they presented it."

The U. S. Circuit Court of this, the Fourth Circuit, in a decision filed 21 December, 1922, in *Davis, Director General, v. Timmonsville Oil Company,* a similar case to the one at bar, after citing Rule 5, section (a), of the demurrage rules as to constructive placement, says:

"As we have heretofore pointed out, the railroad immediately upon arrival of the cars respectively mailed to the oil company notice of arrival. This notice, in substance, contained the name of the railroad to which the car belonged, the number of the car, the point of shipment, the name of consignor and the date of arrival. But it is insisted that because this notice did not also contain the information that the railroad was unable to make physical delivery of the car at the mill siding, it is a noncompliance with Rule 5, and that there was, therefore, no constructive delivery of the car."

"Formerly, no notice at all of the arrival of cars at destination was required to be given, and the giving of notice was the courtesy or custom with no binding obligation on the railroad." *Coal Co. v. R. R.,* 245 Fed., 917.

"The quoted rule has corrected this omission and imposes this obligation on the carrier, and in such case as this, the consignee might well be heard to insist that it was not chargeable with demurrage, if there had been a failure upon the part of the carrier to give it notice of the arrival of the cars; but when such notice was given as was here conceded to have been the case, and when, as is also conceded, the inclusion of the additional fact of inability to make delivery would have made no difference with the defendant, or put it in any better position than it was, or given it any information which it had not already at hand, the omission, we think, is inconsequential. To hold otherwise would be to create a defense against lawful charges, without the showing of any injury to sustain it."

Third. "If not, could such written notice be waived, and was it waived by the defendant?" By reference to the testimony of Page and Clary, as above set out, while there may be some conflict in the testimony of the two witnesses as to whether there was a specific instruction not to send written notice of constructive placement, there is no conflict as to whether the traffic manager had received all the information necessary to apprise him that demurrage was accruing, because he had full knowledge of the provisions of the traffic and had worked under similar provisions for years. This is fully settled in the case just cited and also in Interstate Commerce Commission, Opinion No. 11,085, decided 13 June, 1922; *Pass Co. v. R. R.,* 32 I. C. C., 479; *Grain Co. v. R. R.,* 43 I. C. C., 147; *Steinhardt & Kelly v. R. R. Co.,* 52 I. C. C., 307; *Steel Co. v. R. R.,* I. C. C. opinion No. 9,668, decided 15 April, 1918.

On the fourth question, whether the defendant, after receiving written

notice sent and after knowledge that demurrage had accrued, could receive, unload and accept cotton without paying demurrage, it is distinctly held that it could not in *Davis v. Timmonsville Oil Co.*, above cited, in which it is said: "Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff and must be collected from the shipper or the consignee of the freight, to the same extent as the charge for carriers. A penalty is imposed on the carrier for failure to collect. (*Union Pacific Co. v. Goodrich,* 149 U. S., 690.) The purpose of the law being, of course, to secure absolute equality between the shippers. The fact that the shipments in this case were unauthorized, and the further fact that the oil company did everything in its power to prevent such shipments, would not, in our opinion, have justified its declining to pay the demurrage charges, if he accepted and unloaded the cars. It had presented to it the alternative of declining to accept the cars, in which event the railroad would have had a remedy by sale, or having accepted them, to deduct the demurrage at the time of the remittance to consignors. The fact that the carrier failed to make pressing demand for such payment did not justify the assumption that the demurrage charges had been waived, for this the carrier could not legally do, nor does it, or can it, create an estoppel which would permit by indirection that which may not lawfully be done directly. Mistake, inadvertence, honest agreement or good faith are alike, under such circumstances, unavailing. The railroad and the shipper are both required to abide the published rate." See, also, *R. R. v. York,* 215 Mass., 36.

On the above citations as the law of the case, and the uncontradicted facts as testified by the witnesses for the plaintiffs and defendant, the plaintiffs were entitled to the instructions asked for and set out in the defendant's first three assignments of error, and also to the judgment for the full amount which they tendered for signature.

As to the defendant's appeal, it is unnecessary to take up and discuss the errors therein assigned, for, upon the facts admitted as proven and the uncontradicted testimony as above stated, the plaintiffs are entitled to recover for the full amount of $8,939.37, and judgment should have been rendered therefor.

The case was improvidently submitted to the jury for, upon the facts as agreed to, the plaintiff was entitled to the judgment, and it should be entered here.

A case exactly in point is *Corporation Commission v. R. R.*, 137 N. C., 1, where it was held that when the material issues are found, judgment should be entered thereon, disregarding the finding upon immaterial and irrelevant issues, and the Supreme Court in such case may,

in reversing or affirming the judgment below, enter a final judgment here or direct it to be so entered below. This case was affirmed on writ of error, 206 U. S., 1. In the present case, there being no further controversy as to the facts or the law to be settled, judgment will accordingly be entered here in favor of the plaintiff and against the defendant for the sum of $8,939.37, the amount agreed upon by the parties.

The power of the court to enter final judgment here was exercised in *R. R. Connection Case,* 137 N. C., 21, citing Code, sec. 957 (since Rev., 1542; C. S., 1412); *Alspaugh v. Winstead,* 79 N. C., 526; *Griffin v. Light Co.,* 111 N. C., 438; and it was there said that "final judgment has been entered here not infrequently by order and without opinion, as a matter of course," and among other cases cited there in which this has been done was *Bernhardt v. Brown,* 118 N. C., 710 (36 L. R. A., 412); *Caldwell v. Wilson,* 121 N. C., 473, and *White v. Auditor,* 126 N. C., 584. The same course has been pursued in many other cases since. Among them are *Industrial Siding Case,* 140 N. C., 244; *Smith v. Moore,* 150 N. C., 159; *Griffin v. R. R., ib.,* 315; *Battle v. Rocky Mount (Walker, J.),* 156 N. C., 339; *Chavis v. Brown (Hoke, J.),* 174 N. C., 123.

Judgment will be entered accordingly in this Court in favor of the plaintiff for $8,939.37.

Modified and affirmed.

EFFIE N. LEAK AND HER HUSBAND, J. D. LEAK, v. THE TOWN OF WADESBORO ET AL.

(Filed 20 December, 1923.)

1. Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments.

In proceedings by petition by property owners of a city whose land abuts on streets to have the streets improved upon the assessment plan prescribed by statute, it is not required that the streets to be improved be then connecting, or that to constitute a single improvement there should be then a physical connection between the different portions of the designated area, if the municipal plan is to make them so; and a petition by the majority owners in number and frontage along the streets in the designated area, taken as a whole, is sufficient.

2. Same—Discretionary Powers—Statutes.

It is within the discretionary power of the Legislature or of the municipality to which it is delegated to designate the area for street improvement upon the assessment plan (C. S., sec. 56, art. 9), and when such delegated power is exercised in good faith and is free from abuse, the courts, generally, will not interfere.

3. Same—Ordinances—Bonds.

It is not required by the various statutes on the subject that a bond ordinance of a municipality set forth in express terms the proportion of the cost of the proposed improvements which has been, or is to be, assessed against the property of each owner abutting upon the streets to be improved or the terms and method of making the payment, if the procedure follow the direction of the statutes relating to the subject. C. S., secs. 2937, 2938, 2942, 2938(4), 2141, 2708, this last section requiring, among other things, that the preliminary resolution designate by general description the improvements to be made and the street or streets, or part or parts thereof, whereon the work is to be done, and the proportion of cost to be assessed upon the abutting property, and the terms and manner of payment.

4. Constitutional Law — Municipal Corporations — Cities and Towns — Streets—Assessments—Due Process—Appeal and Error—Statutes.

The right of appeal to the courts being provided in case of dissatisfaction by an owner of land abutting on a street assessed by the governing body of a municipality for street improvement, the objection that the owner's property is taken for a public use in contravention of the due process clause of the Constitution is untenable. C. S., sec. 2714.

5. Pleadings—Amendments—Courts.

The trial judge is given authority to allow an amended answer to be filed in proceedings to assess owners of land abutting upon a city street to be improved by a municipality.

APPEAL by plaintiffs from *Harding, J.*, at the Special July Term, 1923, of ANSON.

On 14 February, 1923, by virtue of C. S., ch. 56, art. 9, property owners presented to the commissioners of Wadesboro a petition requesting that certain streets, including Depot Road, be improved and permanently paved and that a definite percentage of the total cost, exclusive of the cost of improving street intersections, be assessed against abutting property. On 14 March, 1923, at a special meeting of the commissioners an ordinance was introduced to authorize $275,000 of bonds for the purpose of improving all the streets named in the petition and to provide for the levy of an annual tax to pay the principal and interest of the bonds as they matured. The ordinance purports to comply with the provisions of C. S., ch. 56, art. 26, as amended by chapter 106, Public Laws, Extra Session 1921. Before the ordinance was acted on a statement of indebtedness sworn to was duly filed pursuant to a resolution as directed by C. S., sec. 2943, as amended; and at a meeting held on 16 March, the bond ordinance was duly adopted and the clerk of the board was directed to make due publication of the ordinance and notice of its adoption as provided by C. S., sec. 2944, as amended, and to post the ordinance at the courthouse door and four other public places in the town.

It was admitted:

1. That a majority of the landowners whose lands abut on the streets proposed to be paved set out in the petition as a whole have signed the petition, and that they represent a majority of the lineal foot frontage on such streets.

2. That a majority of the landowners whose lands abut on the street leading from the Atlantic Coast Line Railroad to the intersection of that road (whether known as Depot Street or Washington Street) with Martin Street have not signed the petition, and that a majority of those owners representing a majority of the lineal foot frontage on said street have not signed the petition.

3. That the lineal foot frontage along Depot Street and Washington Street from the Atlantic Coast Line Railroad to Martin Street is 7,254 feet.

4. That no person owning lands on Barrington Street has signed the petition.

5. That certain streets had formerly been paved, and that there is a road beginning at the end of Washington Street which is sometimes called Washington Street and sometimes called Depot Street or Depot Road, which constitutes a continuous line of traffic with Washington Street from Martin Street to the Atlantic Coast Line Railroad.

6. That the improvements set forth in the admissions were made pursuant to authority vested in the commissioners of the town of Wadesboro, under chapter 265 of the Public Laws of 1909.

7. That the boundaries of the town of Wadesboro have been changed from time to time, as shown by the original charter and amendments thereto, by the act of the Legislature incorporated therein, chapter 213, Public Laws of 1907, chapter 26 of the Public Laws of 1891.

8. That under the authority of the town charter in 1907 the corporate limits of the town of Wadesboro were extended to embrace all of the territory on which the so-called Depot Street is situated.

9. That the yellow lines on the map attached represent the location of the improvements which the commissioners of the town of Wadesboro propose to make and contemplate making.

10. That the red lines on the map represent the location of streets which were improved under the act of 1909 and the amendments thereto.

11. That the four blocks heretofore improved are 99 yards square. It is admitted that Washington Street extends from A to B, and that the Depot Road extends from B to C, as shown on the map marked "Exhibit A."

12. That all the charters of the town of Wadesboro and the amendments thereto are in evidence.

13. That paragraph 3 of the plaintiffs' complaint was introduced in evidence by the defendants for the purpose of showing that the deeds mentioned therein referred to the Depot Road and the new Depot Road, and made it a boundary line in the description.

The following is the verdict:

"Is the Depot Road from the northern end of Washington Street to the Atlantic Coast Line Railroad a public street of the town of Wadesboro? Answer: 'Yes.'"

His Honor held upon the pleadings, admissions, and verdict that the petition was sufficient in law, that the bond ordinance was valid, and that the question of the legality of the assessment was not properly before the court, and should be hereafter determined in the manner provided. Judgment for defendants. Appeal by plaintiffs.

John T. Bennett, F. L. Dunlap, J. A. Lockhart, and McLendon & Covington for plaintiffs.

John C. Sikes and Caudle & Pruette for defendants.

ADAMS, J. According to the verdict, Depot Road, which extends from Washington Street to the track of the Atlantic Coast Line Railroad, is a public street in Wadesboro. The plaintiff owns property abutting each side of Depot Road and brings this action to vacate and nullify an ordinance adopted by the defendant authorizing municipal bonds in the sum of $275,000 for the improvement of certain streets, and urges various objections to the sufficiency of the ordinance.

The plaintiff first contends that Depot Road makes no physical connection with the other streets to which the ordinance relates, and that the improvement of streets which are not contiguous involves the unlawful consolidation of disconnected improvements. Several years before the ordinance in question was adopted the defendant, pursuant to the provisions of chapter 265 of the Private Laws of 1909, improved a part of six streets near the center of the town, and its present purpose is to pave other streets so as to combine all the improvements, past and prospective, into a constituent whole. To this end the pavement of Depot Road is to be connected at the intersection of Washington and Martin streets with the improvement made there under the act of 1909.

When an improvement of streets by a municipal corporation constitutes a single scheme, the ordinance may provide for the pavement of several streets, a single street, or a portion of a street; and when streets are practically similar and are to be paved in the same manner and with the same material, and are grouped as a unit, in the absence of provision to the contrary, they may generally be treated as a single improvement. McQuillin says that to constitute a single improvement,

physical connection between the different portions is not absolutely essential. 5 Mun. Corp., sec. 2084. In 25 R. C. L., 155 (69), it is said: "It is a general rule applicable in most jurisdictions that only one improvement shall be embraced in a single ordinance. In applying this rule it has been held that an ordinance providing for the paving of several streets and alleys, and parts of streets, with the same material, and in the same way, is not obnoxious to the objection that it embraces more than one improvement, although there may be a difference in the width of the streets proposed to be paved, and the cost of paving certain railway tracks is excluded from the assessment in respect of some of the streets." And in Elliott on Roads and Streets, sec. 694: "It is also held that the legislative decision, whether by the Legislature itself or the municipality to which it has delegated the authority, as to what territory shall compose the district and what improvements shall be included in one general assessment, is conclusive upon the judiciary. Where the statute forbids, either expressly or by implication, the local officers from including more than one improvement in a single order of assessment, they have no authority to provide for more than one improvement. It would seem to be in harmony with the general rule that prevails in cases where the authority exercised is purely statutory, that two distinct and radically different improvements cannot be included in one general order of assessment unless by express words or clear implication it is authorized by statute. Improvements are not, however, necessarily distinct and different because different roads or different streets are included, for it may well be that the system is a single and uniform one, although it embraces more than one street. If, in fact, the improvement is a unity, an assessment may be valid, although it embraces in its line more than one street or road. It may often happen that in order to secure a complete and effective system it is necessary to construct a main line with branches, or to improve two or more streets at once so as to secure a uniformity of grade, and in these, or similar instances, there is no reason why the system may not be considered as a single improvement, except, of course, where the statute supplies a reason for a different rule."

In *Springfield v. Green,* 11 N. E. (Ill.), 261, the city adopted an ordinance providing for the pavement of a large number of its streets and alleys, and the ordinance was assailed on the ground that it embraced more than one improvement. The Court said: "We do not think this is true in point of fact. While many streets and parts of streets are embraced in the scheme of improvement adopted by the city, yet we regard them all as but parts of the same improvement. The city authorities, in adopting the ordinance, must have found, as a matter of

fact, that those streets and parts of streets were so similarly situated with respect to the improvement proposed to be made as to justify treating them as parts of a common enterprise and single improvement, and from the record before us we think they were justified in doing so. They were all to be paved with the same material, and in the same way; and the fact that there was a difference of a few feet in the width of some of them, and that the cost of paving the railway tracks in others was to be excluded from the estimate, should, in our opinion, make no difference in this respect. The similarity of the improvement proposed to be made, and the situation of the property to be assessed, with respect to it, afford a more satisfactory test as to whether they might all be embraced in a common scheme, as one improvement, than their actual connection or physical contact with one another. It is true, expressions are to be found in one or two cases looking in a contrary direction, but these expressions were made *in arguendo* merely, and not for the purpose of laying down any rule on the subject. So far as the actual decisions of this Court go, they support the contrary view, and are in perfect harmony with what is here said. *Prout v. People,* 83 Ill., 155; *People v. Sherman, id.,* 167; *Ricketts v. Hyde Park,* 85 Ill., 110." See, also, 4 McQuillin's Mun. Corp., sec. 1879; *Adams County v. Quincy,* 6 L. R. A., 155; *Mayor v. Weed,* 23 S. E. (Ga.), 900; *Lewis v. Seattle,* 69 Pac. (Wash.), 393; *Wilder v. Cincinnati,* 26 Ohio St., 284.

In the statutes under which the defendant is proceeding there is nothing to contravene the foregoing principles. In analogy to taxing districts, the area in which these improvements are to be made may be designated by the Legislature or by the local authorities to whom may be delegated the power to say what territory shall be included in each improvement; and when such delegated power is exercised in good faith and is free from abuse the courts will generally be slow to interfere. C. S., ch. 56; Public Laws Ex. Sess. 1921, ch. 106; *Asheville v. Trust Co.,* 143 N. C., 360; *Justice v. Asheville,* 161 N. C., 62; *Felmet v. Canton,* 177 N. C., 52; *Durham v. Pub. Ser. Co.,* 182 N. C., 333; *Gunter v. Sanford, ante,* 452. Upon consideration of our statutes and the principles of law applicable to the facts disclosed by the record, we are unable to uphold the plaintiffs' contention that the defendants are attempting to consolidate several unrelated improvements in violation of law, or that there is a fatal want of physical connection between Depot Road and the other streets or, taking all the territory, a deficiency in the requisite number of lineal feet of frontage.

The plaintiffs insist also that the ordinance is invalid because it does not state definitely the proportion of the cost of the proposed

improvements which has been or is to be assessed against the property abutting on the improvements and the terms and method of making payment.

The Municipal Finance Act provides that a municipality may issue its bonds for specified purposes when properly authorized by an ordinance passed by the governing body. C. S., secs. 2937, 2938. If the bonds are to be issued for local improvements, one-fourth the cost of which at least (exclusive of the cost of paving at street intersections) has been or is to be specially assessed, the ordinance shall take effect upon its passage without being submitted to the qualified voters. C. S., sec. 2938. It need not set forth the location of the improvement except as prescribed by section 2942. C. S., sec. 2938 (4). Section 2141 is as follows: "In cases where a petition of property owners is required by law for the making of local improvements, a bond ordinance authorizing bonds for such local improvements may be passed before any such petition is made, but no bonds for the local improvements in respect of which such petitions are required shall be issued under the ordinance, nor shall any temporary loan be contracted in anticipation of the issuance of such bonds, unless and until such petitions are made, and then only up to the actual or estimated amount of the cost of the work petitioned for. The determination of the governing body as to the actual or estimated cost of work so petitioned for shall be conclusive in any action involving the validity of bonds or notes or other indebtedness. The bond ordinance may be made to take effect upon its passage, notwithstanding that the necessary petitions for the local improvements have not been filed: *Provided,* that it appears upon the face of the ordinance that one-fourth or some greater proportion of the cost, exclusive of the cost of work at street intersections, has been or is to be assessed." The substance of the proviso is embodied in the ordinance.

The cost to be borne by the owners of property is to be determined as provided elsewhere. A preliminary resolution shall designate by a general description the improvement to be made and the street or streets or part or parts thereof whereon the work is to be done, and shall specify the proportion of the cost to be assessed upon the abutting property and the terms and manner of payment. C. S., sec. 2708. Other sections provide for ascertaining the amount of and levying assessments, with the right of appeal to the Superior Court in case of dissatisfaction by any person against whom an assessment is made. Section 2714. In *Gunter v. Sanford, supra,* the subject is discussed and some of the controlling authorities are cited. The reasoning on which the decision is based need not be repeated here. We think it clear that omission of the proposed cost does not invalidate the ordinance under consideration.

What we have said with respect to the right of appeal disposes of the additional objection that the plaintiff's property may be taken without due process of law. *Brown v. Hillsboro,* 185 N. C., 370; *Gunter v. Sanford, supra.*

Several of the remaining exceptions were abandoned on the argument. We have examined those relied on and find them untenable. The trial judge had the right to allow an amended answer to be filed, and the question of the clerk's authority need not be considered. *Brown v. Hillsboro, supra.*

We find no error which entitles the plaintiff to a new trial.

No error.

W. L. SLAYTON & CO. v. BOARD OF COMMISSIONERS OF CABARRUS COUNTY ET AL.

(Filed 20 December, 1923.)

1. Municipal Corporations—Cities and Towns—Bonds — Sales — Bids—Conditions—Attorney and Client.

Where a competitive bidder for the purchase of municipal bonds makes his bid upon condition of approval by his attorney as to the legality thereof, the stipulation is a condition precedent to a binding agreement to purchase, and in the absence of bad faith, the stipulation will be upheld, though the attorney's opinion against the validity of the bonds proves to be erroneous.

2. Same.

When the bidder for a proposed issue of municipal bonds incorporates in his written offer the condition that the municipality furnish certain record information of the proceedings leading up to and culminating in the issuance and delivery to the satisfaction of his attorney: *Held,* the record to be furnished was to afford the attorney reliable data for his opinion on the validity of the proposed bonds as a binding municipal obligation enforceable by taxation, and his opinion that the bonds would be legally invalid is binding between the parties, when made by the attorney in good faith.

3. Same—Contracts, Written—Parol Evidence.

When a foreign bidder for the purchase of municipal bonds specifies in his written offer, in effect, that it was upon condition that the validity of the bonds be approved by the opinion of its attorney regularly employed for the purpose, verbal statements made by a local attorney at the time he submitted the bid that varies, alters, or contradicts the written stipulations cannot be received in evidence.

4. Municipal Corporations — Cities and Towns — Bonds — Attorney and Client—Sales—Bidders—Good Faith—Evidence.

When a nonresident bidder for the purchase of municipal bonds refuses to accept them upon the adverse opinion of his attorney, made a con-

dition precedent to their acceptance by the terms of his bid, the fact that the opinion was not in accordance with an opinion recently rendered by the Supreme Court will not be considered as evidence of bad faith, upon the assumption that the attorney has seen the opinion of the Court, when it is made to appear that the attorney had investigated our statutes and decisions on the subject and there is no evidence that in giving his opinion he had acted in bad faith.

CLARK, C. J., dissenting.

APPEAL by defendant from *Webb, J.*, at April Term, 1923, of CABARRUS.

Civil action. The action is to recover of defendants a certified check, or amount of same, deposited with the defendants as a guarantee of good faith in their bid made in April, 1917, on a proposed bond issue of the county in the sum of $50,000, for the purpose of building a county home for the aged and infirm.

Defendants, denying plaintiff's right to a return of the check, or proceeds of same, alleged further and by way of counterclaim that plaintiffs wrongfully and in breach of their contract refused to take said bonds at their specified bid, and defendants were thereby compelled to sell said bonds to other purchasers at a loss to the county of $3,990, and the county suffered damages to said amount in addition to the $500 check which plaintiff had failed and refused to pay, etc.

The following issues being submitted to the jury:

"1. Is plaintiff the owner and entitled to the possession of the certified check in controversy and sued for in this action?

"2. What amount, if any is plaintiff indebted to defendant on the counterclaim?"

Evidence was offered by both parties, and at the close the court instructed the jury that on all the evidence, if the jury believed the same, they would answer the first issue "Yes" and the second issue "Nothing." Verdict and judgment for plaintiff, and defendant excepted and appealed.

Morrison Caldwell for plaintiff.
L. T. Hartsell and H. S. Williams for defendants.

HOKE, J. The facts in evidence tended to show that on 5 April, 1917, defendants having invited bids for a proposed bond issue of the county of $50,000 for the purpose of building a county home, plaintiff with others submitted their bid and deposited with defendants their certified check for $500 as an evidence of good faith, same to be credited on the price of the bonds in case plaintiff's bid was accepted and they became the purchasers. That plaintiff's bid was submitted in writing duly

signed by Bruce Craven as attorney for plaintiff, and same contained an offer of a premium for said bonds of $1,790, and also a stipulation in terms as follows:

"Prior to taking up and paying for said bonds you are to furnish us with a full and accurate transcript of the record, duly certified, of the proceedings leading up to and culminating this issuance and delivery of the bonds, to the satisfaction of our attorney. Herewith is our certified check for $500 as evidence of good faith in making this bid, which is to be retained by you and presented for payment as part of the purchase price of the said bonds, provided the same are duly awarded to us on this bid and delivered to us in accordance with the terms thereof at the Northern National Bank in Toledo, Ohio."

That plaintiff's being the higher bid, defendants, by formal resolution spread upon the minutes of the board and signed by them, accepted said bid and awarded the bonds to plaintiffs in pursuance of the terms of the same. That the records considered necessary appertaining to the proposed bond issue some time thereafter, about or just before 11 April, were forwarded to plaintiffs at Toledo, Ohio, and on being submitted to their regular bond attorney, W. H. Roose, he replied by letter of 16 April, asking for further data, and such data being furnished, said attorney, on 30 April, wrote a letter giving his opinion in formal disapproval of said bond issue, and containing among other things the following:

"It appears from the data now furnished that the above-mentioned bonds are being issued under the so-called inherent right of the county officials to borrow money for necessary expenses. This being true, there is no authority to levy a special tax for the payment of said bonds, but same would have to be taken care of out of the general county-purpose tax. It also appears that $105,000 of the outstanding bonded indebtedness of said county has been issued under a local law which authorizes the levy of a special tax to take care of same. This leaves $159,000 of such outstanding bonded indebtedness which must also be taken care of out of the general county-purpose tax.

"It appears from the certificate of the Register of Deeds of Cabarrus County, now submitted, that said county is now levying 47 2/3 cents on the $100 valuation for State and school purposes, 19 cents for county purposes, 30 cents special road, and 8 cents special interest and bridge fund. It therefore appears that there has already been levied in said county for State and county purposes 66 2/3 cents on the $100 valuation, not counting the special tax. This being the maximum amount of taxes which may be levied in any year, it is quite apparent that said county will be unable to levy the additional tax necessary to take care of this new issue of bonds. I am therefore returning to you herewith the transcript submitted without my approving opinion."

And the deposition of W. H. Roose, in reference to said bonds, and duly put in evidence, is as follows:

"I, W. H. Roose, of the city of Toledo, am a practicing attorney duly qualified and authorized to practice within the State of Ohio. I have been a practicing attorney for 35 years and a bond attorney almost exclusively for 20 years, and am still in the active practice of law, particularly bond law. I have my office at Room No. 740, Spitzer Building, Toledo, Ohio. On 11 April, 1917, W. L. Slayton & Co. submitted to me a transcript of the record of the proceedings of the Board of County Commissioners of Cabarrus County, North Carolina, relating to the issuance of $50,000 home bonds, and requesting my opinion as to the legality of the proceedings leading up to and including the issuance of said bonds.

"After a very thorough examination of the transcript of the record of the proceedings of said board relating to the issuance of said bonds, I advised W. L. Slayton & Co. that I could not approve said issue of bonds. I am attaching hereto copies of two letters I wrote to W. L. Slayton & Co., which contained my opinion rendered to them regarding the validity and legality of said bonds, the first letter dated 16 April, 1917, and now marked 'Exhibit A,' and the second letter dated 30 April, 1917, and now marked 'Exhibit B.' My opinion was made after a very thorough examination of the transcript and of the statutes and law of the State of North Carolina, and in entire good faith, and was based on my conviction that the construction of a county home was not a necessary expense as contemplated by section 7 of Article VII of the Constitution of North Carolina; and that even though it might be considered a necessary expense, the county was already levying taxes up to its constitutional limit."

There was also evidence of the good character and capacity of said attorney. Immediately on receipt of this opinion plaintiff notified defendant that they would not proceed further in the proposed purchase, and defendants were compelled to dispose of the bonds at a lower bid and with a loss to the county as stated.

It also appeared that defendants had duly tendered the bonds, claiming that there had been a definite contract of purchase at the price, which plaintiffs refused as stated, and some time thereafter, plaintiff having demanded a return of the check, defendants refused compliance, etc., and in suit entered therefor set up a counterclaim for damages incident to plaintiff's alleged breach of their agreement to buy the bonds.

It has been held by this Court, in cases where the question was directly considered, that where a bid for bonds has been made on condition of approval of the bidder's attorney as to the legality of the proposed bond issue, such stipulation is a condition precedent to a

binding agreement to purchase, and in the absence of bad faith, the position will prevail though the attorney's opinion prove to be erroneous. *Grant v. Board of Education,* 178 N. C., 329; *Webb v. Trustees,* 143 N. C., 299; *City of Rome v. Breed & Co.,* 21 Ga. App., 805.

In the *Webb case, supra,* the matter was discussed in a well-considered opinion by our former associate, *Mr. Justice Connor,* and it was there held as follows:

"Where the plaintiff proposed to purchase certain bonds issued by the defendant, 'when legally issued to the satisfaction of our attorney,' which proposition was accepted by the defendant, the approval of the attorney selected to pass upon the validity of the bonds, honestly and fairly expressed, was a condition precedent to the completion of the purchase.

"The correspondence or negotiation leading up to a proposition to purchase bonds is not material, where the proposition made by plaintiff and accepted by defendant was the result of such negotiation, and their relative rights and liabilities must be ascertained and declared upon the plain and unambiguous language found therein."

And in the subsequent case of *Grant v. Board of Education* the Court, in upholding this decision, and as pertinent to this inquiry, said: "On these, the pertinent facts of the controversy, the question chiefly presented was fully considered by us in *Webb v. Trustees,* 143 N. C., 299, and it was there held in effect that when the designated attorney, acting in good faith, has given an adverse opinion as to the validity of the bonds, the bidder was justified in refusing to proceed further, and in such case the conditional deposit is recoverable by the express terms of the agreement, and the position is not affected by the fact that the opinion of the attorney may have been erroneous, unless so arbitrary and capricious as to permit the inference of bad faith," citing further authorities: *Kinnicent v. Joint School Committee,* 165 Wis., 654; *U. S. Trust Co. v. Inc. Town of Guthrie,* 181 Iowa, 992; *City of San Antonio v. Rollins & Sons* (Texas), 127 S. W., 1166.

This being the principle as it prevails here, we can find no valid reason why the cases heretofore cited shall not be regarded as controlling on the facts of this record. It is contended for appellant that by the terms of the condition the attorney is not authorized to pass on the validity of the bonds, but only, and as a matter of form, on the regularity of the procedure leading up to the proposed issue, but this to our minds is not a fair or permissible interpretation of the condition expressed in the bid, and would in effect be to rob the stipulation of all significance. Considering the position of the parties, the purpose had in view, and the more reasonable meaning of the words used, it is clear, we think, that the "full and proper record" is to be furnished to

afford the attorney reliable data for his opinion on the validity of the bonds as a binding municipal obligation enforceable by taxation, and, so considered, the opinion of the attorney was well within the purpose and meaning of the powers contained in the terms of the bid. *Commissioners of Johnston v. State Treasurer,* 174 N. C., 141-145.

It is further insisted that the stipulation is of no effect because Bruce Craven, Esq., who submitted the bid for plaintiff before same was accepted, gave definite assurance that the record and bond issue would be approved by his principals. A proper perusal of the record will disclose, we think, that this statement of Mr. Craven was not intended or received as a contractual modification of the written bid submitted by him, but was rather by way of retort to the charge of an opposing bidder that the principals represented by Mr. Craven were in the habit of avoiding their bid when it suited them to do so, but if the evidence is to receive a different interpretation the position here may not avail the defendants because of the fact that plaintiff's bid was submitted and thereafter formally accepted in writing, and this, the express written agreement of the parties containing the condition of the attorney's approval, may not be varied by a previous or contemporary stipulation in direct modification of the written contract between them. *Improvement Co. v. Andrews,* 176 N. C., 280; *Mfg. Co. v. McCormick,* 175 N. C., 277; *Walker v. Venters,* 148 N. C., 388; *Bank v. Moore,* 138 N. C., 529, citing *Meekins v. Newberry,* 101 N. C., 18; *Ray v. Blackwell,* 94 N. C., 10.

In the impressive language of the present *Chief Justice,* in *Walker v. Venters, supra,* "The written word abides." And in *Ray v. Blackwell, supra, Smith, Chief Justice,* delivering the opinion, said: "It is a settled rule too firmly established in the law of evidence to need a reference to authority in its support that parol evidence will not be heard to contradict or alter the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for the purpose."

Nor is there any evidence tending to show that Mr. Craven had any authority to modify the terms of plaintiff's written bid, or that defendants in accepting the bid understood or acted in any belief in such authority. On the contrary, the only sworn testimony is to the effect that he was the attorney of plaintiff only to submit the bid of plaintiff in the terms and at the price specified, and to show that defendants so understood it, they submitted the data as to the procedure leading up to the proposed bond issue, and the circumstances attending it, to plaintiff's bond attorney in Toledo, Ohio.

As we have seen in the authorities cited, the mere fact that the attorney has given an erroneous opinion is without significance unless, as

stated in one of the authorities cited (*City of San Antonio v. Rollins*, Texas), "The disapproval was fraudulent, capricious, and in bad faith," and in our opinion such a position cannot for a moment be upheld. True, as pointed out by appellant, this Court had directly decided, nearly a month before the opinion was submitted, and contrary to the same, that the building of a county home was a necessary county expense, and that a debt therefor could be contracted and taxes laid without a popular vote on the subject, but the facts in evidence do not disclose that the attorney knew of this or that he was likely to know of it, and assuredly the circumstances are not such as to permit an inference of fraud on his part concerning it. The opinion referred to, announcing the principle, was rendered at Spring Term, 1917, being filed 14 March of that year. It did not appear in our published Reports until the summer following, long after this transaction. Nor was it published in the S. E. until four or five weeks after it was filed. On the record, therefore, this matter was considered and the written opinion given by the attorney before the Court opinion in question appeared in any accredited publication likely to have come under the observation of the attorney, and the possibility that he might have seen it is entirely too vague to constitute legal evidence on an issue of fraud.

On authority apposite such a charge is not even made in the pleadings with sufficient definiteness to raise an issue of that kind. *Galloway v. Goolsby*, 176 N. C., 635-639; *Best v. Best*, 161 N. C., 514; *Mottu v. Davis*, 151 N. C., 237.

And assuredly there is no evidence to sustain such a charge against a man proved to be an honorable and capable attorney whose opinion shows that he had examined the matter with care and had given an opinion based on our published Reports, and so far as they were then reasonably accessible to him.

We think the charge of his Honor is in accord with the precedents applicable, and the judgment on the verdict is affirmed.

No error.

CLARK, C. J., dissenting: This is an action against the Board of Commissioners of Cabarrus County to recover possession of a certified check for $500 deposited with the defendants as evidence of good faith in making a bid for $50,000 county home bonds issued by the county. Plaintiffs subsequently refused to take said bonds, which defendants were compelled to sell at a loss of $3,790, and defendants set up a counterclaim for said amount of loss and $200 attorney's fees in finding another purchaser and effecting a sale to other parties, and retained said check to be applied on such counterclaim.

The defendants advertised for sale $50,000 of bonds of the county of Cabarrus, issued for the building of a county home, reserving the right to reject any and all bids. The plaintiffs filed the following offer:

"5 April, 1917. Board of Commissioners of Cabarrus: We offer you a premium of $1,790 in addition to par value, free blank bonds, and our attorney's fee and accrued interest, for your $50,000, 5 per cent county home bonds, advertised for sale this day, interest payable semi-annually and maturing $2,000 a year beginning at the end of the second year after date of bonds.

"Prior to taking up and paying for the bonds you are to furnish us with full and accurate transcript of the record, duly certified, of the proceedings leading up to and culminating in this issuance and delivery of bonds, to the satisfaction of our attorneys.

"Herewith is our certified check for $500 as evidence of good faith in making this bid, which is to be retained by you and presented for payment as part of the purchase price of the said bonds, provided the same are duly awarded to us on this bid, and delivered to us in accordance to the terms thereof, at the Northern National Bank in Toledo, Ohio.

"If any proposition shall be entertained by you in connection with paying interest on deferred payments on said bonds or on your bank balance from the proceeds thereof, we will equal any such proposition in addition to the above offer. Bruce Craven, Attorney for W. L. Slayton & Co."

Out of 10 or 15 bidders the plaintiff's bid was the highest; but before said bid was accepted by defendants, Bruce Craven, attorney for W. L. Slayton & Co., made a statement in explanation of his bid.

The defendants then asked the witness, L. A. Weddington, chairman board of commissioners, "State whether or not prior to the acceptance of the price offered by W. L. Slayton & Co. that Mr. Craven, their attorney, agreed to accept these bonds without any question as to the opinion of the attorney?" The answer to this question was objected to. Objection sustained, and defendants excepted. The witness would have testified and did, in the absence of the jury, testify as follows: "After the bids were all opened and the different prices compared, Mr. Craven's bid was the highest, and immediately afterwards one or two of the other bond buyers, one especially, told that Mr. Craven had been buying bonds at numbers of places for this same concern, Slayton & Co., and had been refusing to accept them; and they got into a regular melee, took quite a time to get them separated and quieted down. Then the suggestion was made to throw these bonds into an auction and sell them to the highest bidder. Craven objected, saying

that he was the highest bidder and felt that he was entitled to the bonds; and after consideration the county commissioners agreed that the advertisement was that the bonds would be awarded to the highest bidder; and when they said he would not pay for them, he would not take them, Craven assured us, guaranteed that the bonds would be accepted without an attorney's opinion other than his own."

"Q. I ask you if he (Craven) didn't state at the time that he knew the whole situation and he would guarantee the acceptance? A. Yes, sir.

"Q. Some statement was made that Mr. Craven had been buying bonds and not taking them; he and this party got into a fight? A. Craven told him he was a liar.

"Q. It was a kind of mix-up? A. Yes.

"Q. What was said by Mr. Craven in response to this other fellow? A. He appealed to the board of county commissioners. This man who had raised a row with him was the next highest bidder. After we got them settled down, some of the other bond buyers wanted to throw the bonds into an auction sale and let the highest bidder have them, and Craven appealed to the board that he came here at expense to buy the bonds and he was the highest bidder and didn't think it was treating him right to turn him down, which the board considered the fact after his saying that he guaranteed that he would take the bonds.

"Q. I ask you if you don't know it to be a fact that you and your board did not change one word or syllable of that written contract that Bruce Craven submitted? A. I have no knowledge of it, it never was authorized.

"Q. There wasn't any new auction? A. No, sir.

"Q. No verbal bidding by anybody? A. No, sir.

"Q. The only thing is, you claim that after this fellow charged him that he was in the habit of getting them and would not pay for them, he called the fellow a liar and claimed he would, and said he would take the bonds whether they were good or not? A. He claimed so. He said 'on no other opinion than his own.'

"Q. You didn't make him change his bid? A. No; it was not changed in his written contract. It may have been changed by Mr. Craven and the clerk to the board. The minutes were written up in his presence while the board was in session.

"Q. After the bids were all opened the board retired to themselves? A. Yes, sir.

"Q. They had declined to accept any of the written bids until they came back and Mr. Craven made this proposition? A. Yes, sir.

"Q. I ask you if he didn't state at the time that he knew these bonds were valid and all right and he would accept them? A. Yes, sir."

J. F. Harris testified for defendant: "I was register of deeds and clerk to the board of commissioners in the year 1917. As clerk to the board of commissioners it was my duty to keep the minutes of the board of commissioners. I have a record of the minutes of the board in reference to the proposal of Bruce Craven. This is the record of it, dated 5 April, 1917:

" 'Resolution. Whereas W. L. Slayton & Co., of Toledo, Ohio, are the highest and best bidders for the $50,000 county home bonds to be issued by Cabarrus County, dated 5 April, 1917, bearing interest at 5 per cent, payable semiannually, to mature as specified in their bid, bearing date of 5 April, 1917: Now, therefore, be it resolved, that the said bonds be and the same are hereby awarded to said W. L. Slayton & Co., and the chairman and clerk are hereby authorized and directed to execute said bonds, and when executed to deliver the same to the said W. L. Slayton & Co. on compliance with the terms of their said bid on file in the office of the clerk, which bid is as follows:

" 'We offer you a premium of $1,790 in addition to par value, free blank bonds, and our attorney's fees and accrued interest, for your $50,000, 5 per cent county home bonds, advertised for sale this day, interest payable semiannually and maturing $2,000 a year, beginning with the end of the second year after date of the bonds.

" 'Prior to taking up and paying for the bonds, you are to furnish us with a full and accurate transcript of the record, duly certified, of the proceedings leading up to and culminating in this issuance and delivery of bonds, to the satisfaction of our attorneys.

" 'Herewith is our certified check for $500 as evidence of good faith in making this bid, which is to be retained by you and presented for payment as part of the purchase price of the said bonds, provided the same are duly awarded to us on this bid, and delivered to us in accordance to the terms thereof, at the Northern National Bank in Toledo, Ohio.

" 'If any proposition shall be entertained by you in connection with paying interest on deferred payments on the said bonds, or on your bank balance from the proceeds thereof, we will equal any such proposition in addition to the above offer. (Signed) Bruce Craven, Attorney for W. L. Slayton & Co.'

"As register of deeds and clerk to the board, I furnished W. L. Slayton & Co. 'with a full and accurate transcript duly certified' by me. I gave them every information they asked me for; everything they wrote me concerning it I answered and mailed it to them. They never complained that I failed to do so. Yes, I think W. L. Slayton & Co. sent me the blank bonds to be executed. As well as I remember, those

bonds did come to us and we executed them and furnished the resolution and everything, and shipped them."

The court erred in excluding the above evidence of what occurred and of the guarantee by the attorney of the plaintiffs. On the next day after this transaction war was declared, and the bonds went down in price. On 19 April, 1917, W. L. Slayton & Co. wrote a letter to the plaintiffs in which they stated that certain questions had been raised as to the legality of the above bonds and as soon as that was established they would then proceed with printing the same.

The court erred in excluding the above testimony and in instructing the jury if they believed the evidence to accept the issues in favor of the plaintiff.

The language of the written bid cannot be construed to mean the *legality* of the bonds must be passed upon by their attorney. It is "not so nominated in the bond." The stipulation in the bid was "prior to taking up and paying for the bonds, you are to furnish us *with a full and accurate transcript of the record, duly certified,* of the proceedings leading up to and culminating in this issuance and delivery of bonds, to the satisfaction of our attorneys." This stipulation means simply that the *transcript of the record* must be furnished to the satisfaction of their attorneys. This, according to the evidence, was done. The testimony of the register of deeds is that he sent plaintiffs a full and accurate transcript of the record and "gave them every information they asked for."

There is no statement in the bid that the attorneys of the buyers were to pass conclusively upon the *legality* of the bonds before accepting them. It is certainly not so stated in their offer, and it would be preposterous to accept such a bid which would put every advantage in the hands of the bond buyers to reject bonds at any time should the market go down, and would violate the age-old maxim that no man can be a judge in his own case. See *Grant v. Board of Education,* 178 N. C., at p. 333. The true test is whether the bonds were legal and valid, and that is a matter for the courts and not for the purchaser at the highest bid to decide.

The testimony offered and rejected was that Craven, the accredited attorney of the plaintiffs representing them in person on this occasion, when the other bidders said that his clients would not pay for them and would not take them, "Craven assured us that he would guarantee that the bonds would be accepted without an attorney's opinion other than his own." This evidence explains *what attorney* would pass on them and does not contradict the bid, and this evidence should have been admitted as an essential part of the *res gestæ,* and the court should subsequently pass upon its binding power on the plaintiffs. He was

undoubtedly the plaintiff's attorney. He signed the bid which they had authorized him to make—"Bruce Craven, Attorney for W. L. Slayton & Co." In the letter written by Slayton & Co. on 19 April they stated, "When these bonds were offered for sale on 5 April by your county, *our representative and attorney for your State,* Bruce Craven, submitted a bid." This evidence, which was improperly excluded, did not contradict the written bid but explains and elucidates the bid by telling what attorney would pass upon the transcript of the record. *Johnston v. McRary,* 50 N. C., 369.

Exception 3 is as follows: "Q. You may state whether or not the county commissioners would have awarded these bonds to Slayton & Co. if there had been no other offer or proposition by Bruce Craven, attorney for W. L. Slayton & Co.?" Witness was chairman of the county commissioners, and his answer would have been, "They would not." The court erred in excluding the answer to this question because, if Craven had not said the bonds would be accepted without an attorney's opinion other than his own, the bonds would not have been awarded to the plaintiff.

There was further error set out in exceptions 4, 5, and 6, as follows: "The court charges you that if you believe all this evidence it would be your duty to answer the first issue 'Yes,' which reads, 'Is the plaintiff the owner and entitled to the possession of the certified check in controversy as sued on in this action?' "

If there was any evidence to the contrary, then the court erred in this instruction. As already stated, there was nothing in the written offer which says the bonds were bought subject to their *legality,* "To be determined by their attorneys." If that construction be placed upon said bid then Bruce Craven, whom the plaintiffs stated in their letter had authority to file said bid as attorney for W. L. Slayton & Co., told the defendants that said bonds would be passed upon by him as their attorney, and he has never yet given an opinion that the bonds were not legal. In fact there was neither then nor at any time any real doubt as to the validity of said bonds, for the legality of this very class of bonds had already been passed upon on 14 March, 1917, in the case of *Comrs. v. Spitzer,* 173 N. C., 147. If the attorney (Roose) had erroneous doubts, it did not invalidate the sale. Clearly the plaintiffs rejected their purchase of the bonds, which has cost the taxpayers of Cabarrus some $4,000, because, owing to the declaration of war the very next day, April 6, there was a slump in the price of bonds.

The county and other municipal officers in marketing bonds have always been at a disadvantage in dealing with bond buyers who by combination among themselves, or otherwise, have full opportunity to "chill the bidding," but it has never been held in our courts that the

highest bidder under a bid made by the admitted attorney of the bidder, who expressly stated at the time that he was authorized to make the bid, and who in a letter of 17 April by his clients was expressly admitted by them to have been authorized to make such bid, should be afterwards at liberty to reject such bid because, the market having fallen, another attorney of theirs then expressed a doubt as to the legality of the bonds. That is a matter which they should have investigated before making the bid, and if a doubt should subsequently arise it was a matter which should have been decided by the courts.

The phrase in the written bid requiring, as this does, that a certified record of the proceedings under which the bonds were issued should be submitted to the purchaser (which was done on this occasion), could not give the bidder the right to decide for himself as to the legality of the bonds, but would merely enable the purchaser to present any doubt as to the validity of the bonds to the courts. Otherwise the public are absolutely at the mercy of such bidders.

It may be noted that Mr. Craven not only stated unqualifiedly that he made the bid as attorney for the plaintiffs and deposited their $500 check by their authority as evidence of good faith, and at the session of the commissioners, when the bonds were awarded to his clients, unqualifiedly asserted that such bonds would be subject only to his approval as their attorney, and proved his good faith by entering into a personal difficulty to prove the integrity of his clients, but those clients subsequently in a letter of 17 April asserted that he was "their attorney for the State of North Carolina," and that never at any time since has Mr. Craven, by word or deed, thrown any doubt upon his assertion that he was duly authorized to buy said bonds, and he has given no indication since that he was not so authorized. Indeed it seems to be clear beyond question that the whole trouble arose solely because of the slump in the price of bonds which took place the next day upon the declaration of war. The purchasers, who had deposited $500 as evidence of their good faith, are now seeking to retract their bid, though the validity of such class of bonds had already been decided in this Court in the case above cited, *Comrs. v. Spitzer*, 173 N. C., 147, upon the very point upon which Attorney Roose expressed his doubt, and the identical bonds have since been sold, though at a loss, not caused by their invalidity, but owing to the war.

There has been nothing in the conduct of Craven, whom the plaintiff admitted to be their attorney for this State, to indicate that he has not acted in entirely good faith. It is the plaintiffs themselves, alone, who afterwards sought to withdraw their bid to the loss of many thousands of dollars to the taxpayers of Cabarrus and in bad faith to them and to the county commissioners, who, in reliance upon their good

faith as the highest bidder, lost the opportunity to sell the bonds to the next highest bidder or at public auction as the other bond buyers offered to do on that day.

There was error by the presiding judge in refusing the testimony of the county commissioners, as set out in the record, as to the transaction, and also in taking the case from the jury by instructing them to return a verdict in favor of the plaintiff if they believed the evidence. Men who deal with the Government, whether National, State or county, should learn that they must do so in the utmost good faith. There can be no possible question in this case that Craven made the bid for his clients with the fullest authority and in the utmost good faith, and he had done nothing to throw doubt upon this proposition or to indicate that he has repudiated his action. Whatever the motive of the plaintiffs in cancelling their bids, in regard to which there can be slight doubt, they had no right to do so. If they had any doubts about the validity of the bonds (as to which they should have satisfied themselves before making the bid), at least the legality of the bonds should have been tested before the courts. They could not decide the case in their own favor and to the loss of the other side. The cancellation upon the *ex parte* opinion of another of their attorneys is without excuse.

Even if the plaintiffs had the right to cancel their bid upon the opinion of another attorney than Mr. Craven, this Court had already decided more than a month before this occurrence, in *Comrs. v. Spitzer, supra,* that this very class of bonds was valid and, at the least, the good faith of that other attorney of the plaintiffs, who gave an opinion which served as an excuse to the plaintiffs to cancel their order when the bonds went down in price, should have been submitted to the jury upon all the evidence.

In protection to the taxpayers of North Carolina, whose rights have been so often sacrificed in such cases, the jury should have been allowed at least to have passed on the good faith of the plaintiffs in refusing to accept these bonds at a cost to the taxpayers of the county of Cabarrus of so many thousands of dollars. The counterclaim should have been submitted to the jury as well as the plaintiff's claim for return of the $500 which was deposited as a guarantee of the *good faith* which they have not proven to any jury, and hence are not entitled to recover.

The County Commissioners of Cabarrus heretofore saved their county and people from a heavy loss unjustly attempted to be imposed on them (as this Court held) in *Mfg. Co. v. Comrs.,* 183 N. C., 553.

LAURA BALLEW, ADMX. OF ALBERT BALLEW, v. ASHEVILLE AND EAST TENNESSEE RAILROAD COMPANY AND REGINALD HOWLAND.

(Filed 20 December, 1923.)

1. **Carriers—Railroads—Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Statutes—Comparative Negligence.**

The common-law principle that there could be no recovery of damages from negligence for a personal injury when the plaintiff was guilty of contributory negligence is now changed by statute (C. S., 3467) as relating to railroad employees, diminishing the recovery in proportion to the negligence attributable to the employee.

2. **Negligence—Contributory Negligence—Defenses—Actions.**

The plaintiff's contributory negligence will not bar his recovery of damages in his action when the defendant has inflicted the injury with either actual or constructive intent, but it is otherwise if it is admitted that he had not this intent, and his contributory negligence will bar his recovery.

APPEAL by Howland, individually, from *Bryson, J.*, at April Term, 1923, of BUNCOMBE.

Civil action. The defendant company operated an electric railway between Asheville and Weaverville (intrastate), of which the defendant Howland was the superintendent. The plaintiff's intestate was a motorman subject to the superintendent's orders. On 12 May, 1922, the intestate operated one of the cars, and on his return from Weaverville his car collided with another operated by Howland and he suffered injuries causing his death.

The issues were answered as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was the conduct of the defendant, Rex Howland, wilful and reckless, and his negligence gross? Answer: 'Yes.'

"3. Did the plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: 'Yes.'

"4. What damage, if any, is the plaintiff entitled to recover? Answer: '$35,118.75 net.'"

By consent the damages were reduced to $12,500.

Judgment for the plaintiff. Appeal by Howland, but not by the railroad company.

Mark W. Brown for the plaintiff.

Merrimon, Adams & Johnston for the appellant Howland.

ADAMS, J. In an action brought in a court of common law there could be no recovery for negligence by a plaintiff whose default contributed to the injury, but as against common carriers by railway this principle has been modified by statute. The fact that the employee may have been guilty of contributory negligence is not a bar to recovery, but in such case the damages shall be diminished by the jury in proportion to the negligence attributable to the employee. C. S., sec. 3467. This statute is effective against the railroad company but not against the defendant Howland, and the question for decision is whether the answer to the second issue prevents Howland from relying for his exoneration upon the plaintiff's contributory negligence.

The authorities generally hold that the doctrine of contributory negligence as a bar to recovery has no application in an action which is founded on intentional violence, as in the case of an assault and battery; but intentionable violence is not negligence, and without negligence on the part of the defendant there can be no contributory negligence on the part of the plaintiff. The verdict does not show that the intestate's death was caused by intentional violence, but it does show gross negligence and wilful and reckless conduct on the part of Howland.

In view of the plaintiff's admission that the defendant did not intend to injure the deceased, we think upon consideration of all the evidence the answer to the second issue signifies nothing more than gross, wilful, and reckless negligence. Does this finding of the jury entitle the plaintiff to recover notwithstanding the contributory negligence of the intestate?

Upon the second issue his Honor instructed the jury as follows: "I instruct you, gentlemen, that in order that one may be guilty of wilful and wanton conduct, it must be shown that he was conscious of the surroundings and was aware from his knowledge of existing conditions that injury would probably result from his conduct under the circumstances, and, with reckless indifference to consequences, consciously and intentionally did some wrong or omitted some known duty which produced injurious result." We must consider this instruction, not with reference to an award of punitive damages (for none were awarded), but with reference to the question just proposed.

In *Foot v. R. R.*, 142 N. C., 52, the plaintiff alleged that while she was traveling in a buggy on a highway near the defendant's road the defendant's employees operated a passing handcar so as to cause her horse to run away and injure her; and the jury found, in answer to the first issue, that the plaintiff was injured by the defendant's negligence, and in answer to the second, that the negligence was wanton and wilful. The defendant contended that the answers were incon-

sistent on the ground that a negligent and a wilful wrong cannot coexist. The Court held that the second issue was framed to enable the jury to say whether the wrongful act of the defendant permitted the recovery of punitive damages, and that the answer thereto fixed the character of the negligence. Furthermore, it was said, a breach of duty can be and frequently is intentional and wilful while the act is yet negligent, and that the idea of negligence is eliminated only when the injury or damage is intentional. Distinction was noted between the wilfulness which is referred to a breach of duty and the wilfulness which is referred to the injury caused or damage done. In the former there is wilful negligence; in the latter there is intentional injury. Wilful and wanton negligence will support a verdict for punitive damages, and intentional injury will constitute ground for recovery notwithstanding negligence on the part of the plaintiff.

The authorities hold, however, that the intention to inflict injury may be actual or constructive. In *Conner v. Railway,* 45 N. E. (Ind.), 662, it is said: "The substance of the rule as established by the cases to which we have referred is that, to entitle one to recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reasonable consequence would be to produce injury to others, the actor having knowledge of the situation of those others. There must have been an actual or constructive intent to commit the injury." *McClellan, J.,* speaking for the Supreme Court of Alabama, stated the rule in this language: "The true doctrine, and that supported by many decisions of this Court, as well as the great weight of authority in other jurisdictions, is that, notwithstanding plaintiff's contributory negligence, he may yet recover if, in a case like this, the defendant's employees discover the perilous situation in time to prevent disaster, by the exercise of due care and diligence, and fail, after the peril of plaintiff's property becomes known to them as a fact, and not merely after they should have known it, to resort to all reasonable effort to avoid the injury." 9 Southern, 233. And in *Central Railway Co. v. Moore,* 63 S. E. (Ga.), 644, it is said: "The court in charging the jury upon the subject should make it plain that it (the rule that contributory negligence is not a defense against wilful and wanton negligence) is never applicable unless the defendant's conduct was such as to evince a wilful intention to inflict the injury or else was so reckless or so charged with indifference to the consequence where human life or limb was involved as to justify the jury in finding a wantonness equivalent in spirit to

actual intent." See, also, *Chicago Ry. Co. v. Jordan,* 74 N. E. (Ill.), 452; *McIntyre v. Converse,* 131 S. E. (Mass.), 198; *Louisville and N. R. R. v. Coniff's Admr.,* 27 S. W. (Ky.), 865; *Ft. Wayne, etc. Traction Co. v. Justus,* 115 N. E. (Ind.), 585; *Ehlers v. R. R.,* 194 Ill. A., 24; *Birmingham Ry. v. Cockrum,* 179 Ala., 372; *Holwerson v. Ry. Co.,* 50 L. R. A. (Mo.), 850; *Banks v. Braman,* 188 Mass., 367; *Brittain v. R. R.,* 167 N. C., 642; Thompson on Negligence (2d Ed.), sec. 20 *et seq.*

The meaning of "constructive intention" or the spirit of wilfulness, which is equivalent to the actual intent, may be illustrated by reference to one or two decisions. In *Aiken v. Street Railway,* 184 Mass., 269, there was evidence tending to show that the plaintiff, a boy six and one-half years of age, was on the lower step of a car which was going around a curve from one street to another and was clinging to the step trying to get into a stable position, and that he cried out to the motorman, "Let me off"; that the motorman saw and heard him, and knowing that he was in a place of danger, turned on the power in a wanton and reckless way for the purpose of starting the car quickly, and that the plaintiff was thrown off and injured. The judge instructed the jury that to maintain the action on the ground of wanton and reckless conduct it must be proved that the motorman wilfully and intentionally turned on the power with a view to making the car start forward rapidly and go at full speed quickly, but that it was not necessary to prove that he did it with the intention of throwing the boy off and injuring him. He also told them that the plaintiff need not show that he was in the exercise of due care. The Supreme Judicial Court, sustaining the instruction, reached this conclusion: "In these cases of personal injury there is a constructive intention as to the consequences which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge, which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness. *Palmer v. Chicago, St. Louis and Pittsburgh Railroad,* 112 Ind., 250; *Shumacker v. St. Louis and San Francisco Railroad,* 39 Fed. Rep., 174; *Brannen v. Kokomo, Greentown and Jerome Gravel Road Co.,* 115 Ind., 115. In an action to recover damages for an assault and battery, it would be illogical and absurd to allow as a defense proof that the plaintiff did not use proper care to avert the blow. See *Sanford v. Eighth Avenue Railroad,* 23 N. Y.,

343, 346. It would be hardly less so to allow a similar defense where a different kind of injury was wantonly and recklessly inflicted. A reason for the rule is the fact that if a wilful, intentional wrong is shown to be the direct and proximate cause of an injury, it is hardly conceivable that any lack of care on the part of the injured person could so concur with the wrong as also to be a direct and proximate contributing cause to the injury." In this case the motorman had actual knowledge of the plaintiff's situation and the danger to which he was exposed, and the doctrine of constructive intent was applied.

This Court recently approved the doctrine in *Fry v. Utilities Co.*, 183 N. C., 281. A boy between eleven and twelve years of age was riding on the rear step of an ice wagon which was moving northward on Tryon Street in the city of Charlotte. The street railway track was undergoing repairs and a pile of concrete extended from Seventh Street to Ninth Street, with the exception of an open space about thirty feet in length just south of and about fifty feet distant from Ninth. The driver of the wagon knew the boy was on the rear step and without warning turned the horses on the car track at the open space just in front of an approaching car. A collision occurred and the boy was killed. The jury found that his death was caused by the negligence of the ice company and assessed the damages. The Court, granting a new trial for error in the instruction as to contributory negligence, said: "There can be no doubt as to what was the conclusion of the jury, which is that the driver of the wagon, regardless of any contributory negligence of the boy, acted not only negligently when he had a chance to save him, but wilfully, recklessly, and wantonly, and against such conduct as this finding implies, the contributory negligence of the boy is no protection or bar to the plaintiff's recovery. If the party injured is himself ever so negligent; the one who caused that injury is liable to him for the ensuing damages if he was aware of the dangerous situation and caused the damage wilfully, wantonly, or even recklessly, that is, if he did so without regard to the consequences of his act and being indifferent to the rights of others." Here, too, the defendant's employee had actual knowledge of the intestate's peril. See, also, *Brendle v. R. R.*, 125 N. C., 474.

These and other authorities maintain the doctrine that if the defendant knows the plaintiff is in a perilous situation and wilfully and wantonly does an act which naturally and reasonably will result in the plaintiff's injury, the wilful and wanton act imparts a constructive intention to injure, which is imputed to the defendant. Hence, where the defendant intentionally injures the plaintiff, whether the intention to injure be actual or constructive, the plaintiff's contributory negligence is not a bar to his recovery of damages.

In the instant case Howland had no actual intent to cause injury to the intestate. This the plaintiff admits. And there is no evidence that he had actual knowledge of the intestate's peril or the place where the intestate's car was running until about the time the collision occurred—no evidence of such wilful and wanton conduct as imputed to him the constructive intent to injure the deceased. There is abundant evidence of negligence, but no sufficient evidence of the defendant's actual or constructive intent to cause injury or death.

In concluding, we note just here what *Mr. Justice Hoke* said in *Hicks v. Mfg. Co.*, 138 N. C., 331, concerning the decision in *Greenlee's case* (122 N. C., 977) and in *Troxler's case* (124 N. C., 190): "These opinions could be well justified and upheld on the ground that a failure to correct an evil of this magnitude, when it could be accomplished so effectually at an insignificant cost, was such a reckless and wanton disregard of the lives and safety of employees as to amount to an intentional wrong, against which contributory negligence is no defense. They have, however, been approved and accepted as decisions eminently just and proper in applying the principles of the law of negligence to new and changing conditions, and can be upheld and supported both by reason and precedent."

There was error in giving judgment upon the verdict against the defendant Howland, and to this extent the judgment should be reformed.

Error.

CITIZENS HOTEL COMPANY v. E. D. LATTA.

(Filed 20 December, 1923.)

Corporations—Subscriptions—Conditions—Waiver.

A subscriber to shares of stock in a corporation proposed to be formed waives certain of the stipulations contained in his written subscription when he has afterwards become an incorporator and active trustee for its formation for the purposes set forth in his subscription, and has attempted to deal with it under the provisions of its incorporation.

CLARKSON, J., did not sit.

APPEAL by defendant from *Long, J.*, at March Term, 1923, of MECKLENBURG.

Civil action to recover the sum of $5,000, same being the first call of 10 per cent on defendant's subscription for 500 shares of the capital stock of the plaintiff corporation of the par value of $100 per share.

The defendant's original stock subscription reads as follows:

"$50,000.00. Charlotte, N. C., 10 April, 1920.

"The undersigned, in consideration of similar subscriptions of other subscribers, hereby subscribes for and agrees to and with the following named trustees, to wit:

"H. M. Victor (chairman), Robert Lassiter, W. H. Wood, W. S. Alexander, E. D. Latta, W. H. Twitty, Julian H. Little, C. C. Coddington, A. J. Draper, Joe Garibaldi, J. A. Durham, and J. H. Wearn, that he will take and pay for 500 shares of the par value of $100 each of the capital stock of a corporation to be formed under the laws of North Carolina by said trustees, or such number of them as may apply therefor, with a capital stock of not less than $750,000, for the purpose of purchasing the necessary real estate in the city of Charlotte and building a hotel thereon. The said stock is to be issued when the said corporation is organized, and paid for in such installments as the board of directors may order, the first installment to be not exceeding 20 per cent of the par value due and payable at the time of organization, and subsequent installments of not exceeding 20 per cent each to be payable at intervals of not less than four (4) months.

"The foregoing subscription is made upon the condition that subscriptions for $750,000 of stock shall be secured within six months from 1 April, 1920, and that a valid proposal for a contract to lease the proposed hotel shall be received from a responsible party within twelve months from 1 April, 1920, the rent to be not less than a 6 per cent return on the investment. Lessee to pay all taxes, insurance, and upkeep.

Witness: (Name) E. D. LATTA,
JNO. M. SCOTT. (Address) Charlotte, N. C."

Having secured uniform subscription contracts, like the above, totaling $777,400 prior to 30 April, 1920, the defendant and three other "trustees" and one additional subscriber, designating themselves as incorporators, made application, in due form, for articles of incorporation, and upon which the Secretary of State issued a charter to the plaintiff company.

In this application, the defendant represented himself as subscribing for 500 shares of stock, the same amount as in his original subscription contract, and further agreed that "the corporation can organize and begin business when $107,000 of the capital stock, composed of 1,070 shares, shall have been subscribed." This was the amount of stock subscribed by the incorporators.

The charter contains none of the conditions set forth in the uniform stock subscription, but provides that the corporation shall have power

"to engage in, carry on and conduct a hotel business, either itself or through its lessee or lessees, successors or assigns," and "to build all necessary buildings and to buy, lease, or otherwise acquire all necessary property, either real or personal, for said purposes, . . . to purchase, hold, sell, mortgage by deed of trust or otherwise, and to convey or sell real estate and personal property for the proper conduct of the business of the corporation," . . . anywhere in the United States.

After the charter was received by the incorporators, they all, including the defendant, signed a written agreement waiving notice and designating the time and place to hold the meeting for the organization of the corporation, and caused a notice to be sent out to every subscriber inviting him to come and participate in the meeting, which was held on 11 May, 1920, as agreed; and while the defendant could not be present, he requested H. M. Victor to be present and look after his interests, and Mr. Victor was present and took part in the meeting.

The corporation was duly organized. The board of directors elected officers, and they shortly thereafter began to consider sites for the hotel, and the defendant appeared before the board in person once or twice, trying to sell them a site for the hotel, without any conditions or reservations, and wrote them some two or three times on the same subject and to the same purpose and effect.

Owing to the depressed business conditions that soon followed, the officers of the company decided to defer action for a while, and sent to all the subscribers for stock, including the defendant, a letter dated 3 September, 1920, advising that they would defer action until the following year.

In the early part of 1921 the officers became active and finally obtained propositions from two parties to lease the proposed hotel, and contracted with one set of proposed lessees, and notified the stockholders thereof.

They rejected the sites offered by the defendant and selected and agreed to purchase one for the hotel, with the benefit of the judgment and approval of the lessees, at the corner of West Trade and Poplar streets, in the city of Charlotte, and then made a call of 10 per cent on all the stock subscribers, and gave notice of said call for the same to be due 10 January, 1922.

The defendant never questioned his liability on his subscription until after he received notice of the said first call, to which he replied that he would not pay either that or any other call, and denied his liability *in toto*.

The plaintiff instituted this suit on 20 March, 1922, to recover the said first call, and founded its cause of action solely upon the agreement of the defendant as set forth in the charter.

The defendant answered, admitting the execution of the charter, notice of the call, and his refusal to pay, and set up as a defense that he did not intend by signing the charter to subscribe for any different amount of stock or upon any different terms than as set forth in his original subscription, which he pleaded as a defense, claiming that certain stipulations set forth therein were and are conditions precedent to his liability to take and to pay for his subscribed stock, that they had not been performed, and therefore he was not bound by his subscription. He also denied in his answer the legal existence of the plaintiff, or the right of any one ever to have acted for it.

The plaintiff filed a replication, pleading that the original liabilities of the defendant were merged in or superseded by the charter, but if that were not so that the said stipulations pleaded by him were not conditions precedent, and even if they were they had been fully performed in so far as necessary, but if they had not, the defendant waived the same by his conduct in signing the charter, helping to organize the corporation or agreeing for it to be organized, and his attempts to deal with it and fasten obligations upon it through its officers.

Upon the issues thus joined, the jury returned the following verdict:

"1. Did the defendant subscribe to the articles of incorporation marked 'Exhibit A,' attached to the complaint? (By consent.) Answer: 'Yes.'

"2. Did the plaintiff make a call of 10 per cent on all stock subscriptions, including that of the defendant, on or about 8 December, 1921, to be due and payable 10 January, 1922, and give defendant due and proper notice thereof? (By consent.) Answer: 'Yes.'

"3. Did the defendant fail and refuse to make payment of the amount of the said call? (By consent.) Answer: 'Yes.'

"4. Was the condition of the uniform subscription contract that subscriptions for $750,000 of stock shall be secured within six months from 1 April, 1920, complied with? Answer: 'Yes.'

"5. Did the defendant waive compliance with provision of the uniform subscription contract requiring that subscriptions for $750,000 of stock shall be secured within six months from 1 April, 1920? Answer: 'Yes.'

"6. Was the condition of the said uniform subscription contract that a valid proposal for a contract to lease the proposed hotel shall be received from a responsible party within twelve months from 1 April, 1920, the rent to be not less than 6 per cent return on investment, and lessee to pay all taxes, insurance and upkeep, complied with? Answer: 'Yes.'

"7. Did the defendant waive compliance with the condition of the uniform subscription contract that a valid proposal for a contract to

lease the proposed hotel shall be received from a responsible party within twelve months from April, 1920, the rent to be not less than 6 per cent return on investment, and lessee to pay all taxes, insurance and upkeep? Answer: 'Yes.'

"8. In what amount is defendant indebted to the plaintiff on account of the call of 10 per cent made by plaintiff on or about 8 December, 1921? Answer: '$5,000, and interest from 10 January, 1922.'"

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

Pharr, Bell & Sparrow and Thaddeus A. Adams for plaintiff.
Cansler & Cansler and Tillett & Guthrie for defendant.

STACY, J., after stating the facts as above: The record in the instant case is voluminous; it contains, in all, 80 exceptions and 79 assignments of error. After a careful and painstaking investigation of the whole matter, we are constrained to believe that the case has been tried substantially in accordance with the law bearing on the subject, and that the validity of the trial should be sustained. Apparently all matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

In their final analysis, the questions of law presented for our consideration arrange themselves in a narrow compass. The defendant contends (1) that his rights and liabilities are to be determined entirely by the provisions of the uniform subscription contract without reference to anything else, and (2) that the conditions contained in the last paragraph of said subscription contract, as above set forth, are conditions precedent which have never been performed. In support of this position, defendant relies strongly upon the case of *Alexander v. Savings Bank*, 155 N. C., 124. But the verdict in the *Alexander case* is quite different from the one in the case at bar, and for this reason it cannot be considered as a controlling authority. On the contrary, we think the principles announced in *Coöperative Assn. v. Boyd*, 171 N. C., 184, are more nearly applicable to the facts of the instant case, though it is conceded the two cases are somewhat dissimilar.

In the present case it should be remembered that the defendant was one of the trustees named in the uniform subscription contract; that he signed the articles of incorporation and agreed for the plaintiff company to be organized, and thereafter he offered to sell to the plaintiff a hotel site, etc. Upon evidence of this character, all the controverted

issues of fact have been answered by the jury in favor of the plaintiff. The case is distinguishable from those cited and relied on by defendant's counsel in their elaborate brief by virtue of the verdict rendered herein. The rights of the parties have been settled by the jury in a cause tried in conformity to established principles of law. We have been unable to find any reversible error on the record.

No error.

CLARKSON, J., did not sit.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF WILLIAM LOVE, DECEASED.

(Filed 20 December, 1923.)

1. Wills—Revocation—Cancellations—Alterations—Statutes.

In order to a revocation of a will, in whole or in part, under the provisions of C. S., sec. 4133, there must not only exist the intent of the testator to cancel, but it must be accompanied by the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue.

2. Same.

Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein, and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of C. S., sec. 4133; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation.

ISSUE of *devisavit vel non* as to the last will and testament of William Love, deceased, tried before *Harding, J.*, at August Term, 1922, of GUILFORD.

The will having been proved in common form, at the instance of E. E. Bain, one of the executors duly named therein, a caveat was entered by E. C. Love and other children of the testator to the effect that the second item of paper-writing constitutes no part of said last will and testament, same having been canceled or revoked by the testator in his lifetime; and on citation made, the matter was transferred

to the docket of the Superior Court where it was submitted to the jury, as stated, on an issue in form as follows:

"1. Is the paper-writing propounded the last will and testament of William Love, deceased, or any part thereof, and if so, what part?" And to said issue the jury made answer: "Yes, all except article two (2)."

On the trial it was proved that William Love died in Morganton, N. C., on 1 December, 1921, domiciled in the county of Guilford, and leaving a large estate of real and personal property devised and bequeathed chiefly to his children—Annie E. Bain, wife of E. E. Bain; E. C. Love, W. H. Love, J. A. Love, Mrs. Sallie Love Bass, and Lelia Pitts, a grandchild. That said will was duly signed and witnessed and complete in form on 29 March, 1917, and when same was propounded for probate in February, 1922, the second item of said will, the validity of which is challenged by the caveat, contained the erasure of certain words in said item by having short ink marks drawn across face of these words, and also the same or some of them seem to have been blurred to some extent as if they had been rubbed over with a finger end. Whether at the time of the cancellation or at some other time does not clearly appear, but neither of these erasures or attempted erasures were such as to render the words illegible, and the said item as it then appeared was in form as follows, the words of the items affected by said erasures being in italics:

"Second: I will and devise unto my *daughter, Annie* E. Bain, wife of E. E. Bain, my *entire factory* site, with all improvements thereon, located on the west side of and adjacent to South Ashe Street, and just south of and adjacent to the North Carolina Railroad Company right of way; subject to and charged, however, with the payment of seven thousand dollars ($7,000) payable to my son, E. C. Love, and with the further sum of *seventeen hundred and fifty dollars* ($1,750), payable to my son, *J. A. Love.* In the event that my said daughter, wife of E. E. Bain, shall fail to pay unto said E. C. Love the seven thousand dollars ($7,000) hereinbefore charged on said property, in his favor, and the further sum of seventeen hundred and fifty dollars ($1,750) hereinbefore charged on said land and property, in favor of and payable to *J. A. Love,* then my executors hereinafter named shall sell said property, and out of the proceeds thereof pay unto said E. C. Love the principal sum of seven thousand dollars *($7,000),* and unto *J. A. Love* the sum of seventeen hundred and fifty dollars *($1,750),* and the balance of said proceeds shall go and be the property of my said daughter, wife of E. E. Bain. The said two sums above charged on said land, one payable to E. C. Love and the other to *J. A. Love,* shall commence to bear interest after sixty days after my death, and shall bear interest

at the rate of six per cent per annum till paid; and the power of sale vested in my said executors shall be exercised unless my said daughter, wife of E. E. Bain, shall pay said charges and interest, as hereinbefore provided, within twelve months after my death."

There was evidence tending to show that from the time the will was written and executed until June, 1920, it was in a sealed envelope in the office of one of testator's sons, E. C. Love, and in June, 1920, testator obtained possession of the will and kept it until January, 1921. That he then handed it to the propounder, E. E. Bain, in a sealed envelope, which was not opened till after the testator's death, when it was found in its present condition. That about the time the will was obtained from his son, E. C. Love, and before that, testator, who had been an alert and capable business man, became affected with a condition supposed to be senile dementia, which caused at times aberration of mind more or less protracted; that this condition grew upon him until he became unmanageable, and he was treated at two or more institutions for his disorder, and was in one of them at Morganton at the time of his death.

It was further shown that while he had control of his will, in 1920, he was heard to say to one or more persons, and in reference to this item in question, that the factory property had enhanced in value to such an extent that the disposition he had made of it would work an injustice, and he intended to change it in that respect, and again that he had changed it, etc.

On the verdict, as heretofore stated, there was judgment for caveators, and propounders, having duly excepted, appealed.

King, Sapp & King and Brooks, Hines & Smith for propounders.

Bynum, Hobgood & Alderman, Wilson & Frazier, and Hoyle & Harrison for caveators.

HOKE, J. Our statute on the subject, C. S., sec. 4133, provides in effect that no will or testament in writing, or *any clause thereof,* shall be revoked, except by burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence and by his direction and consent, or by a formal will with witnesses or a holograph will, duly executed as the statute requires and prescribes.

In construing this statute, it is held with us that in any of the modes specified there may be a partial revocation of the will. *In re Will of Saunders,* 177 N. C., 156; *Baker v. Edge,* 174 N. C., 100; *Barfield v. Carr,* 169 N. C., 574; *In re Wellborn's Will,* 165 N. C., 636; *Cutler v. Cutler,* 130 N. C., 1. And that in order to a revocation by burning, cancelling, etc., there must be the physical act effecting an erasure or

destruction of some material portion of the will, and this must have been done with intent to revoke. Both the physical act and the intent must concur to an effective revocation. If a testator accidentally drops his will, duly executed, into the fire and it is burned in whole or in part, or though he may have a settled purpose to revoke and has expressed this purpose to others, if there is a failure in the physical act required to carry out his purpose, there is no revocation.

And in case of an alleged revocation by cancelling, while it is not required that the words should be effaced so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the same that is challenged on the issue. *In re Shelton's Will,* 143 N. C., 218; *White v. Casten,* 46 N. C., 197; *Hise v. Fincher,* 32 N. C., 139; *Bethell v. Moore,* 19 N. C., 311; *Evans' appeal,* 58 Pa. Rep., 238; *Wolf v. Bolliner,* 62 Ill., 368; *Clark & Perry v. Smith,* 34 Barbour's Reports, 140; *Martins v. Gardiner,* 8 Sim., 72; 59 English Reports, 29; 1st Jarman on Wills, 291-92-93-94; Underhill on Wills, sec. 229.

In *Shelton's case, supra,* it was held that a cancellation or erasure made after the execution of a will, which does not in fact destroy some material portion of the substance of the will, does not constitute a revocation thereof. In *White v. Casten,* that revocation of a will is an act of the mind, demonstrated by some outward and visible sign. And in *Cutler v. Cutler* it is said in the opinion: "That revocation consists of two things—the intention of the testator and some outward act or symbol of destruction. A defacement, obliteration or destruction without the *animo revocandi* is not sufficient, neither is the intention, the *animo revocandi,* sufficient without some act of obliteration or destruction done." And coming more directly to the question presented, it was held in *Clark & Perry v. Smith, supra:* "The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation." "A testator having an only son, James W. Smith, devised certain real estate to his 'son, James W. Smith.' After the execution of the will he, with a pen, erased from the clauses of the will containing the devise the name, 'James W. Smith,' leaving the word 'son' uncanceled: *Held,* that neither the will nor the devises to James W. Smith were revoked by the erasures."

And in *Martins v. Gardiner, supra,* where the name of the legatee had been erased in certain places, leaving it in others, "That as the description and in some places the name of the legatee remained uncanceled the Court would not be warranted in holding that the bequest

to her was revoked." A case that is quoted with approval by Mr. Jarman in his valuable work on Wills, at p. 293.

On a proper application of these authorities and the principles they approve and illustrate, the Court is of opinion that there has been no revocation of this will or any part of the same, for the want of any physical act effecting a material alteration in its meaning. Leaving out the words that are obliterated, and accepting the position that the erasures were made with intent to revoke, the primary and controlling clause in this item of the will remains unaltered and is sufficient to carry the designated property to the devisee as originally written.

True, in the portion of the will descriptive of the devisee, the words "Annie E." and possibly "my daughter, Annie E.," are erased, but the words "wife of E. E. Bain" remain, fully designating the beneficiary. And as to the property, while the words "entire factory" are erased, the words "my site" remain, followed by a full and sufficient description of the property by metes and bounds. The significance of the devise, therefore, stands unimpeached. Whether this failure on the part of the testator to carry out his expressed purpose arose from an attack of unconsciousness, to which he was at times subject, or from an infirmity of purpose incident to his disease that was then upon him, or otherwise, he has failed to signify his intent by any adequate physical act, and it must be held that on the evidence, if accepted by the jury, there has been no revocation of this will or any part thereof.

We are not unmindful of the subsequent erasures, in which the name of one of the beneficiaries, J. A. Love, is marked out wherever the same appears, but this is manifestly dependent, and intended to be, on the successful revocation of the principal devise to the daughter, on which it is made a charge, and this attempt having failed for the reasons stated, the attempted revocation as to this legatee fails also. Several of the authorities above cited and others are in general support of this position, and no claim to the contrary is insisted on before us. See *Bethell v. Moore, supra; Wolf v. Bolliner,* 62 Ill., *supra;* 1st Jarman on Wills, 294.

On the record the judge should have charged the jury, as requested, that there were no facts in evidence permitting an inference of revocation, and this will be certified that the verdict of the jury be set aside and further proceedings had in accord with this opinion.

Reversed.

WILLIAM WATERS ET AL. v. BOARD OF COMMISSIONERS OF BUNCOMBE COUNTY ET ALS.

(Filed 20 December, 1923.)

1. **Schools—Bonds—Petition—Resolution—Orders—Evidence—Presumption—Burden of Proof.**

   The recitations of the school board for the district and of the county commissioners calling an election for an issuance of bonds for school purposes, declaring a full investigation had been made as to the sufficiency in number of the signers of the petition to the school board for that purpose, is *prima facie* evidence of the fact, and the bonds accordingly to be issued will not be declared invalid on the ground of the insufficiency of the investigation unless the presumption is overcome by the plaintiff seeking to declare them invalid.

2. **Statutes—Repeal—Repugnancy.**

   The law does not favor the repeal of a statute by implication, and only such parts that are irreconcilable with the later act will be construed as repealed.

3. **Same—Schools—Bonds—Taxation.**

   A later statute authorizing the levy of a special tax for school purposes by a district does not repeal a former act providing for the issuance of bonds therefor; and the act of 1921, amendatory of the act of 1915, in relation to this matter, applicable to the school laws of Buncombe County, does not revive the act of 1913 so as to repeal the act of 1915, there being no conflict therein and the Municipal Finance Act of 1921, relating to municipal corporations as cities and towns, etc., and not to school districts, is not in conflict with such matters relating to school districts. Chapter 136, Public Laws of 1923, has no application to this case.

4. **Constitutional Law—Schools—Taxation—Municipal Corporations—Faith and Credit—Elections.**

   The provisions of Article VIII, section 4, of our Constitution, relates to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting debts or pledging their credit than Article VII, section 7, which requires an election by its voters to do so, when not for necessary expenses; and an exception to the constitutionality of chapter 722, Public Laws of 1915, cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized.

APPEAL by plaintiffs from *McElroy, J.*, at October Term, 1923, of BUNCOMBE.

Civil action to enjoin the defendants from issuing certain school bonds of Haw Creek Special School District, Buncombe County, to the amount of $50,000, which the defendants propose to issue pursuant to chapter 722, Public-Local Laws 1915, the same having been authorized by an election held in said school district on 17 October, 1922.

From a judgment sustaining the legality of the election and upholding the validity of the bonds in question, the plaintiffs appealed.

M. W. Brown for plaintiffs.

Chas. N. Malone, G. A. Thomasson, and George W. Craig for defendants.

STACY, J. Upon the petition of one-fourth of the voters of Haw Creek Special School District, which petition was approved by the county board of education, the board of county commissioners of Buncombe County ordered an election to be held in said district on 17 October, 1922, for the purpose of submitting to the qualified voters of said district the question as to whether bonds to the amount of $50,000 should be issued for said school district, the proceeds derived therefrom to be used in erecting a new school building as provided by chapter 722, Public-Local Laws, 1915. The election was duly carried and the defendants are preparing to issue the bonds as authorized. This suit is to test the regularity of said election and to determine the validity of the said proposed bond issue.

In the first place, it is alleged that while the action of the board of education in approving the petition in question and requesting the board of commissioners to order an election thereon appears to be regular on its face and in due form, yet, as a matter of fact, such action on the part of the board of education was without due inquiry as to whether the petition contained the requisite signatures of one-fourth of the qualified voters of said district, and that the approval of the board of education, as well as the action of the board of commissioners, was taken *pro forma,* for which reason, plaintiffs contend, the election should be held for naught and the bonds declared invalid.

The evidence offered by the plaintiffs, tending to impeach the proceedings of the two boards, was excluded by the trial court on the ground the plaintiffs have not alleged nor do they contend that the petition did not contain the requisite number of signatures, but the objection of the plaintiffs, without any allegation of bad faith, fraud, or lack of a proper petition, simply relates to the manner in which the two boards arrived at their conclusions. To the action of the trial court in excluding this evidence, the plaintiffs except and assign same as error. The exception cannot be sustained. The resolutions of the two boards are in due form and, in the absence of any allegation which tends to impeach their validity, evidence of the character offered will not be received. The recital in the resolution of the board of education that the petition presented was "signed by more than twenty-five

per cent of the voters residing in the district," and the recital in the resolution of the board of commissioners, "Whereas it has been found and judicially determined that the signatures to said petition constitute more than twenty-five per cent of the voters resident in said school district: Therefore, be it resolved," etc., are to be taken, *prima facie* at least, as correct. No competent evidence was offered to overcome the presumption of sufficiency arising from such recitals. 28 Cyc., 977; *McManus v. The People,* 183 Ill., 391. Indeed, the sufficiency of the petition is not even questioned.

The next contention of the plaintiffs, which merits discussion, is that chapter 722, Public-Local Laws of 1915, is repealed by implication by the passage of chapter 73, Public-Local Laws, Extra Session 1921, or, if not abrogated by this act, it is repealed by implication by the Municipal Finance Act, ch. 106, Public Laws, Extra Session 1921.

Chapter 73, Public-Local Laws, Extra Session 1921, purports to amend chapter 518, Public-Local Laws of 1913, an act relating to the school law in its application to Buncombe County, but this act of 1913 in no way conflicts with chapter 722, Public-Local Laws of 1915. The act of 1915 provides for issuance of bonds "for the purpose of repairing, altering, making additions to or erecting new buildings, or for purchasing schoolhouse sites and playgrounds," whereas the act of 1913 merely authorizes the voting of a special tax of ten cents to maintain, repair, and erect schoolhouses. It did not and was not intended to authorize a bond issue on behalf of school districts. Hence, the amendatory act of 1921 did not revive the act of 1913 so as to repeal the act of 1915, because they are not in conflict. Repeals by implication or construction are not favored, and for such a repeal to take effect, the repugnancy between the later statute and the one of earlier date must be clear, and only then will the repeal operate to the extent of such repugnancy. *S. v. Perkins,* 141 N. C., 797; *Comrs. v. Henderson,* 163 N. C., 114; *S. v. Kelly, ante,* 365. For like reason it cannot be said that the act of 1915 is repealed by implication by the Municipal Finance Act of 1921. By the express terms of the latter act a "municipality means and includes any city, town or incorporated village in this State, now or hereafter incorporated," and this act nowhere purports to deal with school districts. The two acts are not in conflict, hence the later act will not be construed to repeal the one of earlier date. *S. v. Perkins, supra,* and cases there cited.

Plaintiffs further contend that chapter 722, Public-Local Laws of 1915, violates Article VIII, section 4, of the State Constitution, because it contains no limitation upon the amount of bonds which may be issued thereunder. The section of the Constitution in question makes

it "the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

It will be observed that this language is more restricted than that used in Article VII, section 7: "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 officer of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

We have held consistently that school districts are municipal corporations within the meaning of Article VII, section 7, of the Constitution. *Perry v. Comrs.*, 148 N. C., 521; *Smith v. School Trustees*, 141 N. C., 155; *Hollowell v. Borden*, 148 N. C., 256. But apparently in no case, where the question was squarely presented, has it been held that school districts come within the purview of Article VIII, section 4, of the Constitution. In *S. v. Green*, 126 N. C., p. 1034, it was said: "The Constitution, Art. VIII, sec. 4, authorizes the General Assembly to 'provide for the organization of cities, towns and incorporated villages,' and from this it would seem that only those that are thus 'organized' should, in purview of law, come under that head." And again in *Felmet v. Comrs., ante*, p. 254: "The words 'school district' are not within the purview of Article VIII, section 4, of the Constitution."

We are of the opinion that chapter 722, Public-Local Laws of 1915, is not unconstitutional by reason of any failure of the Legislature to limit, in said act, the amount of bonds which may be issued thereunder.

It will be observed that the bonds in question were authorized by an election held on 17 October, 1922, long before the passage of chapter 136, Public Laws 1923, and it is not contended that the validity of said bonds is in any way affected by this later act. In fact, it was conceded on the argument, by counsel for both sides, that the act of 1923 has no application to the facts of this case.

We have examined the remaining exceptions with care—none have been overlooked—but we do not consider them of sufficient moment to warrant any extended discussion. The judgment entered below will be upheld.

Affirmed.

W. M. PERSON ET AL. V. R. A. DOUGHTON, COMMISSIONER OF REVENUE.

(Filed 20 December, 1923.)

1. Taxation—Mandamus—Corporations—Shares of Stock — Pleadings — Demurrer—Courts—Jurisdiction—Commissioner of Revenue.

On this appeal from sustaining a demurrer of the Superior Court for a writ of *mandamus* to compel the State Commissioner of Revenue to have listed for taxation as personal property shares of stock in foreign corporations held by resident stockholders, in this case *it is held* that the opinion in *Person v. Watts*, 184 N. C., 499, controls, and that the complaint failed to state facts sufficient to constitute a cause of action, and that the court had no authority or jurisdiction to grant the relief demanded.

2. Same—Constitutional Law.

The provisions of section 4, Revenue Act of 1923, excepting from taxation shares of stock held in this State when the situs of the corporation is in another State where it has its principal place of business and conducts the same, are not in contravention of Article V, section 3, of the State Constitution: *Held further*, the remedy by *mandamus* is not ordinarily applicable when the constitutionality of a statute is involved in the controversy.

CLARK, C. J., dissenting.

APPEAL by plaintiffs from *Cranmer, J.*, at chambers in Raleigh, 20 June, 1923. From WAKE.

Application for writ of *mandamus*, heard upon demurrer, and from a judgment sustaining the demurrer, plaintiffs appeal.

W. M. Person for plaintiffs.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

STACY, J. In this action or proceeding, plaintiffs make application for a writ of *mandamus* to compel the defendant, Commissioner of Revenue of North Carolina, by order of court, to have listed for taxation, as personal property of the respective holders thereof, all shares of stock in foreign corporations held by individual shareholders and residents of this State. A demurrer was interposed in the trial court and sustained upon the ground (1) that the complaint, or petition, failed to state facts sufficient to constitute a cause of action, and (2) that the court had no jurisdiction or authority to grant the relief demanded. The appeal presents for review the correctness of the judgment sustaining the demurrer. We held in *Person v. Watts*, 184 N. C., 499—a case exactly parallel with the one at bar, so far as the right to a writ of *mandamus* is concerned—that the plaintiff there had not only applied for the wrong remedy, but had also selected the wrong forum. The same dual error has been repeated here.

It is the position of the plaintiffs that, under Article V, section 3, of the Constitution, the Legislature is required to pass laws "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"; and that this section has been violated by the following so-called "exemption clause" in section 4 of the Revenue Act of 1923: "Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock in this State, and the *situs* of such shares of stock in foreign corporations, owned by residents of this State, for the purposes of this act, is hereby declared to be at the place where said corporation undertakes and carries on its principal business." Wherefore plaintiffs pray that this clause in the Revenue Act of 1923 be declared null and void and that the defendant be required, by judicial decree, to have listed for taxation, as personal property of the respective holders thereof, all such stock in foreign corporations held by individual stockholders and residents of this State.

Even if the above clause in the Revenue Act of 1923 be unconstitutional—which it does not seem to be, though the question is not before us for decision—still the plaintiffs would not be entitled to the relief demanded, for the judiciary is without power to levy assessments or to devise a scheme of taxation. *Fert. Co. v. McFall,* 128 Tenn., 645. This is a legislative and not a judicial function.

Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Missouri v. Murphy,* 170 U. S., 78; *Withers v. Comrs.,* 163 N. C., 341; *Edgerton v. Kirby,* 156 N. C., 347; *Betts v. Raleigh,* 142 N. C., 229. As to when the writ will issue generally, see note to *M'Cluny v. Silliman,* 4 L. Ed., 263.

It is rarely, if ever, proper to award a *mandamus* where it can be done only by declaring an act of the Legislature unconstitutional. *People v. San Francisco,* 20 Cal., 591; *Wright v. Kelley,* 4 Ia., 624; *People v. Stephens,* 2 Abb. Pr. N. S. (N. Y.), 348. In *S. v. Douglas Co.,* 18 Neb., 506, this position is stated as follows: "On an application for a *mandamus* against the county commissioners of Douglas County to compel them to call an election in the city of Omaha for twelve justices of the peace therein, there being six precincts, and alleging that an act reducing the number of justices in said city to three was unconstitutional and void: *Held,* that the Court would not in that proceeding determine whether or not the act was in contravention of the Constitution."

The presumption is that the Legislature has done its duty and that an act passed by it is not in conflict with the Constitution. It is incumbent upon all ministerial officers to obey the law, not to disregard it.

The courts have no direct supervisory power over the Legislature. The two are separate and distinct, though coördinate branches of the same government. The Constitution may contain provisions intended to guide and to control the course of legislation, but the courts will not undertake to enjoin or to prevent the enactment of unconstitutional laws, nor will they direct what laws shall be enacted. They may only render them harmless in individual cases, when properly presented. It is not the function of the courts to change or to repeal statutes. Their duties are judicial. They pass upon the rights of litigants, and in doing so may declare an act of the Legislature valid or invalid, when directly and necessarily involved, but this is as far as they go in dealing with legislation. If the law-making body has failed to obey the constitutional mandates, the remedy is with the people, by electing other servants, and not through the courts.

The courts never anticipate a question of constitutional law in advance of the necessity of deciding it; and they never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, etc. Steamship Co. v. Comrs. of Immigration,* 113 U. S., p. 39; 28 L. Ed., p. 900; *Comrs. v. State Treasurer,* 174 N. C., p. 148; *Mass. v. Mellon,* 43 S. C. R., 597.

Again, the courts will not adjudge legislative acts invalid unless their violation of the Constitution be clear, complete and unmistakable. *Bonitz v. School Trustees,* 154 N. C., 379; *Coble v. Comrs.,* 184 N. C., p. 348. Speaking to this question in a recent case, *Adkins v. Children's Hospital,* 67 L. Ed., 440, the United States Supreme Court said: "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the Government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from *Chief Justice Marshall* to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."

But we pursue the matter no further, as the constitutionality of the above clause in section 4 of the Revenue Act of 1923 is not now before us for decision. The application for writ of *mandamus* in the instant case was properly denied.

Affirmed.

CLARK, C. J., dissenting: The Constitution of North Carolina, Art. V, sec. 3, is the Magna Carta in its guarantee of *equality* and *uniformity* in taxation to protect the weaker and less influential part of our people from being oppressed by over-taxation, forbidding discrimination in the laying of taxes, or by exempting the property of the wealthy and influential from their share of taxation, and thereby increasing the taxation upon those who are less able to protect themselves from such inequality.

This section provides in unmistakable language, which can be construed by any one as clearly and intelligently, and doubtless more correctly, than by merely technical lawyers who sometimes construe constitutions and legislation in the light most favorable to their clients.

This section is thus plainly expressed in Constitution, *Art. V, sec. 3—"Taxes Shall be by Uniform Rule and Ad Valorem: Laws shall be passed taxing, by 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 authority, which has been held to reside in the courts (beginning with *Marbury v. Madison,* by *Chief Justice Marshall*), to set aside acts as unconstitutional, is based upon the fundamental idea that when the act of a Legislature is in conflict with, or impinges upon any provision in the Constitution, such act is *no law.* Therefore it is exactly as if the act in question was not on the statute book at all, and the Constitution is unchanged by the attempted legislation. Upon this basis, therefore, the act which is impeached by the plaintiffs in this proceeding is a nullity. It stands as if it had never been enacted. It was not upon the statute book in any form in 1921, and, in contemplation of the Constitution, it is not there now.

All *"investments in stocks"* are necessarily made by those who buy them, and, under this rule of uniformity so clearly and unmistakably prescribed by the Constitution, such investments should bear exactly the same rate of taxation that is imposed upon all other tangible property which is required to be taxed "by uniform rule (as the Constitution expresses it)—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." This clearly requires that $1,000 "invested in stocks" shall pay the same tax as the same sum if invested in livestock or land or in any other property whatsoever.

The statute now in question, exempting from taxation foreign stocks owned in this State, is therefore a nullity. In constitutional contemplation it does not exist, and it is the duty of the Commissioner of Revenue to have such property listed and taxes collected thereon as the

law existed in 1921, prior to this act attempting to exempt it from all taxation. If he does not do so, necessarily it deprives the State of the revenue which was collected upon foreign stocks until this act of 1923 was enacted. Such exemption increases the burden of taxation upon all other property notwithstanding the express provision of the Constitution that *all* property shall be taxed *ad valorem* and by uniform rule. The property of non-stockholders is thus made to pay the taxes, some fifteen million dollars or more, which under the Constitution should be paid by those who have invested in such stocks.

This exemption of foreign stocks from all taxation is a very serious discrimination and adds to the exemption already made an additional exemption of at least $116,237,236, which were taxed last year, even if such foreign stocks had heretofore been all listed. The burden of taxation upon those not owning stocks is therefore increased by this statute exactly to the extent of the taxation which this property has paid, and it is the duty of the courts by *mandamus* to enforce the Constitution by requiring the Commissioner of Revenue to perform his duty by disregarding the illegal exemption and requiring such stocks to be taxed equally with other property.

It is true that in *Person v. Watts,* 184 N. C., 499, the majority of this Court declined to issue a *mandamus* to compel Mr. Watts, the then Commissioner of Revenue, to enforce the constitutional provision requiring the taxation of at least 1,500 million dollars of domestic stock which the statute had sought to exempt from all taxation. But that case is express authority against the defendant in this case for the contention for the validity of the act construed in *Person v. Watts* was rested upon the ground that as the domestic corporations paid taxes upon their property, or so much of it as was in this State, therefore the stockholders should not be taxed upon the stock which they had purchased from such corporations. But in this case the property is foreign stocks issued by corporations which have paid no taxes here, and therefore there is not the shadow of the semblance of a reason why the holders of such foreign stocks should be exempted from taxation. The owners of such stocks live here. They are protected at the expense of our citizens, by our courts and officers, in their lives, their persons and their property and should pay their proportionate part of the expenses of government, and are entitled to no other exemptions than are accorded to other citizens.

But even as to *Person v. Watts,* in the 184 N. C., at p. 499, while the majority of the Court dismissed that case upon the same technicality set up by the defendant in this, that a writ of *mandamus* was not the proper form of remedy—without pointing out what was the course by which a citizen could obtain his constitutional right not to be taxed

beyond what would be his fair share under the rule set out in the Constitution—still the Court, though indicating that to tax the stockholder upon his stock, if the corporation was taxed upon its property, would be double taxation, admitted that there was nothing which prohibited such double taxation (p. 508). Besides, that case was merely an *obiter dictum* upon the question of the exemption of domestic stocks, for the action was dismissed upon the form of the remedy asked not being the proper one, and therefore the opinion as to the exemption of stocks was outside the mark and purely *obiter*.

As *Person v. Watts* has been referred to, it is permissible to say that, upon reference to the dissenting opinion therein, it will be found that the Supreme Court of the United States, in many cases therein cited, has always held 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. The United States Government acts on this and levies income tax on dividends received by stockholders from their stocks.

In *Pullen v. Corporation Commission,* 152 N. C., 553, *Manning, J.,* 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.,* at p. 582, says, quoting from *Bank v. Tenn.,* 161 Tenn., 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 not double taxation. *Van Allen v. Assessors,* 70 U. S. (3 Wall.), 244, cited in *Farrington v. Tenn.,* 95 U. S., 678. 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 franchise 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. In our own Court there are many other cases to the same effect. *Comrs. v. Tobacco Co.*, 116 N. C., 446; *Chief Justice Smith*, in *Belo v. Comrs.*, 82 N. C., 415 (33 Am. Reports, 668); and *Ashe, J.*, in *Worth v. R. R.*, 89 N. C., 305; and this, indeed, is in accordance with all legal authorities and text-books.

There are other cases in this State, all to the same effect, quoted in the dissenting opinion, 184 N. C., at 527 *et seq.*, and the United States decisions to the same purport are uniform and quoted at p. 531 of that opinion, and the authorities in other States having the same provision as our Constitution are quoted in 184 N. C., pp. 532-536.

The whole subject of our constitutional requirement as to taxation may be thus summed up upon these authorities and others: *"In all cases where the Constitution, as in this State, requires that all property, real and personal, shall be taxed and by a uniform rule, 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, especially when, as in our Constitution, 'investment in stocks and bonds' are mentioned as subject to this rule."* This statement cannot be met by quoting from States whose constitutions do not require equality in taxation like ours.

The law, as above stated, is also summed up in the following legal works of general scope: 37 Cyc., 758, 759, 821, and cases cited; 14 Corpus Juris, 387, 388, secs. 509 and 510; also Ruling Case Law, p. 184 (sec. 155), and 289 (sec. 284).

It has been well said that "the power to tax is the power to destroy," and it has been the history of the world over that wherever the power to tax has gotten into the hands of the few the result has been the continuing accumulation of great wealth in the hands of the exempted and the destruction ultimately of those who are thus forced to pay the taxes which should be borne proportionately by those who have procured exemption from all burdens. The result through the ages, wherever not checked, has been the decay of all nations where this has prevailed.

The unearned income from stocks and bonds is a potential taxable wealth, which the Constitution has not only made available for revenue, but has required that it shall be taxed at least equally with all other property. Stocks are sold by the corporation and become the absolute property of the stockholder. The stockholder can sell his stock, bequeath it, or otherwise dispose of it at will, like any other property. The corporation has no control whatever over it. He is not liable for

the debts of the corporation, and it is not liable for his debts. If an individual gives a bond for the payment of money, and even if he secures it by a mortgage, he remains liable for the tax upon the property which can be subjected to payment of it, and the holder is also liable to tax thereon. The stock is set out in all reports by corporations as a *liability*.

The exemption of so many hundreds of millions of dollars from all taxation by the influence of corporations who wish to sell their "tax-free" stocks, and by the purchasers of such tax-free stock, results in "double taxation," but this is laid upon those who do not have idle capital to invest in stocks and bonds. More and more the burden is laid upon productive enterprise—upon the man on the farm, the man in business. These give labor employment. These are the real wealth producers of the country and mainstay of its prosperity. It is certainly unfair that the "endowed loafer," with money invested in "tax-free" stocks, bonds or public securities, shall be permitted to shift his share of the expense of government entirely upon the productive industries. Those holding stocks and bonds, drawing unearned income, assuredly should at least pay as much proportionately as individuals and other forms of property which earn their income.

From the adoption of the Constitution in 1868, for twenty-one years, down to 1887, this provision guaranteeing uniformity and equality in taxation to all was observed. Then the influence of the corporations having stocks to sell, and of those seeking investments for their wealth which they desired to "invest free of taxation," began to be felt, notwithstanding the decisions of the courts above cited, that this could not be done under the Constitution. But it was not until 1921 that they achieved full success and the constitutional guarantee was fully and ruthlessly set aside by the act which now makes fully fifteen hundred million dollars of idle capital exempt from all taxation. The newspapers immediately swarmed with advertisements on one page of "tax-free" stocks for sale, and on another with the sheriff's advertisements of the property of the poorer classes for sale for taxes. When public attention was called to this breach of the Constitution, suddenly the advertisements of "tax-free" stocks disappeared from all the papers, and ever since the work has been done by brokers' letters to the rich, inviting purchasers of "tax-free" stocks.

There can be no reason or justice, even if there had been no constitutional guarantee against this discrimination, why millions invested by the very rich should be exempted from all taxation of every kind—State, county, and city—while those who own a little piece of land, giving a bare support for wife and children, should have their taxes raised many-fold to make up the deficiency and live under constant threat of

the sheriff's hammer. These plaintiffs were right in appealing to the courts, and are entitled to the remedy they seek, that their taxes may be lessened and they may live in less fear of a sheriff's sale.

That a *mandamus* lies in such a case as this was held by *Connor, J.*, in *R. R. v. Comrs.*, 148 N. C., 220, and by *Hoke, J.*, in *Perry v. Comrs., ib.*, 521. See numerous other cases cited to same effect, 184 N. C., 538-540. The great corporations and great wealth constantly appeal to the courts for remedies in their favor on tax questions. Why should redress be denied to the masses of the people when they are asking at the hands of their courts the enforcement of the constitutional guarantee to all the people of "equality and uniformity in taxation" and against the illegal exemption of great wealth, whether in corporate or in individual hands, by the non-taxation of their stocks which necessarily throws the payment of the taxes which their property should pay upon those classes which earn every dollar they get?

The plaintiffs are asking that this Court shall enforce the constitutional provision which requires that all property shall be taxed alike. They have asked that this Court hold, as it has often held in cases above cited, without hesitation, that any act of the Legislature giving an exemption of so many hundreds of millions of property from taxation, shall be held null and void. This Court, upon the plain and unmistakable language of the Constitution, should direct the Commissioner of Revenue to disregard the act conferring this exemption, because it is a violation of the Constitution, and relieve the struggling masses who are burdened with paying the taxes which should be borne by those who are able to invest their idle capital in stocks and bonds. It is a matter of no importance, under our Constitution and our statutes, whether the proceeding is called a *mandamus* or not. "A rose would smell as sweet by any other name." The people are entitled to the protection so plainly given them by their Constitution, and the officers of the law should be directed to enforce equal and uniform taxation as required by the plain provision of the organic law.

Our tax burdens should be apportioned justly—share and share alike—according to the amount of property held by each, with no exemptions of any property from taxation save that expressly authorized by the Constitution, Art. V, sec. 5.

The whole matter can be summed up as follows: The provision of the Constitution is too plain to be misunderstood that all "*investments* in stocks" shall be taxed *equally and uniformly* with all real and personal property, according to its true value in money; and, therefore, the act exempting these stocks in corporations of other States and countries, but held by owners residing here, is unconstitutional. They have always been taxed heretofore. *Brown v. Jackson*, 179 N. C., 367-374.

In *Person v. Watts, supra,* it was held that to tax the stocks in the hands of the owner when the corporation had paid taxes on its own property would be double taxation; but it was also held (p. 508) that there was nothing in our Constitution which forbade double taxation. The exemption of some fifteen hundred million dollars of property in stocks upon the ground that the Legislature has so enacted creates the only double taxation in this State, and that is caused by the fact that those who have not invested in stocks have to pay the taxes which the stocks should pay, as well as their own; and the Legislature, under the ruling in *Person v. Watts,* 184 N. C., at p. 508, can at any time, and in any view, lay the tax upon stocks as required by the Constitution and relieve those not owning stock of the more than "double taxation" now laid on them.

The United States Supreme Court has held repeatedly that "the Fourteenth Amendment does not prohibit double taxation." *Cream of Wheat Co. v. Great Forks,* 253 U. S., 330, and cases there cited. In *Kidd v. Alabama,* 188 U. S., 730, it was held that where the State, under its Constitution (unlike ours), was not required to impose a tax on the holders of stock in domestic railroads, it was still not unconstitutional to tax stocks held by citizens of Alabama in railroads in other States, citing numerous cases on p. 733.

I am of the opinion, therefore, that this Court should direct a *mandamus* to issue to the Revenue Commissioner that taxes should be laid upon the foreign stocks as prayed by the plaintiffs in this case, both under the authority of *Person v. Watts,* 184 N. C., 499, as well as under the broad terms of the Constitution, which requires that "all investments in stocks" shall be taxed by *uniform* rule with all other property, "real and personal, according to its true value in money." If the Constitution does not protect the people at large, what is it for?

T. & H. MOTOR COMPANY ET AL. v. A. P. SANDS, SHERIFF.

(Filed 20 December, 1923.)

Sheriffs—Claim and Delivery—Replevin—Retention of Property—Statutes—Negligence.

When the sheriff of the county retains possession of the goods replevined in claim and delivery under C. S., 3403, instead of surrendering possession to the plaintiff who has given the replevin bond prescribed by C. S., 836, the status of his possession is changed from that of a custodian of the law, and his liability is to be determined under the

provisions of C. S., 836, and those of his official bond, and he is responsible for the loss of the goods when destroyed by fire in his possession, irrespective of any question of negligence on his part in keeping it.

CLARK, C. J., and CLARKSON, J., dissenting.

APPEAL by defendant from *Shaw, J.*, at June Term, 1923, of ROCKINGHAM.

Civil action, in claim and delivery, to recover the possession of an automobile.

Upon an agreed statement of facts, judgment was entered for the plaintiffs. Defendant appealed.

A. W. Dunn and King, Sapp & King for plaintiffs.
Glidewell & Mayberry for defendant.

STACY, J. The essential facts of this case are as follows:

1. On 15 December, 1921, the defendant, A. P. Sands, sheriff of Rockingham County, in the discharge of his duties as such officer, seized an automobile which was being used, in violation of the prohibition law, in transporting liquor along one of the public highways of Rockingham County.

2. Two men were riding in the car, one of whom was arrested, and the other made his escape. The one making his escape was not known to the sheriff, and he has been unable, up to the present time, to ascertain his identity. The one arrested was tried and convicted in the Superior Court of Rockingham County for unlawfully transporting liquor in said car, though it does not appear that he held "any right, title or interest in and to the property so seized."

3. On 7 November, 1921, the T. & H. Motor Company sold the automobile in question to one of the plaintiffs, C. Vance Smith, a resident and citizen of Guilford County, and took from him, by way of security for part of the purchase price, a chattel mortgage on the car, which said mortgage was duly registered in the office of the register of deeds for Guilford County, and has never been canceled or satisfied. This fact was made known to the defendant, but he declined to surrender the automobile to the plaintiffs on demand. Whereupon plaintiffs instituted this suit to recover possession of said car. Bond was duly given, and a writ of claim and delivery issued therefor, but defendant replevied, giving bond as required by C. S., 836, and retained possession of the car, as he deemed it his duty to do, under C. S., 3403.

4. It is admitted that the plaintiffs were in no way connected with, or interested in, the liquor found in the car, or its transportation, and that they had no knowledge of the illegal use of the automobile.

5. Pending the trial of this action, and while the car was in the warehouse of the Union Motor Company for safe-keeping, the same was destroyed by fire, through no fault of the defendant.

Upon these, the facts chiefly relevant, the question presented for decision is whether the defendant is liable to the plaintiffs on his forthcoming bond. We think this question has been decided in favor of the plaintiffs and against the defendant in *Randolph v. McGowans,* 174 N. C., 203.

The defendant was authorized and required, under C. S., 3403, to seize the automobile in question and to keep the same until the guilt or innocence of the defendant could be determined upon his trial. This statute fully warranted the defendant in seizing the property and taking it into his possession. But when he was directed, in this action of replevin, to deliver the property to the plaintiff (which order relieved him from his obligation to hold it under the statute), he elected to retain the automobile in his possession and to give a bond for its forthcoming, as allowed by C. S., 836. The character of his possession was thereupon changed from that of a custodian or bailee, under C. S., 3403, to that of practically an insurer under his bond and under C. S., 836. *Randolph v. McGowans,* 174 N. C., p. 206. His present liability, therefore, is to be determined by the provisions of the latter statute.

In keeping with the general trend of authorities, it is the declared law of this jurisdiction that a plaintiff in replevin, in possession of the property under a replevin bond, as well as a defendant in replevin, retaining possession of the property under a forthcoming bond, is liable, at all events, for the return of the property, if the action be decided against him; and the fact that his failure to make return is caused by an act of God, or other circumstance beyond his control, is of no avail to relieve him from his obligation, nor is he to be discharged by a showing of a want of negligence on his part. C. S., 833 and 836.

Upon the record, and under the law as now written, the judgment in favor of plaintiffs must be upheld.

Affirmed.

CLARKSON, J., dissenting: I think the case at bar distinguishable from *Randolph v. McGowans,* 174 N. C., 206. In the instant case the suit is brought, not against A. P. Sands as an individual, but as sheriff of Rockingham County. It was the duty of this official, under the law, to seize any vehicle used in conveying liquor.

C. S., 3403, is as follows: "If any person, firm or corporation shall have or keep 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 and 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 his 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 the 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 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 same under the laws governing the sale of personal property under execution."

Under the above law the defendant, under his oath of office, was in duty bound to safely keep the vehicle *"until the guilt or innocence of the defendant has been determined upon his trial."* When the vehicle was seized, two men were in the car, with forty gallons of whiskey. The vehicle was seized on the public highway of Rockingham County. One of the men was tried and convicted; the other made his escape. The car was being held pending the capture of the unknown man. The plaintiff took out claim and delivery, alleging it had a mortgage on the car. The suit was against the defendant as sheriff, and, as such, he gave replevy bond and stored the car in a garage—a modern, up-to-date storage room—and it was accidentally burned pending the trial of the issue.

The case of *South Ga. Motor Co. v. Jackson,* 184 N. C., 328, is distinguishable from the present case. That case decides:

"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.

The sheriff, as an officer of the law, gave the bond to hold the car as evidence, under the statute. He used every care and caution, and it was burned in the garage. Under the statute then in existence he acted in good faith, and his conduct should not be "weighed in gold scales." Under the statute now in force, provision is made for cases of this kind. Public Laws 1923, ch. 1, sec. 6. When the vehicle is seized, as in the present case, "such officer shall at once proceed against the person

arrested under the provisions of this act in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer, *and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court.*"

Officers of the law must obey the law. With the mandate of the statute positively requiring the sheriff to keep the vehicle "until the guilt or innocence of the defendant has been determined," he performed his duty and replevied the vehicle.

I cannot, under the facts in this case, see how an officer should suffer for doing his duty.

CLARK, C. J., dissenting: The plaintiffs took out claim and delivery, claiming to be owners of a chattel mortgage on an automobile. The defendant executed a replevy bond denying the right of plaintiffs to recover possession of the car, which, while acting in his official capacity as sheriff of Rockingham County, he had seized while it was being used for transporting, in violation of law, forty gallons of whiskey, and for the further reason that one of the occupants of said car at said time had been tried and convicted for the unlawful transportation of whiskey and the other was unidentified and had escaped. Pending the trial of the plaintiffs' claim, the automobile in question, which was stored in a local garage, was accidentally destroyed by fire along with the garage and other cars therein, and there was no evidence that there was any negligence on the part of the sheriff or the garage.

The defendant sheriff had seized the car and held the same pending the time when he should ascertain who the man was who made his escape at the time of the seizure or until its title was decided by the court, as the law of this State directed he should do.

The car was destroyed by fire, a circumstance beyond the control of the sheriff, and admitted in the "facts agreed," due to no fault of his. He was not the owner of the car, and in giving the forthcoming bond, as required by the writ served on him, he did not set up ownership. This had passed to the State of North Carolina upon the conviction of the occupant for transporting whiskey, subject only to any interest of a third party.

This is not a case where the possession of the defendant was wrongful *ab initio*, for it was the duty of the defendant sheriff, acting under mandate of law, to retain possession of the automobile, first, for use as evidence in the trial of the criminal action against the man who

escaped, and second, to be turned over to the State under the judgment of the court confiscating the car to the State, if it should so order.

The case was submitted upon an agreed state of facts which is silent as to whether C. Vance Smith, the owner of the car, had guilty knowledge of the use to which the car was being put. There was no serious contention that he did not have this guilty knowledge, and the case turns solely upon the rights of the mortgagee, the motor company. It was the duty of the defendant sheriff to retain possession of this car, for in case the mortgagees sustained their claim, then the excess in value over and above the mortgage would belong to the State. The defendant sheriff was not the owner of the property in question nor did he claim to be. He was holding the car as the law commanded him to do, to be turned over upon the final determination of the criminal action to the owners—the mortgagee or the State—as the judgment of the court might determine. This case is therefore entirely different in principle from *Randolph v. McGowans,* 174 N. C., 203, relied upon by the plaintiffs, which was an action between individuals over a cow, no official duty being imposed upon the defendant.

It would be "hard lines" upon the sheriffs of the State, when honestly and faithfully endeavoring to execute the mandate of the people of the United States in the Eighteenth Amendment and the mandate of the ballot box in their own State, to suppress the liquor traffic, to hold that they must surrender possession of an automobile captured when filled with forty gallons of whiskey, when some distant company shall present to him a claim to possession as mortgagee, when he has no opportunity to examine the correctness of their claim, the registration and *bona fides* of the mortgage, and when the statute requires that he should hold the machine subject to the future order of the court until it shall be determined who is the owner thereof.

We have had no such case as this. On the contrary, even when a defendant was holding the machine in his individual capacity, and purely as bailee, this Court has held in *Beck v. Wilkins,* 179 N. C., 231, that even where the defendant owner of a garage has received an automobile for repair he is regarded as a bailee and is "not liable for its destruction by fire if he observed ordinary care for its safe-keeping," which could only be determined by the verdict of a jury. This case is printed as a leading case in 9 A. L. R., 554, and is sustained by an overwhelming majority of decisions occupying 18 pages of notes, and the annotations on page 570 state that it is also supported by the cases in this Court of *Lyman v. R. R.,* 132 N. C., 721, and *Hanes v. Shapiro,* 168 N. C., 24. In the latter case *Walker, J.,* in a very learned opinion (page 28) says: "The rights and liabilities of the parties to a bailment, as we shall see, depend primarily upon which one is to receive the

benefits of the transaction. The law justly imposes a stricter liability upon the one who is to receive the whole benefit of the bailment than upon one who entered into it solely out of good will and for the accommodation of the other party."

In this case, the sheriff had no interest whatever in the automobile, which was taken in strict accord with the authority conferred by the statute and in the line of his duty, and it was held by him according to the provisions of the statute until the criminal action should be disposed of and the ownership of the machine decided.

Under the Federal statute, a machine, horses or other property seized while being used in the illicit manufacture or transportation of liquor is confiscated to the Government—not only the interest of the party using it but the interest of the mortgagee and of the owner claiming to have rented it to the violator of law. The Court in this State has not sustained that doctrine, and it is common knowledge that the liquor traffic has been much aided by fictitious mortgages and alleged ownership of such property in other persons than those directly engaged in violating the law. Under these circumstances the officer of the law was justified in holding the property until, in the manner directed by the statute, its ownership should be determined.

Certainly the officer, who received no benefit from holding the machine and was simply endeavoring to discharge his duty under the statute, and who admittedly was guilty of no negligence in housing the machine, should not be made responsible when, under our own decisions above cited, he would not be liable even if he had been the holder of the machine for repairs in a garage, unless proven to be negligent. *Beck v. Wilkins, supra.*

There is no statute nor indication of a statute in North Carolina holding a faithful, conscientious officer, who discharges his duty in taking over an automobile while in use for the illicit transportation of liquor, an insurer while holding it in compliance with the statute, when it has been accidentally destroyed without fault or negligence on his part. There is no statute making him liable as insurer under these circumstances. The Court has never so held heretofore in any decision, and should not now by judicial decree place such liability on its own accord upon the sheriffs of the State. To create such new liability by judicial decree will sorely increase the difficulty of enforcing the law against the manufacture and transportation of intoxicating liquor.

R. G. RAMSEY, ADMINISTRATOR OF EDNA RAMSEY. v. STANDARD OIL COMPANY.

(Filed 20 December, 1923.)

1. **Negligence—Explosives—Evidence—Nonsuit.**

In this action to recover damages for the wrongful death of plaintiff's intestate caused by an explosion of a certain admixture of kerosene and gasoline, sold and purchased for good kerosene oil, that would not have produced the result under the circumstances, there was evidence of negligence of the defendant through its employees in the distribution of the admixture, etc., sufficient to take the case to the jury, and defendant's motion as of nonsuit was properly disallowed.

2. **Same—Proximate Cause—Intervening Cause.**

When a dangerous admixture of kerosene and gasoline has been sold by the defendant through a local merchant as good kerosene oil, and bought by the husband, who carried it to his wife, and caused the death of the latter by its explosion, which would not have occurred except for the extra danger of the admixture, the proximate cause of the death was the negligence of the defendant in making the sale of the admixture for the more harmless fluid, and not that of an intervening agency, when both the retailer and the husband who bought it were without knowledge, actual or constructive, of its more dangerous character.

3. **Experts—Evidence—Findings—Appeal and Error—Objections and Exceptions.**

When upon the trial a witness is apparently an expert upon the testimony he has given, the appellant may not sustain an exception to the evidence he has given on the ground that the judge had not found him to be an expert, it being required that he should have requested the judge to rule thereon.

APPEAL by defendant from *McElroy, J.*, at September Term, 1923, of MADISON.

Civil action to recover damages for alleged negligence of defendant, causing death of plaintiff's intestate.

The evidence on part of plaintiff tended to show that in 1922 defendant company negligently sold to a local merchant in said county, as good kerosene oil, an admixture of kerosene and gasoline, producing a highly explosive article; that this merchant, who only dealt in kerosene, acting under the belief that he was selling that kind of oil, and in entire ignorance of any admixture, in the usual course of trade, sold a small quantity to plaintiff, and shortly thereafter, on 21 December, 1922, when plaintiff's wife, using proper and ordinary precaution, was endeavoring to light a fire with said oil, the same, owing to its changed condition, exploded, setting fire to intestate's clothing and inflicting severe burns, from which intestate then died.

On part of defendant there was denial of the alleged negligence, a plea of contributory negligence, etc., and on issues submitted there was

verdict for plaintiff and assessing damages for the wrong and injury. Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning errors.

Guy V. Roberts and Mark W. Brown for plaintiff.
George M. Pritchard and Martin, Rollins & Wright for defendant.

HOKE, J. We have carefully considered the record, and find no valid reason for disturbing the results of the trial. On the argument before us it was chiefly contended that appellant's motion for nonsuit should have been allowed, but in our opinion the position cannot be maintained. While the testimony tends to show that both kerosene and gasoline were conveyed to the large storage tanks in the county with circumspect care, there are facts in evidence as to defendant's methods in the local distribution of these articles which clearly permit the inference of negligence as the proximate cause of intestate's death; and, further, that these methods seem to have been in violation of the State statutes and the regulations of the Department of Agriculture designed to prevent just such occurrences. And the jury having accepted this version of the matter, and having found that the wife of plaintiff was in the exercise of proper care at the time, liability for the injury has been thereby established, and appellant's motion for nonsuit was properly disallowed.

And we find nothing which tends to relieve defendant by reason of the fact that the immediate sale was through the intervening act of the local merchant, Len Henderson, or that the purchase was made by the plaintiff himself. Both seem to have acted in entire ignorance of the conditions presented, and on the facts presented it is the permissible and the more probable inference that primary breach of duty on the part of defendant in carelessly permitting the admixture which resulted in the explosion continued to be the sole proximate cause of the injury. *Balcum v. Johnson,* 177 N. C., 213-216; *Paul v. R. R.,* 170 N. C., 230-233; *Ward v. R. R.,* 161 N. C., 179.

In *Balcum's case, supra,* it is held, among other things: "In order for the act of an intelligent intervening agent to break the sequence of events and protect the author of a primary negligence from liability, it must be an independent, superseding cause, and one that the author of the primary negligence had no reasonable ground to anticipate, and must in itself be negligent or at least culpable."

The exceptions to the rulings of the court on questions of evidence are without merit. They are chiefly to the testimony of J. B. Rhodes, a witness for plaintiff, and on the ground that he was allowed to testify as an expert without any finding of the court to that effect. The facts, however, show that the witness was competent as an expert and was testifying to matters particularly within his experience and training as

such; and if defendant desired to challenge the qualifications of the witness in this respect, he should have requested a direct finding of the court on the subject, the authorities being that the exception cannot be maintained on a general objection to the evidence. *Vann v. R. R.,* 182 N. C., 567-569.

The case is very similar to that of *Waters Pierce Oil Co.,* 18 Okl., 107, in which a recovery was had for the injury, and on writ of error to the Supreme Court of the United States, the judgment was sustained. *S. c.,* 212 U. S., 159.

There is no error, and the judgment for plaintiff is affirmed.

No error.

TRUSTEES OF REX HOSPITAL v. E. B. CROW AND J. M. NORWOOD.

(Filed 20 December, 1923.)

Trusts—Hospitals—Deeds and Conveyances—Mortgages.

The owner of lands conveyed them to two trustees to be held for hospital purposes and to receive additional gifts from others for the same purpose, which was later incorporated by the Legislature to create a succession of trustees: *Held,* a later conveyance of adjoining lands by another owner to two other trustees for the purpose of another gift, with power to convey or mortgage the same at the request of the hospital trustees, created an active trust, and in the absence of any charter provision to the contrary, the trustees in the second deed, in accordance with its provisions, were authorized and required to make a mortgage thereon for money necessary to be used for hospital purposes.

CONTROVERSY without action, heard and decided by *Calvert, J.,* at November Term, 1923, of WAKE.

From the facts properly submitted it appears that on 20 July, 1921, Claude E. Barbee and wife, Mrs. Estella K. Barbee, conveyed to defendants as trustees the piece of land in question, adjoining the original Rex Hospital property, for the use and benefit of Rex Hospital and the trustees of same, subject to the other provisions of said deed, among others that: "Said grantees, their heirs and successors as trustees, are hereby given full power and authority to mortgage or otherwise encumber the foregoing property to secure any debt due or to become due by the said trustees of Rex Hospital, or to secure any debt which the said trustees of Rex Hospital may make in the future; and the said parties of the second part, their heirs or successors as trustees, are hereby given full power and authority to mortgage or otherwise encumber the foregoing property to secure any person or persons who may endorse or become otherwise bound for any debt, note or other liability of the said trustees of Rex Hospital.

"Fourth. Whenever, in the judgment of the said parties of the second part, it may seem best, the said parties of the second part are hereby given full power and authority to convey the above-described property to the said trustees of Rex Hospital in fee simple; such conveyance, however, to be subject to any valid encumbrances placed upon the property by the said parties of the second part and then outstanding."

That there is an outstanding indebtedness of said hospital, evidenced by its promissory notes, to the amount of $10,000, incurred in the necessary operation, maintenance and equipment of the institution, and $8,000 additional is imperatively required and necessary to its successful operation, and that plaintiffs have arranged for a loan of this amount with the State and City Bank of Richmond, Va., provided a valid mortgage can be made on the property to secure the same. That plaintiffs have applied to defendants, grantees in said deed, for the execution of a mortgage for the purposes aforesaid, and they have declined on the sole ground that under the terms of said deed from Claude Barbee and wife, Estella Barbee, they take and hold said property subject to the provisions of the charter of incorporation of the hospital, and as said charter contains no express provision authorizing a mortgage, the trustees under said deed are without power in the premises. Upon these facts the court entered judgment as follows:

"It is therefore ordered, adjudged and decreed that the defendants, E. B. Crow and J. M. Norwood, trustees named in the deed of Claude B. Barbee and wife to them, and recorded in Book 380, page 95, as aforesaid, are authorized and empowered to encumber the lands conveyed by Barbee and wife to said E. B. Crow and J. M. Norwood, but not to include any of the lands devised in the will of John Rex for the purposes aforesaid upon the directions of the trustees of Rex Hospital; and in pursuance of the wishes and direction of said trustees of Rex Hospital, have the right to convey said lands in fee by mortgage or deed of trust in as free and ample a manner as shall be proper and necessary to secure the loan of said funds hereinbefore mentioned and set out."

Defendants, grantees in the deed, excepted and appealed.

W. F. Evans for plaintiff.
Womble & Dodgen for defendants.

HOKE, J. In addition to the facts heretofore stated, it further appears that John Rex died on 29 January, 1839, leaving a last will and testament duly admitted to probate in February following, in which he devised 21 acres of land lying in the southern part of the city of

Raleigh to Duncan Cameron and George W. Mordecai, trustees, for the purpose of having erected thereon an infirmary or hospital for the sick and afflicted poor of the city of Raleigh, and bequeathed to said trustees also, for the endowment of said hospital, his money and personal estate, etc., to be held by said trustees and their successors to be duly appointed, in trust forever, for the erection and endowment of said hospital, and for no other use and purpose whatsoever, etc.

That there being no adequate provision in said will for the appointment of trustees, etc., for the proper and continued governance of said hospital, the Legislature, at the suggestion of said trustees named in the will, and others, at the January Session, 1841, enacted a statute incorporating the hospital and providing a method for the appointment of said trustees and their successors, and empowering them to "receive and hold the property and effects devised and bequeathed by said John Rex in and by his said will, and to use and apply the same to and for the purposes, and none other, specified in said will, and also to receive donations of land and personal estate by deed or will for the purposes aforesaid and none other, and to have succession and to sue and be sued, and have the other powers incident to corporations in regard to the charity created by said will, and for no other purposes, etc."

It will thus be seen that under the provisions of the Barbee deed the trustees named therein have full power to mortgage the property conveyed to them to secure any debt due or to become due by the trustees of Rex Hospital, incurred for the legitimate purposes of the institution, and it becomes their duty to do so for such purposes at the instance of the trustees of said hospital, when definitely and properly determined upon and communicated to them, a duty enforceable by appropriate action or proceedings in the courts. *Thomson v. Newlin,* 41 N. C., 380; *Cox v. Williams,* 39 N. C., 15; 39 Cyc., 510; 36 R. C. L., 1358 *et seq.*

And this being an active trust (*Kirkman v. Holland,* 139 N. C., 185; 39 Cyc., 213), and there being nothing anywhere in the charter in contravention or restriction of this power to mortgage, his Honor was clearly right in the ruling that the defendants carry out and perform the duties placed upon them by the deed under which they hold the property. *Paper Co. v. Chronicle,* 115 N. C., 143; Clark on Corporations, 133-134 *et seq;* C. S., 1126.

There is no error, and this will be certified that the judgment entered be

Affirmed.

BANK OF SPRUCE PINE v. BOONE FORK MANUFACTURING COMPANY ET AL.

(Filed 20 December, 1923.)

Corporations—Officers—Declarations—Evidence—Prejudicial Error—Appeal and Error.

Declarations of an officer of a corporation that took over the assets of another corporation, that his company had assumed its liabilities also, are incompetent in an action to recover upon a note given plaintiff by the absorbed corporation, when not made in the declarant's line of official duty, or while not discharging it in reference to a transaction for the company.

APPEAL by defendant, Boone Fork Manufacturing Company, from *Ray, J.*, at April Term, 1923, of MITCHELL.

Civil action to recover upon the following promissory notes:

$4,000. ELIZABETHTON, TENN., July 6, 1921.

Two months after date, we promise to pay to the order of W. S. Whiting four thousand dollars at the Citizens Bank of Burnsville, N. C., without defalcation, for value received.

ELIZABETHTON FLOORING COMPANY,
By G. W. Renfro, Asst. Treasurer.

Endorsed on back by W. S. Whiting.

$3,000. ELIZABETHTON, TENN., August 7, 1921.

One month after date, we promise to pay to the order of W. S. Whiting three thousand dollars at the Citizens Bank of Burnsville, N. C., without defalcation, for value received.

ELIZABETHTON FLOORING COMPANY,
By G. W. Renfro, Asst. Treasurer.

Endorsed on back by W. S. Whiting.

Plaintiff alleges that it is the holder in due course of these notes, same having been purchased for value and before maturity, and that the defendant, Boone Fork Manufacturing Company, is liable for their payment.

From a verdict and judgment in favor of plaintiff, the Boone Fork Manufacturing Company appeals, assigning errors.

Chas. E. Green, G. F. Washburn, and Watson, Hudgins, Watson & Fants for plaintiff.

Francis J. Heazel for defendant.

STACY, J. This is a civil action brought by the Bank of Spruce Pine to recover on two notes executed by the Elizabethton Flooring Company (hereafter called the Flooring Company) to W. S. Whiting, duly endorsed by him and negotiated to the plaintiff for value and before maturity. It is alleged that, after the execution of the notes above set out, the Boone Fork Manufacturing Company (hereafter called the Manufacturing Company) took over all the assets of the Flooring Company, and agreed to assume its liabilities and to pay its debts, including the two notes held by plaintiff, and that, therefore, the Manufacturing Company is indebted to the plaintiff in the amount of said notes.

The defendant, Manufacturing Company, admitted in its answer that it had taken over the assets of the Flooring Company, alleging that it paid full value therefor, but denied that it had assumed or agreed to pay the indebtedness of the latter company or the notes held by the plaintiff, and further denied that it was indebted to the plaintiff in any sum whatever.

The agreement, setting out the terms and conditions under which the Manufacturing Company acquired the assets of the Flooring Company, was wholly in writing and the same was produced on the hearing, at the instance and notice of the plaintiff, and offered in evidence by the defendants. This contract does not show that the Manufacturing Company assumed all the debts of the Flooring Company, nor that it agreed to pay the notes held by plaintiff.

For its right to recover against the Manufacturing Company, plaintiff relies upon the following oral testimony of T. R. Byrd, J. M. Burleson and D. M. Green, all of which was admitted over objection of the appealing defendant:

1. Byrd was permitted to testify that, on several occasions after the transfer of the property of the Flooring Company to the Manufacturing Company, W. S. Whiting, president of both companies, told him the Manufacturing Company was assuming the debts of the Flooring Company.

2. Burleson was permitted to testify that, some time after the transfer was made, W. S. Whiting told him the Manufacturing Company had assumed the obligations of the Flooring Company.

3. Green was permitted to testify that W. S. Whiting told him the Manufacturing Company was taking over all the assets of the Flooring Company and assuming its liabilities. The record does not disclose at what time this statement was made.

We think this evidence was incompetent as against the Manufacturing Company, considering the manner and form in which it was offered, and that it was prejudicial. *Bank v. Ins. Co.*, 159 N. C., 200.

Plaintiff failed to lay any proper basis for its admission. *Rumbough v. Imp. Co.*, 112 N. C., 751; 31 Cyc., 1644. "It is well settled that the declarations of officers of a corporation are competent only when made in line of declarant's official duty and while discharging it in reference to a transaction for the company." *Brown, J.*, in *Younce v. Lbr. Co.*, 155 N. C., 239. It nowhere appears that these statements, attributed to W. S. Whiting, were made by him in the line of his official duty as president of the Manufacturing Company and while he was discharging such duty in reference to a transaction for the company.

The case seems to have been tried upon the assumption that the complaint contained an allegation of fraud, but we do not find any allegation of this kind.

For the error, in the admission of evidence as stated, there must be a new trial, and it is so ordered.

New trial.

A. E. MURPHY v. SUNCREST LUMBER COMPANY ET AL.

(Filed 20 December, 1923.)

1. **Employer and Employee—Master and Servant—Negligence—Instructions—Appeal and Error—Harmless Error.**

   It is not the imperative duty of an employer to furnish his employee a safe place to work and safe appliances with which to perform the services required of him in a hazardous employment so as to make him, in effect, liable as an insurer, for he is only required to do so in the exercise of ordinary care; but an erroneous instruction in this respect will not constitute reversible error when it is made to appear on appeal that the actionable negligence of the employer was not questioned on the trial, and no issue as to contributory negligence was submitted to the jury.

2. **Employer and Employee—Instructions—Appeal and Error—Objections and Exceptions—Requested Instructions.**

   An exception to the charge, in an action to recover damages for a negligent permanent injury sustained by the plaintiff, will not be held for error on appeal upon the ground that the instruction too generally permitted a recovery for prospective damages without limiting them to the present cash value, or that he should have charged in a particular way, when he had so charged in general effect, in the absence of a refused requested instruction, correctly and more particularly stating the principles applicable to the evidence.

APPEAL by defendant, Suncrest Lumber Company, from *Bryson, J.*, at July Term, 1923, of HAYWOOD.

MURPHY *v.* LUMBER CO.

Civil action to recover damages for an alleged negligent injury sustained by the plaintiff, an employee of the defendant, on 24 June, 1922, while working on an "edger" in the sawmill plant of the defendant company.

From a verdict establishing liability, and judgment thereon, the defendant appeals, assigning errors.

Morgan & Ward for plaintiff.
Alley & Alley for defendant.

STACY, J. Defendant assigns as error the following excerpt from the charge: "Where the relationship of master and servant, employer and employee, is established, then the master or employer owes to the employee certain duties, to provide him with reasonably suitable tools and appliances with which to perform the work assigned, and likewise to provide him with a reasonably safe place in which to do the labor assigned."

This instruction is in direct conflict with what was said in *Owen v. Lbr. Co.,* 185 N. C., 612; *Gaither v. Clement,* 183 N. C., 455; *Tritt v. Lbr. Co.,* 183 N. C., 830; *Smith v. R. R.,* 182 N. C., 296, and we would be disposed to hold it for reversible error if it were not for the fact that, upon the instant record, the defendant's liability is not seriously controverted and the error is clearly harmless, or nonprejudicial. 2 R. C. L., 230; *Wilson v. Lbr. Co., ante,* 56. A new trial will not be granted for error which is without prejudice.

It is not the absolute duty of the master to provide for his servant a reasonably safe place to work and to furnish him reasonably safe appliances with which to execute the work assigned—such would practically render the master an insurer in every hazardous employment—but it is his duty to do these things in the exercise of ordinary care. *Owen v. Lbr. Co., supra.* This limitation on the master's duty is not a mere play on words, nor a distinction without a difference, but it constitutes a substantial fact, or circumstance, affecting the rights of the parties. *Tritt v. Lbr. Co., supra.*

In the case at bar, the plaintiff's evidence—there was none offered by the defendant—shows a clear case of culpable negligence. In the opening part of the charge the court used the following language, to which there was no objection or exception: "The defendants, through their counsel, concede in their argument that if the evidence be found to be true, that it discloses negligence upon the part of the defendants." It was further conceded on the trial that no evidence had been elicited tending to show any contributory negligence on the part of the plaintiff, though this plea was set up in the defendant's answer, and for this

reason no issue as to contributory negligence was submitted to the jury. This error in the charge was therefore harmless and the exception must be overruled.

The defendant also excepts and assigns as error the following instruction on the issue of damages: "Where one is injured by the negligent acts of another, actionable in their nature, then the injured party is entitled to be awarded and to recover such an amount as will reasonably compensate him for loss sustained—past, present and in the future, or prospective. Such losses may embrace actual expenses of medical care and attention, such as are expended for nurse's services; they likewise may include the diminution or impairing of the ability of the injured person to perform labor, either mental or physical; and likewise they may include such sufferings of mind and body as are incident to, flow from and are proximately and directly caused by the injuries sustained. Such are the elements of damage recognized by the law."

The vice of this instruction, according to defendant's contention, is that it fails to limit plaintiff's recovery for future losses to a sum equal to their present cash value or present worth. Defendant's position in regard to limiting the damages, if any, which may accrue in the future to the present cash value or present worth of such damages is undoubtedly the correct one, for if the jury assess any prospective damages, the plaintiff is to be paid now, in advance, for future losses. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future. The verdict should be rendered on the basis of a cash settlement of the plaintiff's injuries, past, present and prospective. *Ledford v. Lbr. Co.*, 183 N. C., p. 617; *Johnson v. R. R.*, 163 N. C., 431; *Fry v. R. R.*, 159 N. C., 362.

But we do not think this rule or principle was altogether ignored in the charge, though it was not stated as fully as it might have been. Speaking to a similar question and to a similar instruction in *Hill v. R. R.*, 180 N. C., p. 493, *Walker, J.*, said:

"If the defendant desired it to be stated more fully, or in any special way, he should himself have asked for an instruction sufficient to present his view, or so as to direct the attention and consideration of the jury more pointedly to the rule of damages. *Simmons v. Davenport,* 140 N. C., 407; *Beck v. Tanning Co.*, 179 N. C., 123, 127. We have recently said upon this question, in the case of *Harris v. Turner,* 179 N. C., 322, at p. 325: 'The judge left the question of damages entirely to the jury, for he could not decide it as a matter of law. . . .When the judge left the amount paid by the defendants for the jury to find, defendants were silent, and therefore assented to this treatment of the

question. If the defendants desired a special instruction to guide the jury, they should have asked for it. *Simmons v. Davenport,* 140 N. C., 407. We there held that if a party desires fuller or more specific instructions than those given by the court in the general charge, he must ask for them, and not wait until the verdict has gone against him and then, for the first time, complain that an error was committed.' And in *Davis v. Keen,* 142 N. C., at p. 502: 'Any omission to state the evidence correctly or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances, and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object, where the instruction of the court is not itself erroneous. This has been approved in many cases, and very lately in several,' citing *Baggett v. Lanier,* 178 N. C., 132; *Futch v. R. R., ib.,* 282; *Sears v. R. R., ib.,* 285; *S. v. Stancill, ib.,* 683. The instruction, as to damages, was somewhat general, but not inherently erroneous, and therefore the rule of practice, which we have just stated, should apply."

Viewing the record in its entirety, we have discovered no sufficient reason for disturbing the result of the trial. The verdict and judgment will be upheld.

No error.

DOUGLAS STEVENS, ADMR., v. BLACKWOOD LUMBER COMPANY AND CANEY FORK LOGGING RAILWAY COMPANY.

(Filed 20 December, 1923.)

Removal of Causes — Federal Courts — Jurisdiction — Misjoinder of Parties—Petition—Fraud.

When the nonresident petitioner sufficiently sets forth facts in his petition to remove a cause from the State to the Federal Court under the Federal statute, for diversity of citizenship, that a resident defendant was improperly joined to fraudulently defeat the jurisdiction of the latter court, the question of determining the right of the petitioner to remove is within the jurisdiction of the Federal Court, and the cause should be removed for that purpose.

APPEAL by defendant, Blackwood Lumber Company, from *Harding, J.,* at Fall Term, 1922, of JACKSON.

Motion for removal of this cause to the District Court of the United States for the Western District of North Carolina. Motion overruled, and the Blackwood Lumber Company appeals.

W. R. Sherrill and A. W. Horn for plaintiff.
Alley & Alley for defendant.

STACY, J. Otto Stevens, a resident of Jackson County, North Carolina, died intestate on or about 19 August, 1921. The plaintiff duly qualified as administrator of the estate of the deceased, instituted this action and filed his complaint in the Superior Court of Jackson County, alleging liability for the wrongful death of his intestate by reason of the joint and concurrent negligence of the Blackwood Lumber Company, a corporation, citizen and resident of the State of Virginia, doing business at East La Porte, N. C., and the Caney Fork Logging Railway Company, a corporation, citizen and resident of East La Porte, Jackson County, N. C.

The death of plaintiff's intestate, a child of tender years, was caused by the explosion of a dynamite cap alleged to have been negligently left on the right of way of a logging road operated jointly by the defendants. For his right to recover, plaintiff relies upon the doctrine announced in *Krachanake v. Mfg. Co.,* 175 N. C., p. 441; *Barnett v. Cotton Mills,* 167 N. C., 580, and other cases to like import.

The Blackwood Lumber Company, in apt time, filed its duly verified petition, accompanied by proper bond, asking that the cause be removed to the District Court of the United States for the Western District of North Carolina, at Asheville for trial, alleging:

"That the defendant, Caney Fork Logging Railway Company, is not a necessary party or proper party to a final judgment in this cause, for that the said Caney Fork Logging Railway Company, at the time of the injury and death of the plaintiff's intestate, had no connection and had nothing whatever to do with the power alleged to have caused the injury and death of the plaintiff's intestate; that at the time alleged this petitioning defendant was and still is conducting a large lumbering operation in Jackson County, with its plant at East La Porte, in said county, and at the time aforesaid was and still is the owner of a large boundary of timber situate on Caney Fork and Moses creeks in said county above said plant.

"That at the time aforesaid this petitioning defendant was engaged in the construction of a logging railroad on Moses Creek in said county, but your petitioner here respectfully showeth to the court that the powder which was taken from its premises by the plaintiff's intestate and which, it is alleged, caused his injury and death, was stored in said mill-house and was being used by this defendant, not for the construction of said logging railroad, but was being used by this defendant in the building and construction of a logging dirt road or snaking road to be used in the snaking of logs on the ground out of the woods, and

the said snaking road was then being constructed by the use of said powder at an entirely different place from where said logging railroad was being constructed. That said snaking roads were being constructed solely by this defendant, and its codefendant, as aforesaid, was not interested in and had absolutely no connection with the building and construction of said snaking roads. That the powder aforesaid was not owned by the Caney Fork Logging Railway Company; that said company had no interest in or control over the same, and the same had not been and was not being used by it for any purpose whatsoever, but to the contrary thereof, the same had been delivered to said mill-house by this petitioning defendant to be used exclusively in the construction of said snaking dirt road, and had been used for no other purpose.

"Wherefore, this petitioning defendant respectfully showeth to the court that the controversy herein is between citizens of different States, and that the defendant, Caney Fork Logging Railway Company, is not a necessary or a proper party to a final judgment herein. That every act of negligence alleged in the complaint is alleged against your petitioner, and all the relief prayed for in the complaint is sought against your petitioner, and the entire controversy presented in said complaint may be prosecuted to final judgment and fully determined without the presence of the defendant, Caney Fork Logging Railway Company. That the plaintiff on the one side, and your petitioner on the other side, are the only material, essential, necessary and proper parties to this action, and the cause can, in all respects, be fully and finally determined without the presence of the other defendant named."

And further: "That while it is true that the defendant, Caney Fork Logging Railway Company, at the time of the alleged injury and death of plaintiff's intestate, was and still is a domestic corporation, your petitioner here respectfully showeth to the court that for the reasons hereinabove specifically enumerated the defendant, Caney Fork Logging Railway Company, was designedly and intentionally made a party defendant to this action with intent and purpose, fraudulently, wrongfully and unlawfully to defeat the jurisdiction of the United States District Court for the Western District of North Carolina, and to defeat your petitioner's lawful right to have this cause removed to said court for trial at Asheville."

Upon these, the facts chiefly pertinent to the question presented, which must be taken as true or as they appear upon the face of the record for present purposes, we think the defendant's motion for removal of the cause should have been allowed. See *Cogdill v. Clayton*, 170 N. C., 526, where the rules, deductible from the authorities, are stated by *Allen, J.*, as controlling in such cases.

If the plaintiff desires to challenge the truth of the averments contained in the petition, he may do so on motion to remand or other procedure in the Federal Court. But that court, and not the State Court, being charged with the duty of exercising jurisdiction in such cases, must have the power to consider and determine the facts upon which the jurisdiction rests. *Wilson v. Republic Iron Co.*, 257 U. S., 92; *Burlington, etc. Ry. Co. v. Dunn*, 122 U. S., 513; *Rea v. Mirror Co.*, 158 N. C., 24, and cases cited.

The question presented has been so thoroughly discussed in these recent cases that we deem it unnecessary to do more than refer to them.

Error.

E. V. IRVIN v. W. L. JENKINS.

(Filed 20 December, 1923.)

New Trials—Contracts—Equity—Recision—Issues—Verdict—Appeal and Error—Partial New Trials—Vendor and Purchaser—Corporations—Shares of Stock—Fraud.

The complaint alleged two causes of action to rescind a sale of certain shares of stock in a corporation, as induced by defendant's fraud, upon different grounds, and to recover the purchase price. The second one was answered in defendant's favor, and no error was committed on the trial; but there was error in the verdict upon the several issues as to the first cause of action material to the inquiry, and *held*, the judgment in defendant's favor on the second cause of action will be sustained on appeal, but a new trial alone is awarded for the error committed in relation to the first cause of action.

APPEAL by plaintiff from *Webb, J.*, at May Term, 1923, of MECKLENBURG.

Civil action to rescind two contracts in regard to the purchase of certain cotton-mill stocks and to recover of the defendant the price paid therefor.

Two causes of action are set out in the complaint: One in regard to the sale of 20 shares of stock in the Ronda Cotton Mills, Inc., and the other in regard to the sale of 18 shares of stock in the Grier Cotton Mills, Inc.

Upon the issues joined on the first cause of action, the jury returned the following verdict:

"1. Did the defendant, on or about 26 January, 1920, for the purpose of inducing the plaintiff to purchase 20 shares of the capital stock of the Ronda Cotton Mills, represent to the plaintiff that the actual

and final cost of the land, buildings, machinery and equipment, etc., constituting said manufacturing plant, had been ascertained to be $30 per spindle? Answer: 'Yes.'

"2. If so, was said representation so made by the defendant to the plaintiff false to the knowledge of the defendant, as alleged in the complaint? Answer: 'No.'

"3. Did the defendant, on or about 26 January, 1920, for the purpose of inducing the plaintiff to purchase 20 shares of the capital stock of the Ronda Cotton Mills, represent to the plaintiff that he was a director in said company, as alleged in the complaint? Answer: 'Yes.'

"4. If so, was said representation so made by the defendant to the plaintiff false to the knowledge of the defendant, as alleged in the complaint? Answer: 'Yes.'

"5. Did the defendant, on or about 26 January, 1920, for the purpose of inducing the plaintiff to purchase 20 shares of the capital stock of the Ronda Cotton Mills, represent to the plaintiff that the stock in said mills could only be purchased through the defendant, as alleged in the complaint? Answer: 'Yes.'

"6. If so, was said representation so made by the defendant to the plaintiff false to the knowledge of the defendant, as alleged in the complaint? Answer: 'Yes.'

"7. If so, did the plaintiff rely upon said representations or any of them, and was he thereby induced to purchase from the defendant 20 shares of the capital stock in said Ronda Cotton Mills at the price of $133 per share, as alleged in the complaint? Answer: 'Yes.'

"8. If so, did the plaintiff, within a reasonable time after the discovery by him of the falsity of said representations, elect to rescind said contract of sale, and before the institution of this action tender to the defendant the certificates for said stock, and demand a return by the defendant of the purchase price paid him by the defendant therefor, as alleged in the complaint? Answer: 'Yes.'"

Issues of similar character were submitted on the second cause of action, all of which were answered by the jury in favor of the defendant.

Upon the verdict as thus rendered it was adjudged: "First, that the plaintiff take nothing under his first cause of action; second, that plaintiff take nothing under his second cause of action, and that the defendant go without day and recover his costs." Plaintiff appeals, assigning errors.

Cansler & Cansler for plaintiff.

Hamilton C. Jones and Pharr, Bell & Sparrow for defendant.

STACY, J. Upon warmly contested issues of fact, the jury returned a verdict on the second cause of action in favor of the defendant. A careful perusal of the record leaves us with the impression that the case, as it relates to this cause of action, has been tried substantially in accordance with the law bearing on the subject. Hence, the verdict and judgment in this respect will be upheld.

We are of opinion, however, that a new trial should be awarded on the first cause of action. At the hearing, the contest waged almost entirely around the first and second issues; but under the principle announced in *Printing Co. v. McAden,* 131 N. C., 178; *Ins. Co. v. Box Co.,* 185 N. C., 543; *Gilmer v. Hanks,* 84 N. C., p. 320, and other cases to like import, it would seem that the remaining issues were material and sufficiently determinative. *Ferebee v. Gordon,* 35 N. C., 350; *Tarault v. Seip,* 158 N. C., 363, and cases there cited. Nevertheless as these issues, on the trial, were regarded as only evidentiary to the main question in dispute, and especially in view of the wording of the seventh issue, we have concluded to award a new trial on the first cause of action rather than direct that judgment be entered on this part of the verdict for the plaintiff.

The judgment for the defendant on the second cause of action will remain undisturbed, and the cause will be remanded for a new trial on the first cause of action.

Partial new trial.

JOSEPH H. BEAL v. CAROLINA COAL COMPANY.

(Filed 20 December, 1923.)

1. Employer and Employee — Master and Servant — Negligence — Explosives—Safe Place to Work.

The employer is held to the highest degree of care in the care and custody of dangerous explosives, such as dynamite, in regard to the safety for those employees whose work exposes them to such menace. The employer cannot delegate to another the duty imposed upon him to provide a reasonably safe place for employees to work in performing the duties of their employment, in release of his own liability, the degree of such care to be measured by the dangerous character of the article. The evidence in this case is sufficient for the determination of the jury of the defendant's actionable negligence.

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

An isolated paragraph of the charge of the court will not be held for reversible error, if considered with the other portions of the charge, the jury must have understood the correct principles of law in relation to the evidence.

BEAL *v.* COAL CO.

APPEAL by defendant from *Daniels, J.*, at July Term, 1923, of CHATHAM.

This is an action for personal injury received while in the employ of the defendant through the explosion of dynamite caps. The defendant offered no evidence.

On 25 April, 1923, while plaintiff was performing the duties assigned him by the defendant, an explosion occurred in defendant's mine which blew off the plaintiff's right arm and which he alleges burst both of his ear-drums and otherwise injured him in the face and body. The dynamite and caps, or exploders, which exploded were carried down into the mine by defendant's foreman. It was his custom to carry with him into the mine dynamite, caps, and batteries when each shift went on duty. The custom, manner, and method of defendant in handling these for a period of 22 or 23 months, as shown in the evidence, was to put them anywhere he saw fit, together in boxes upon the ground, at different places in the mine. The mine had several sections or rooms. The evidence is that the defendant did not during the period above mentioned keep the dynamite, caps and batteries stored in any certain section of the mine, but placed them wherever it suited his convenience, regardless of possibility of explosion by coming into contact with the employees.

On the day of the injury to plaintiff, the foreman got out of the car in which the plaintiff went down in the mine, carrying with him the dynamite and batteries, and placed them about 12 feet from the landing where he got out of the car. The plaintiff, while at his post of duty, saw some batteries sliding off the shelving where he was, and put out his hand to keep them from falling two or three feet below, touching the box which contained the batteries, at which time the dynamite exploded. He had not been warned by any one of their presence or the danger attendant upon the duty to which he had been assigned. There was no light in the mine except the small light on miner's cap. The exploders and wire attached to them are very small and not so easily seen as batteries and dynamite. The jury rendered a verdict in favor of the plaintiff, and defendant appealed.

W. P. Horton for plaintiff.
Siler & Barbee and Bynum, Hobgood & Alderman for defendant.

CLARK, C. J. The degree of care required of persons having the possession and control of dangerous explosives, such as dynamite, is of the highest kind, requiring constant caution in their care and custody. The degree of care required must be measured by the dangerous character of the article. *Brittingham v. Stadiem,* 151 N. C., 302; *Wood v.*

McCabe, ib., 458; *McGhee v. R. R.*, 147 N. C., 142; *Haynes v. Gas Co.*, 114 N. C., 203; *Horne v. Power Co.*, 144 N. C., 375; *Witsell v. R. R.*, 120 N. C., 557.

It is true that dynamite if properly handled is harmless, but if there is negligence most serious results can happen. It was the duty of the plaintiff to use ordinary care to furnish a reasonably safe place for the plaintiff to work. This duty cannot be delegated, and if there is a breach of such duty which is the proximate cause of injury to the employee, the master is liable. An examination of the charge shows that the court correctly instructed the jury as to these matters.

The plaintiff insists, and we think correctly, that the court in its charge properly instructed the jury on these matters taking the whole charge as an entirety, and that an assignment of error predicated upon an isolated paragraph cannot be sustained. *Harris v. Harris,* 178 N. C., 7; *Hubbard v. Goodwin,* 175 N. C., 174; *Monk v. Goldstein,* 172 N. C., 516; *Cockran v. Smith,* 171 N. C., 369.

It was justly said in *Taylor v. Tallassee Power Co.,* 174 N. C., 583, that it is not permissible to select detached portions of the charge for an assignment of error unless it contains distinct and independent propositions not explained or qualified in other parts of the charge.

The manner and method of handling these explosives appears in the evidence and was a matter for the consideration of the jury, and upon consideration of all the evidence and taking the charge as a whole, we cannot see that the defendant has been prejudiced.

No error.

BERNARD ELIAS v. W. H. ARTHUR.

(Filed 20 December, 1923.)

Deeds and Conveyances—Descriptions—Mistakes—Correction—Courts.

The court will correct, as a matter of law, the call in a deed for land from so many degrees "east" to that many degrees "west," when it clearly appears from the other calls therein that this was the unmistakable intent of the parties and the mistake is obvious.

APPEAL by defendant from *McElroy, J.*, at November Term, 1923, of BUNCOMBE.

This was a controversy submitted without action. Judgment for plaintiff, and defendant appealed.

Martin, Rollins & Martin for plaintiff.

D. M. Hodges, Jr., for defendant.

ELIAS *v.* ARTHUR.

CLARK, C. J. The sole question presented upon the facts agreed is whether or not the description in the deed for the lot from R. O. Patterson and wife to S. R. Chedester, set out in the record, is erroneous. The plaintiff contends that the third call mentioned in the deed should read "south 14 degrees *east*" instead of "south 14 degrees *west*," as written in the deed, and that the error is so patent that upon examination of this record it will be seen, as the judge below has held, that this was a patent error and should be corrected.

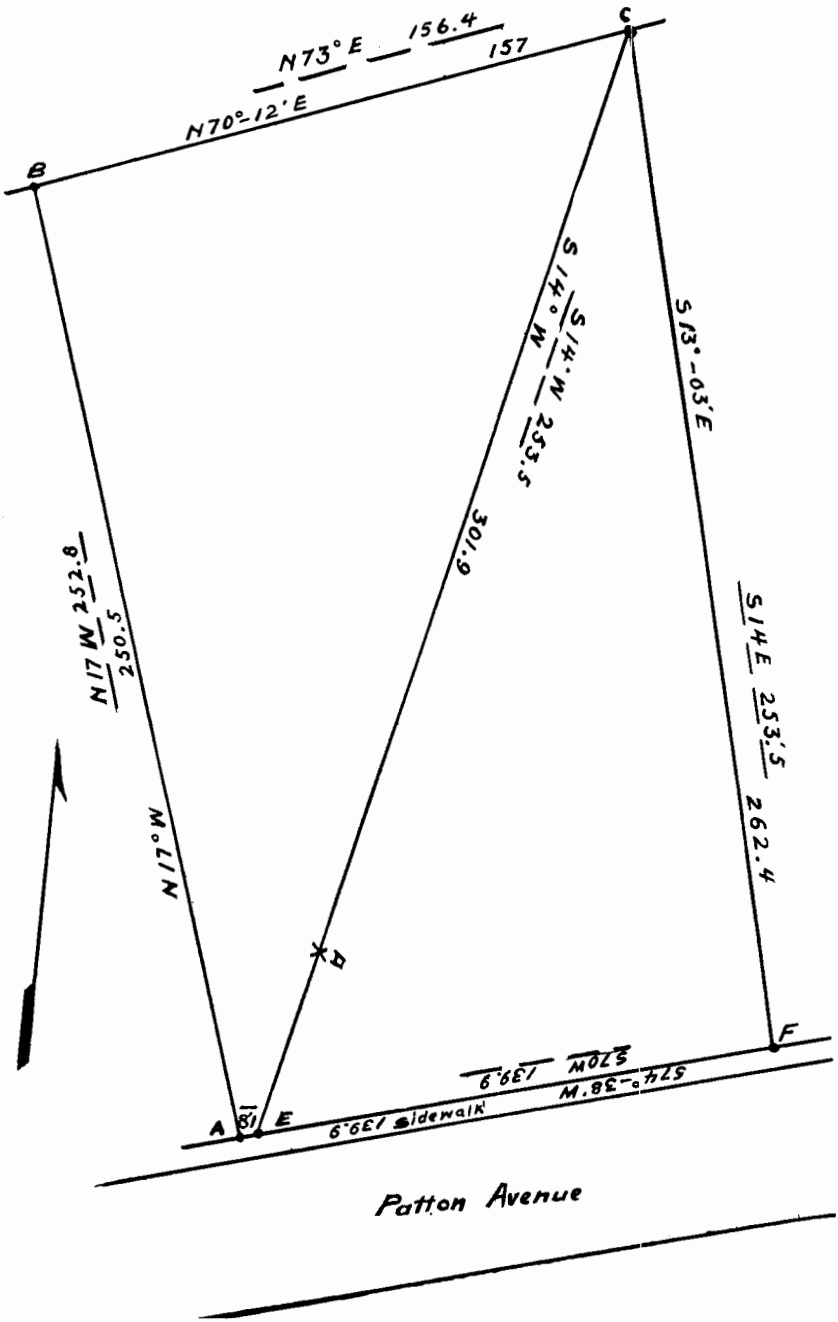
It would seem, upon examination of the record and the contentions, that his Honor was correct in so holding. In the first place, the description calls for a lot on the north side of Patton Avenue, "being the west end of the lot on which the parties of the first part now live." It is clear from this that the west end of the property of grantors was intended to be conveyed, and not the northwest corner. If it should be construed as contended by the defendant, then the conveyance would cover only the northwest corner of the land of the grantors.

In the second place, if the third call in the deed, "south 14 degrees *west* 15 poles 9 links to a stake on the western edge of Patton Avenue," be stopped at the end of the distance called for, the line would be 48.4 feet short of the distance necessary to carry the same to Patton Avenue. In the third place, the last call in the deed from Patterson and wife to Chedester is "thence south 70 degrees west along said (Patton) avenue 8 poles 12 links to the beginning." If the deed were construed as contended by the defendant, the last call in the description, instead of 8 poles and 12 links to the beginning as called for, the distance would be only 1.8 feet or 2.73 links.

If, therefore, the deed were construed according to defendant's contention there would be three errors in the deed at least: First, it would not convey the west end of the lot of the grantors; second, the line from the northeast corner of the lot at "C" would not be long enough to reach Patton Avenue; third, the line from "F" to "A," instead of being 139.9 feet, would be only 1.8 feet.

It is clear, therefore, that there is a clerical error in the deed, and this should be corrected so that the description of the third call should read "south 14 degrees *east*" instead of "south 14 degrees *west*" as written. *Hayden v. Hayden,* 178 N. C., 261, where the word "eastern" was changed to "western" in order to fit the description to the thing intended to be described. To the same purport are the following cases: *Ipock v. Gaskins,* 161 N. C., 678; *Brown v. Myers,* 150 N. C., 443; *Davidson v. Shuler,* 119 N. C., 582.

In *Wiseman v. Green,* 127 N. C., 288, it is held: "Where it plainly appears from the deed itself that there is a mistake in the description as where the word 'east' is written 'west,' the Court will construe the


C
N73° E
156.4
157
N70°-12' E
B
S 14° W
S 14° W
253.5
301.9
S 13°-03' E
N 17 W 252.8
250.5
N 17° W
S 14 E 253.5
262.4
D
F
S 70 W
139.9
S 74°-38' W
A
81
E
6' Sidewalk
Patton Avenue

deed according to the intent." Again, in head-note 5, *Mizell v. Simmons,* 79 N. C., 190, it is stated: "The Court will construe 'east' to mean 'west' in a call for a line in a grant when the mistake is obvious and fully corrected by other calls and an annexed plat."

We think the judgment of his Honor should be

Affirmed.

STATE v. CARY VAUGHAN.

(Filed 20 December, 1923.)

Murder—Evidence—Criminal Law—Appeal and Error.

Upon the trial of a father for the murder of his son: *Held,* the admission of testimony of a witness in explanation of an impeaching question asked by the defendant, and the statements of the defendant that he would "whip that boy," notwithstanding his weakened condition, tending to show *animus* or ill feeling, was not erroneous under the circumstances of the case.

APPEAL by defendant from *Daniels, J.,* at April Term, 1923, of HERTFORD.

Criminal action. The defendant was convicted of murder in the second degree and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel contra.

ADAMS, J. The defendant was prosecuted for the murder of his son, who was about sixteen years of age. On behalf of the State there was evidence tending to show the defendant's threat to "whip" and "fix" the deceased and his indifference as to consequences—"I don't care how soon somebody kills him"; that he did inflict severe corporal punishment; that on the last Sunday in February a physician was called in from whom the defendant concealed the boy's real physical condition; and that the death and burial occurred during the latter part of the week and the disinterment and autopsy on the following Sunday. The post-mortem examination showed that the body was covered with wounds; the left arm was dislocated at the elbow and the right arm at the shoulder joint; on the breast was a cut six or eight inches in length, and at the base of the brain a contused wound which caused the death. The defendant offered evidence, and upon issue joined, the jury found him guilty of murder in the second degree.

There are two exceptions to evidence, neither of which can be sustained. The testimony of John Vaughan, to which objection was taken, was in explanation of an impeaching question propounded by the defendant, and the defendant's statement to Sanford Sutton that he would "whip that boy" notwithstanding his weakened condition, was competent as tending to show animus or ill-feeling.

The substance of the defendant's prayers was given to the jury, and the instructions excepted to are free from error. His Honor was careful to safeguard the rights of the defendant throughout the trial. Indeed, a minute review of the case would result only in the repetition of familiar principles in the law of homicide. The admission of evidence and the charge of the court are sustained by the following authorities: *S. v. Whitfield,* 92 N. C., 831; *S. v. Jones,* 95 N. C., 588; *S. v. Dickerson,* 98 N. C., 708; *S. v. Horn,* 116 N. C., 1037; *S. v. Wilcox,* 118 N. C., 1131; *S. v. Thornton,* 136 N. C., 610; *S. v. White,* 138 N. C., 705; *S. v. Roberson,* 150 N. C., 837; *S. v. Fowler,* 151 N. C., 732; *S. v. Baldwin,* 152 N. C., 822; *S. v. Kincaid,* 183 N. C., 709; *S. v. Johnson,* 184 N. C., 637. We find

No error.

CHARLES KINSLAND v. S. J. KINSLAND AND WIFE, SELMA KINSLAND.

(Filed 20 December, 1923.)

Injunction—Grist Mills—Statutes—Dissolution of Temporary Restraining Order—Trial Hearing.

Ordinarily, in cases relating to the establishment and maintenance of grist mills, the remedy given by statutes must be pursued when their provisions apply, but in the present case, it appearing that though the plaintiff's land has been trespassed upon, the principal damage complained of is caused by the erection and maintenance of a dam to operate a grist mill by defendant on his land, and the restraining order heretofore issued will be dissolved without prejudice to the relief demanded, should the demand be renewed upon the establishment of the facts in plaintiff's favor at the final hearing, in view of the harm that may otherwise presently come to the defendant and the community which the defendant's grist mill now serves.

CIVIL ACTION heard on return to a preliminary restraining order by *Lane, J.,* at April Term, 1923, of the Superior Court of MACON. Defendants having demurred to the allegations of fact contained in plaintiff's affidavits, there was judgment continuing the restraining order to the hearing, and defendants excepted and appealed.

A. W. Horn and H. G. Robertson for plaintiff.
Gilmer A. Jones and T. J. Johnston for defendant.

HOKE, J. In sections 2555, 2556, 2557, and 2558, Consolidated Statutes, provision is made for obtaining relief where one conceives himself damaged by the erection of a grist-mill or mill for other useful purpose, and ordinarily, in cases to which the statute applies, the remedy given must be pursued. The history of this legislation and the reason for it, together with an interpretation of its meaning and purpose, appears in *Hester v. Broach,* 84 N. C., 253, and other cases on the subject.

While there are allegations in plaintiff's affidavit which tend to show wrongful trespasses committed on plaintiff's land lying on Watauga Creek in said county, just above that of defendant's, and which are of such a nature that they might well be made the subject of injunctive relief, it also appears that the principal damage complained of is caused by the erection and maintenance of a dam on the land of defendant for the operation of the latter's mill, also situate thereon, and in view of the above legislation, and of the harm that may come to defendant and the community in the lawful effort to properly run his said mill, we consider it advisable and right that the restraining order be presently dissolved without prejudice to the rights of plaintiff to renew his application therefor when the pertinent facts appertaining to the question shall have been more definitely established at the final hearing. This will be certified that the restraining order be dissolved.

Error.

STATE v. HENRY HOOKER.

(Filed 20 December, 1923.)

1. **Criminal Law—Husband and Wife—Abandonment—Statutes—Pleas—Abatement.**

   Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of C. S., 4447; on appeal *held,* his plea in abatement comes too late after his plea of not guilty.

2. **Same—Place of Abandonment—Indictment—Burden of Proof.**

   The law presumes that the offense of abandonment by the husband of his wife and child, C. S., 4447, took place as alleged in the indictment, and the burden is on the defendant to show otherwise.

3. **Same—Venue.**

   When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of C. S., 4447, is in that county.

4. Same—Limitation of Actions.

Where the abandonment by the husband of the wife consisted in his failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case.

APPEAL by defendant from *Harding, J.*, at April Term, 1923, of RICHMOND.

The defendant was convicted on a charge of abandoning his wife and child and failing to provide adequate support for them. C. S., 4447. He was found guilty and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. A. Tarlton and McLendon & Covington for defendant.

PER CURIAM. The plea in abatement was too late after the plea of not guilty; *S. v. Oliver, ante,* 329. The presumption of law is that the violation of law is presumed to take place where the indictment alleges. If it took place elsewhere the burden is upon the defendant to show that it took place in another county. *S. v. Oliver, supra.*

The court overruled the plea as to venue upon the ground that it was too late after the plea of not guilty was entered, but out of abundant caution submitted the following issue, "Did the alleged abandonment take place in Anson County?" to which the jury responded "No." The evidence was that the wife and child were living in Richmond County when the defendant executed his undertaking to contribute to the support of his wife and child by sending $10 on the first of each and every month to her address at Rockingham in Richmond County, and venue in this indictment upon his failure to do so was properly laid therefore in Richmond. *S. v. Beam,* 181 N. C., 597.

The evidence is that the defendant and the prosecutrix were married and lived in Anson, and the child was born of that marriage. She testified that thereafter he left her and failed to provide anything for her and the child to live on, and the people from whom they had bought their furniture took it away for the unpaid installments thereon; that being left entirely destitute by the defendant abandoning her in Wadesboro in 1919, she sought refuge with friends in the adjoining county of Richmond, and in December, 1920, a warrant was issued by a justice of the peace charging the defendant with abandonment. At the examination before the justice of the peace an agreement was entered into

in writing, which was put in evidence, between Mrs. Hooker and her husband, the defendant, that he would pay her $10 per month on the first day of each month for the support of herself and child. The following month, January, 1921, in the Superior Court, a consent order was entered to that effect. The defendant paid his wife $15 on the first day of February and $10 on the first days respectively of March, April, May, and June, 1921, but he failed to make any payment on the first day of July, and since then has continuously refused to make any payment.

The payment of this money was a recognition of the marital obligation and a renewal of it; *S. v. Hannon,* 168 N. C., 215. The offense was really not complete until he failed to support her, and the failure not to support not having occurred until 1 July, 1921, the statute did not bar. *S. v. Davis,* 79 N. C., 603, and *S. v. Beam, supra,* are directly in point, and the statute of limitations cannot apply as the present indictment was found in April, 1923.

The question was also raised in this case as to whether the prosecuting witness did not abandon the defendant or leave him in such way as to justify his failure to support her. This contention was carefully and fully submitted to the jury in the charge, who found against the defendant. *S. v. Bell,* 184 N. C., 701, where the whole subject is fully discussed.

No error.

WILLIAM FOX, ADMINISTRATOR OF WILLIAM ADIE ENGLISH v. VOLUNTEER STATE LIFE INSURANCE COMPANY.

(Filed 20 December, 1923.)

1. Insurance—Life—Principal and Agent—Local Agent—Negligence—Policies—Premiums.

Held, this case was tried in accordance with the decision in the former appeal on the question as to whether the negligence of the defendant's local agent was the cause of the first premium not being paid, it being the condition upon which the company's liability thereon was made to depend.

2. Same—Evidence—Appeal and Error.

In this case *held,* the evidence of statements made by the agent of the defendant life insurance company's local agent for the delivery of the policy as to his acts and conduct therein related to the question of his negligence at that time and was competent upon the trial.

STACY, J., dissenting.

FOX *v.* INSURANCE CO.

APPEAL by defendant from *Bryson, J.*, at May Term, 1923, of MADISON.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright, and Pou, Bailey & Pou for defendant.

PER CURIAM. Civil action. The case was brought to this Court at a former term, on appeal from a judgment of nonsuit (185 N. C., 121), and a new trial was awarded the plaintiff. It was admitted that the application (parts 1 and 2) and the policy, when issued, should constitute the entire contract between the parties, and that the policy should not take effect until it was issued and delivered and the premium paid; but the Court held that the jury should be allowed to pass upon the defendant's alleged negligent failure to deliver the policy in due time. The case was again taken up at the May Term, 1923, and was tried in substantial accordance with the opinion of the Court. There was disagreement between the parties as to the meaning of the first issue, but the crucial question was whether the defendant negligently delayed the delivery of the policy after it went into the hands of the local agent when the plaintiff's intestate was in good health, and was ready, able, and willing to pay the premium, and the question, which practically included three issues, was answered by the jury in favor of the plaintiff.

The defendant's exceptions to evidence of statements made by its agent are untenable. The statements qualified or explained the conduct of the agent at a time when he was engaged in doing the work and performing the duties required of him and were not a mere narration of what had previously occurred. *Berry v. Cedar Works,* 184 N. C., 187; *Hamrick v. Telegraph Co.,* 140 N. C., 151; *Darlington v. Telegraph Co.,* 127 N. C., 448; *Branch v. R. R.,* 88 N. C., 573. Nor can we sustain the other exceptions to the admission of evidence. The motion for nonsuit seems to have been based on the agreement that the policy should not take effect until it was delivered and the premium was paid, but this question was disposed of in the former appeal. We find

No error.

STACY, J., dissents.

CHARLIE BOOMER v. H. E. GRIFFIN AND THE HAVENS OIL COMPANY.

(Filed 12 September, 1923.)

APPEAL by defendant from *Connor, J.*, at May Term, 1923, of HYDE.

Walter L. Spencer for plaintiff.
Wiley C. Rodman for the Havens Oil Company.

PER CURIAM. We have examined the record carefully in this case, and find no sufficient reason to disturb the verdict and the judgment.
No error.

VIRGINIA-CAROLINA CHEMICAL COMPANY v. N. C. NEWBERN.

(Filed 12 September, 1923.)

APPEAL by plaintiff from *Connor, J.*, at April Term, 1923, of CURRITUCK.

Thompson & Wilson and W. A. Worth for plaintiff.
Ehringhaus & Hall for defendant.

PER CURIAM. We have examined the record carefully in this case, and find no sufficient reason to disturb the verdict and the judgment.
No error.

R. H. WHITFIELD v. NOAH COPPEDGE AND OTHERS.

(Filed 12 September, 1923.)

APPEAL by plaintiff from *Kerr, J.*, at April Term, 1923, of NASH.

W. M. Person for plaintiff.
E. B. Grantham and Finch & Vaughan for defendants.

PER CURIAM. We have examined the record carefully in this case, and find no sufficient reason to disturb the verdict and the judgment.
No error.

J. H. MOORE ET AL. v. ROSSER AND CAMERON, EXECUTORS OF J. H. SMITH ET ALS.

(Filed 19 September, 1923.)

Mortgages—Injunction—Foreclosure.

Where, in a suit to restrain the foreclosure of a mortgage, it appears from the pleadings that there is a serious dispute between the parties as to the right of the mortgagee to proceed further and the amount due, the restraining order will be continued to the hearing.

APPEAL from HARNETT, in open court, by defendants, from *Horton, J.*, on 15 February, 1923.

Civil action. There was judgment continuing the restraining order till the hearing, and defendants excepted and appealed.

Marshall T. Spears for plaintiffs.
Hoyle & Hoyle for defendants.

PER CURIAM. The action is instituted by plaintiffs, mortgagors, against defendants, holders and owners of said mortgage, to restrain a sale of the property under powers contained in the instrument. It appearing on careful consideration of the verified pleadings and other affidavits that there is serious dispute between the parties, both as to the right to proceed further under the mortgage and also as to the amount due on same, we are of opinion that the judgment of his Honor continuing the restraining order to the hearing should be affirmed. *Sanders v. Ins. Co.*, 183 N. C., 66; *Proctor v. Fertilizer Works*, 183 N. C., 153; *Durham v. R. R.*, 104 N. C., 262. This ruling to be without prejudice to the right of the parties to present and insist upon any and all material questions involved in the controversy and as set forth in their pleadings.

Affirmed.

MATILDA EVERETT v. W. M. SNEED ET AL.

(Filed 3 October, 1923.)

New Trials—Supreme Court—Motions—Presumptions.

Upon motion in Supreme Court for new trial for newly discovered evidence the presumption is the correctness of the verdict, which appellant must overcome, and show due diligence on his part.

APPEAL by defendant from *Allen, J.*, at November Term, 1922, of WAYNE.

Civil action in ejectment and to recover rents. Defendants claimed title to the property and also set up claim for improvements or betterments.

From a verdict and judgment in favor of plaintiff, the defendants appealed, assigning errors.

Kenneth C. Royall and E. A. Humphrey for plaintiff.
Langston, Allen & Taylor for defendants.

PER CURIAM. This case, on the trial, narrowed itself principally to questions of fact, which the jury alone could determine. A careful examination of the record leaves us with the impression that the cause has been tried in substantial conformity to the law bearing on the subject. The chief exceptions are those directed to the admission of evidence and to alleged errors in the charge. We have discovered no ruling or action on the part of the trial court which would entitle the defendants to another hearing or to a *venire de novo.*

Defendants have also moved in this Court for a new trial upon the ground of newly discovered evidence. The affidavits accompanying this motion have been scrutinized and examined with care, but we are not prepared to say that they met the requirements or prerequisites announced in *Johnson v. R. R.,* 163 N. C., 431. In this regard the burden is on the applicant, or movant, to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 A. & E. Enc. Pl. and Pr., 790. We are of opinion that the present motion must be overruled, and it is therefore disallowed.

No error.

W. R. DOWDY ET AL. V. W. H. JONES.

(Filed 10 October, 1923.)

APPEAL by defendant from *Grady, J.,* at April Term, 1923, of PAMLICO.

Civil action in ejectment and to recover rents. Defendant denied plaintiffs' title and set up claim to the land. Upon the issues thus joined, there was a verdict and judgment in favor of plaintiffs. Defendant appealed, assigning errors.

D. L. Ward and F. C. Brinson for plaintiffs.
Ward & Ward for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The chief exceptions are those directed to alleged errors in the charge and to the court's refusal to grant the defendant's motion for judgment as in case of nonsuit. There is nothing on the record which entitles the defendant to a new trial or to a dismissal.

No error.

ZENO BROWN v. B. W. MOSELEY ET AL.

(Filed 10 October, 1923.)

APPEAL by defendants from *Grady, J.*, at May Term, 1923, of PITT.

Civil action for specific performance to enforce contract to buy land. Defense interposed upon the ground that the title offered was defective. Judgment for plaintiff. Defendants appealed.

L. W. Gaylord for plaintiff.
Skinner & Whedbee for defendants.

PER CURIAM. Several serious exceptions are entered on the record, but a careful perusal of the whole case confirms us in the belief that substantial justice has been done without violence to any legal principle. Therefore, the judgment as entered below will be affirmed. The case presents no new or novel point of law which would seem to warrant an extended discussion, or which we apprehend would be helpful or beneficial to the profession. Hence we shall not undertake to state the facts, which are not in dispute but somewhat complicated, and make a rather long story.

After a careful and painstaking examination of the whole record, we have discovered no reversible error on the part of the trial court. The judgment will be upheld.

Affirmed.

EAST CAROLINA LUMBER COMPANY v. HYDE COUNTY LAND AND LUMBER COMPANY.

(Filed 17 October, 1923.)

APPEAL by defendant from *Grady, J.*, at April Term, 1923, of CRAVEN.

Civil action to recover damages for an alleged breach of contract, relating to the manufacture and sale of certain designated lumber.

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

W. H. Lee and Whitehurst & Barden for plaintiff.
S. S. Mann and Ward & Ward for defendant.

PER CURIAM. The controversy on trial narrowed itself principally to questions of fact, which the jury alone could determine. After a careful perusal of the record, we are satisfied that the case has been tried in substantial conformity to the law bearing on the subject, and no sufficient reason has been found by us for disturbing the verdict and judgment entered below. The chief exceptions are directed to alleged errors in the charge and to the court's refusal to grant the defendant's motion for judgment as in case of nonsuit. We have discovered nothing which would entitle the defendant to a new trial or to a dismissal.

No error.

RAY & HARRIS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 17 October, 1923.)

APPEAL by defendant from *Lyon, J.*, at March Term, 1923, of CHATHAM.

Civil action to recover damages for an alleged breach of contract in connection with the sale of certain cross-ties.

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

W. P. Horton and Siler & Barber for plaintiffs.
Long & Bell and Murray Allen for defendant.

PER CURIAM. A careful examination of the present record leaves us with the impression that no reversible error was committed on the trial

of the cause. All the exceptions are directed to alleged errors in the charge, but we think the charge as given is in substantial compliance with the law bearing on the subject. No prejudicial error has been made to appear.

No error.

T. L. FERRELL v. SOUTHERN RAILWAY ET AL.

(Filed 24 October, 1923.)

APPEAL by plaintiff from *Cranmer, J.*, at Second March Term, 1923, of WAKE.

Civil action tried upon the following issues:

"1. Was the plaintiff, T. L. Ferrell, injured by the negligence of the defendants, U. S. Railroad Administration and James C. Davis, Director General of Railroads, as alleged in the complaint? Answer: 'No.'

"2. Was the plaintiff, T. L. Ferrell, injured by the negligence of the defendant D. W. Card, as alleged in the complaint? Answer: 'No.'

"3. Did the plaintiff, T. L. Ferrell, by his negligence, contribute to his own injury? Answer: 'Yes.'

"4. What damages, if any, is the plaintiff entitled to recover? Answer: ....."

Judgment on the verdict in favor of defendants. Plaintiff appealed.

Douglass & Douglass and J. R. Williams for plaintiff.
William B. Snow and W. H. Rhodes for defendants.

PER CURIAM. The only exceptions presented on the record are those relating to the exclusion of evidence bearing upon the first two issues. There is no exception directed to the third issue. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the law bearing on the subject, and we have discovered no material ruling or action on the part of the trial court which we apprehend should be held for reversible error.

No error.

OVERLAND GARAGE v. J. P. HARDEE ET AL.

(Filed 26 October, 1923.)

APPEAL by defendants from *Calvert, J.*, at February Term, 1923, of LENOIR.

Civil action to recover balance due on the purchase price of an automobile, plaintiff taking claim and delivery for the machine, etc.

Verdict and judgment for plaintiff. Defendants appealed.

Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse and P. D. Croom for defendants.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The chief exceptions are those directed to alleged errors in the charge and to the court's refusal to grant the defendants' motion for judgment as in case of nonsuit. There is nothing on the record which entitles the defendants to a new trial or to a dismissal.

No error.

W. H. FAULKNER v. J. P. STRICKLAND ET AL.

(Filed 31 October, 1923.)

APPEAL by defendant, J. P. Strickland, from *Devin, J.*, at March Term, 1923, of CUMBERLAND.

Civil action tried upon the following issues:

"1. Did the plaintiff enter into a contract with the defendant Strickland to find a purchaser for the timberland, as alleged? Answer: 'Yes.'

"2. If so, did the plaintiff find a purchaser for said timberlands who was able, ready and willing to purchase the same at the price and on the terms authorized by the said defendant? Answer: 'Yes.'

"3. What amount, if anything, is the plaintiff entitled to recover of the defendant Strickland for his services in said matter? Answer: $'3,405.' "

Judgment on the verdict in favor of plaintiff. Defendant appeals, assigning errors.

Nimocks & Nimocks and W. C. Downing for plaintiff.
Bullard & Stringfield for defendant.

PER CURIAM. Upon warmly contested issues of fact, the jury has accepted the plaintiff's version of the matters here in dispute, and we have discovered no valid reason for disturbing the result of the trial below. A careful examination of the record discloses no prejudicial or reversible error. The verdict and judgment will be upheld.

No error.

W. S. PEARCE v. DURHAM AND SOUTH CAROLINA RAILROAD COMPANY AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 31 October, 1923.)

APPEAL by defendant, Durham and South Carolina Railroad Company, from *Cranmer, J.*, at March Term, 1923, of WAKE.

Civil action tried upon the following issues:

"1. Was the plaintiff injured by the negligence of the Durham and South Carolina Railroad Company, as alleged in the complaint? Answer: 'Yes.'

"2. What amount of damages, if any, is the plaintiff entitled to recover? Answer: '$2,750.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed, assigning errors.

Douglass & Douglass and Armistead Jones & Son for plaintiff.
Fuller & Fuller for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The chief exceptions are those directed to alleged errors in the charge and to the court's refusal to grant the defendant's motion for judgment as in case of nonsuit. There is nothing on the record which entitles the defendant to a new trial or to a dismissal.

No error.

BENJAMIN LEONARD v. WILMINGTON, BRUNSWICK AND SOUTHERN RAILROAD COMPANY.

(Filed 7 November, 1923.)

APPEAL by defendant from *Sinclair, J.*, at January Term, 1923, of BRUNSWICK.

Civil action tried upon the following issues:

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

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

"3. What damage, if any, is plaintiff entitled to recover from the defendant railroad company? Answer: '$600.' "

Judgment on the verdict for the plaintiff. Defendant appealed.

C. Ed. Taylor for plaintiff.
Robert W. Davis for defendant.

PER CURIAM. The case below resolved itself into controverted issues of fact, which the jury has settled by its verdict. No new or novel question of law is presented by the appeal, and we have found no error on the record. The verdict and judgment will be upheld.

No error.

G. S. RAY v. HILL VENEER COMPANY.

(Filed 7 November, 1923.)

APPEAL by plaintiff from *Bond, J.*, at May-June Term, 1923, of ALAMANCE.

Civil action to recover damages for breach of contract alleged to have been made in connection with the sale of certain walnut logs. There was a denial of the contract, and at the close of plaintiff's evidence judgment of nonsuit was entered on motion of defendant. Plaintiff appealed.

Thos. C. Carter for plaintiff.
Parker & Long and David H. Parsons for defendant.

PER CURIAM. Without stating the facts, some of which are in dispute, we are convinced, from a careful perusal of the record, viewing

the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, that the case should have been submitted to the jury. No benefit would be derived from detailing the evidence, some of which is denied by the defendant, as the only question before us is whether or not it is sufficient to carry the case to the jury, and we think it is.

The judgment of nonsuit will be set aside and the case remanded for another trial.

Reversed.

ISAAC SMITH v. LIGGETT & MYERS TOBACCO COMPANY ET AL.

(Filed 7 November, 1923.)

APPEAL by plaintiff from *Bond, J.*, at April Term, 1923, of DURHAM.

Civil action to recover damages for an alleged negligent injury.

The usual issues of negligence, contributory negligence and damages were submitted to the jury, with the result that the first issue was answered in favor of the defendants. Plaintiff appealed, assigning errors.

E. C. Harris for plaintiff.
Fuller & Fuller for defendants.

PER CURIAM. The evidence bearing upon the defendants' alleged negligence was conflicting, but the jury has accepted the defendants' version of the matter and answered the issue against the plaintiff. We have found no substantial or prejudicial error in the trial; hence the verdict and judgment as rendered will be upheld.

No error.

STATE v. WILLIAM W. GREEN.

(Filed 14 November, 1923.)

APPEAL by defendant from *Stack, J.*, at February Term, 1923, of DAVIDSON.

Criminal prosecution tried upon an indictment charging the defendant with rape. The defendant was convicted of an assault with intent to commit rape (C. S., 4205), and from the judgment pronounced thereon he appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Phillips & Bower for defendant.

PER CURIAM. A careful examination of the record leaves us with the impression that the instant case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to entitle the defendant to another hearing.

There is no error of law appearing on the record.

No error.

FLORA POPE ET AL. V. ANDREW HUFFMAN.

(Filed 14 November, 1923.)

APPEAL by defendant from *Shaw, J.*, at February Term, 1923, of FORSYTH.

Civil action tried upon the following issues:

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

"2. What amount of damages, if any, is the plaintiff, Flora Pope, entitled to recover against the defendant? Answer: '$250.'"

Judgment on the verdict in favor of plaintiff. Defendant appealed.

No counsel appearing for plaintiff.

W. T. Wilson for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The verdict and judgment will be upheld.

No error.

STATE v. JACK COE.

(Filed 14 November, 1923.)

APPEAL by defendant from *Lyon, J.*, at April Special Term, 1923, of FORSYTH.

Criminal prosecution tried upon an indictment charging the defendant with larceny and robbery.

From an adverse verdict and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. G. Brown and B. C. Brock for defendant.

PER CURIAM. A careful examination of the record leaves us with the impression that the instant case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to entitle the defendant to another hearing.

There is no error of law appearing on the record.

No error.

M. A. TRIVETT ET AL. v. R. H. HARDIN ET. AL.

(Filed 21 November, 1923.)

APPEAL by plaintiffs from *Lane, J.*, at July Term, 1923, of ASHE.

Civil action in ejectment.

At the close of all the evidence, upon motion of defendants, judgment was entered as in case of nonsuit. Plaintiffs appealed.

C. B. Spicer and Park & Johnston for plaintiffs.

T. C. Bowie for defendants.

PER CURIAM. The record discloses no reversible error. The judgment below will be upheld.

Affirmed.

SURRATT BROTHERS v. C. H. KLUTTZ.

(Filed 21 November, 1923.)

APPEAL by defendant from *Stack, J.*, at May Term, 1923, of DAVIDSON.

Civil action tried upon the following issues:

"1. Did the defendant contract to buy of the plaintiffs 150,000 feet of lumber at $50 a thousand as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the defendant breach the said contract, as alleged in the complaint? Answer: 'Yes.'

"3. What damage, if any, has the plaintiffs sustained by reason thereof? Answer: '$2,825.'"

By consent of plaintiff, the amount of damages was reduced to $2,000 and judgment entered therefor. Defendant appealed.

Phillips & Bower for plaintiffs.

Walser & Walser and Z. I. Walser for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The verdict and judgment will be upheld.

No error.

WEINSTEIN BROTHERS v. JOHN A. McGREGOR.

(Filed 21 November, 1923.)

APPEAL by plaintiff from *Harding, J.*, at June Term, 1923, of SCOTLAND.

Civil action tried upon the following issues:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? A. 'Nothing.'

"2. Is the plaintiff indebted to the defendant, and if so, in what amount? A. 'Nothing.'"

Judgment on the verdict, taxing the plaintiff with costs, from which he appeals.

J. E. Carpenter for plaintiff.
W. H. Weatherspoon and Cox & Dunn for defendant.

PER CURIAM. The trial of this cause reduced itself to a controversy over issues of fact, which the jury alone could determine. A careful perusal of the record convinces us that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which would seem to require another hearing. The verdict and judgment will be upheld.

No error.

PAUL WALLACE v. THE WEST CONSTRUCTION COMPANY.

(Filed 28 November, 1923.)

APPEAL by defendant from *Calvert, J.*, at June Term, 1923, of LENOIR.

Civil action tried upon the following issues:

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

"2. If so, did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$300.'"

Judgment on the verdict in favor of plaintiff. Defendant appealed.

Shaw & Jones for plaintiff.
Rouse & Rouse for defendant.

PER CURIAM. A careful examination of the record in this case discloses no reversible error. The verdict and judgment of the Superior Court will be upheld.

No error.

PAUL WALLACE v. THE WEST CONSTRUCTION COMPANY.

(Filed 28 November, 1923.)

APPEAL by defendant from *Calvert, J.*, at June Term, 1923, of LENOIR.

Civil action tried upon the following issues:

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

"2. If so, did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,600.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed, assigning errors.

Shaw & Jones for plaintiff.
Rouse & Rouse for defendant.

PER CURIAM. Upon controverted issues of fact the jury has determined the case in favor of the plaintiff. A careful perusal of the record leaves us with the impression that the case has been tried substantially in accordance with the law bearing on the subject, and we have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

JOHN BLACKWELL v. PROXIMITY MANUFACTURING COMPANY.

(Filed 5 December, 1923.)

APPEAL by defendant from *Shaw, J.*, at August Term, 1923, of GUILFORD.

Civil action tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$448.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed.

S. B. Adams, R. C. Strudwick, and Geo. A. Younce for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. Let the verdict and judgment in this case be upheld, as the record presents no reversible error. *Cook v. Mfg. Co.*, 182 N. C., 205.

No error.

J. F. FAULKNER v. C. C. CARPENTER.

(Filed 5 December, 1923.)

APPEAL by defendant from *Lyon, J.*, at May Term, 1923, of MECKLENBURG.

Civil action tried upon the following issues:

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

"2. Was the plaintiff, or person driving his automobile, at the time of the collision, guilty of negligence which caused or contributed to the injury to his car, as alleged in the answer? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover? Answer: '$650.' "

Judgment on the verdict in favor of the plaintiff. Defendant appeals, assigning errors.

Frank H. Kennedy for plaintiff.

J. F. Flowers for defendant.

PER CURIAM. We are constrained to believe and to conclude, from a careful perusal of the entire record, that this case has been tried substantially in accordance with the law bearing on the subject. No ruling or action on the part of the trial court has been discovered by us which we apprehend should be held for reversible error. The verdict and judgment, therefore, will be upheld.

No error.

STATE v. CHARLES LOGAN.

(Filed 5 December, 1923.)

APPEAL by defendant from *McElroy, J.*, at May Term, 1923, of RUTHERFORD.

Criminal prosecution tried upon an indictment charging the defendant with manufacturing spirituous liquors in violation of C. S., 4453.

From an adverse verdict and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris for defendant.

PER CURIAM. Defendant relies entirely upon his demurrer to the evidence and motion for dismissal, or for judgment as of nonsuit under C. S., 4643. Viewing the evidence in the light most favorable to the State, the accepted position on a motion of this kind (*S. v. Rountree,* 181 N. C., 535), we think the trial court was justified in submitting the case to the jury, and that the verdict is fully supported by the evidence.

No benefit would be derived from detailing the testimony of the several witnesses, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

No error.

STATE v. FRED BYERS.

(Filed 12 December, 1923.)

APPEAL by defendant from *Ray, J.,* at September Term, 1923, of POLK.

Criminal prosecution, tried upon an indictment charging defendant with manufacturing spirituous liquors in violation of C. S., 4453.

From an adverse verdict, and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris for defendant.

PER CURIAM. Defendant relies chiefly upon his demurrer to the evidence and motion for dismissal, or for judgment as of nonsuit under C. S., 4643. Viewing the evidence in the light most favorable to the State, the accepted position on a motion of this kind (*S. v. Rountree,* 181 N. C., 535), we think the trial court was justified in submitting the case to the jury, and that the verdict is fully supported by the evidence.

No benefit would be derived from detailing the testimony of the several witnesses, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

No error.

J. A. NEWTON v. HENRIETTA MILLS.

(Filed 12 December, 1923.)

APPEAL by defendant from *Webb, J.*, at July Term, 1923, of CLEVELAND.

Civil action, tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$2,500.' "

Judgment on the verdict in favor of the plaintiff. Defendant appealed.

O. Max Gardner for plaintiff.
Ryburn & Hoey for defendant.

PER CURIAM. Defendant relies entirely upon its motion for judgment as of nonsuit, made first at the close of plaintiff's evidence, and renewed at the close of all the evidence. Viewing the evidence in the light most favorable to the plaintiff, the accepted position on a motion of this kind, we think the trial court was justified in submitting the case to the jury, and that the verdict is amply supported by the evidence.

No benefit would be derived from detailing the testimony of the several witnesses, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

No error.

A. W. FLYNN, ADMR., v. CHADBOURN LUMBER COMPANY.

(Filed 20 December, 1923.)

APPEAL by defendant from *Devin, J.*, at September Term, 1922, of PENDER.

Civil action, tried upon the following issues:

"1. In what amount, if any, is the Chadbourn Lumber Company indebted to the plaintiff? Answer: '$1,054.'

"2. In what amount, if any, is the plaintiff administrator of the estate of F. P. Flynn indebted to the Chadbourn Lumber Company? Answer: 'Nothing.' "

Judgment on the verdict in favor of plaintiff. Defendant appealed.

Bland & Bland for plaintiff.
Wright & Stevens for defendant.

PER CURIAM. Upon warmly contested issues of fact, the jury returned a verdict in favor of the plaintiff. We have found no sufficient reason for disturbing the result of the trial. Hence the verdict and judgment will be upheld.

There was also a motion, filed by appellant in this Court, for a new trial on the ground of newly discovered evidence. Upon an examination of the affidavits, filed by both sides in regard to the present motion, we are of opinion that it must be overruled, and it is therefore disallowed.

No error.

HOBART ROGERS v. SUNCREST LUMBER COMPANY ET AL.

(Filed 20 December, 1923.)

APPEAL by defendant from *Bryson, J.*, at September Term, 1923, of HAYWOOD.

Civil action, tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover? Answer: '$5,000.'"

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

Morgan & Ward for plaintiff.
Alley & Alley for defendants.

PER CURIAM. The only material exception presented in this case is one directed to the court's charge on the measure of damages. The instruction here complained of is substantially the same instruction as that given on the issue of damages in *Murphy v. Lumber Co., ante,* 746, just decided, and which was there the subject of exception. The present case is controlled by what was said in the *Murphy case.*

No error.

STATE v. SUMMEY BIGGERSTAFF.

(Filed 20 December, 1923.)

APPEAL by defendant from *McElroy, J.*, at May Term, 1923, of RUTHERFORD.

Criminal prosecution, tried upon an indictment charging the defendant with transporting spirituous liquors and having the same in his possession for the purpose of sale, contrary to the statute in such cases made and provided, etc.

From an adverse verdict, and judgment pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris for defendant.

PER CURIAM. Defendant relies entirely upon his demurrer to the evidence and motion for dismissal, or for judgment as of nonsuit under C. S., 4643. Viewing the evidence in the light most favorable to the State, the accepted position on a motion of this kind (*S. v. Rountree*, 181 N. C., 535), we think the trial court was justified in submitting the case to the jury, and that the verdict is fully supported by the evidence.

No benefit would be derived from detailing the testimony of the several witnesses, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

No error.

W. P. LYNN v. KITCHEN LUMBER COMPANY.

(Filed 20 December, 1923.)

APPEAL by defendant from *Bryson, J.*, at June Term, 1923, of GRAHAM.

Civil action, to recover damages for an alleged breach of contract relating to the cutting and hauling of certain cord-wood.

Upon denial of liability and issues joined, the jury returned the following verdict:

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

"2. Did the defendant breach its contract with the plaintiff? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant by reason of said breach? Answer: '$924.50.'"

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

T. M. Jenkins and J. N. Moody for plaintiff.
R. L. Phillips for defendant.

PER CURIAM. A careful perusal of the present record leaves us with the impression that the case has been tried substantially in accordance with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The verdict and judgment will be upheld.

No error.

J. E. GENTRY v. SUNCREST LUMBER COMPANY ET AL.

(Filed 20 December, 1923.)

APPEAL by defendant from *Bryson, J.*, at September Term, 1923, of HAYWOOD.

Civil action, tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover? Answer: '$7,500.'"

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

Morgan & Ward for plaintiff.
Alley & Alley for defendants.

PER CURIAM. The only material exception presented in this case is one directed to the court's charge on the measure of damages. The instruction here complained of is substantially the same instruction as that given on the issue of damages in *Murphy v. Lumber Co., ante,* 746, just decided, and which was there the subject of exception. The present case is controlled by what we said in the *Murphy case.*

No error.

CASES FILED WITHOUT WRITTEN OPINIONS

Aldridge v. Dunn. (223)
Allman v. Christopher. (601)
Bank v. Scarboro. (260)
Boyd v. R. R. (605)
Browning v. Knights of Pythias. (329)
Bunn v. Dunn. (235)
Burger v. Tatham. (607)
Cohen v. Schwartz. (453)
Cole et al. v. Hutchings. (108)
Crisp v. Burger. (607)
Dawkins v. Phillips et al. (362)
Distributing Co. v. Edmunds et al. (181)
Esty v. Hardison. (181)
Farr v. Carver. (609)
Fleming v. Bullock et als. (334)
Fox v. Realty Co. (289)
Garner v. Harrison. (156)
Gossett v. Gossett. (232)
Harris v. Russell. (473)
Hedrick v. Kanoy. (392)
Hunt v. Atkins. (387)
Isam v. Jessie. (357)
Jones v. McKeel. (165)
Mfg. Co. v. Produce Co. (162)
Motor Co. v. Whitford. (180)
Petition for Writ of Habeas Corpus by Dr. Paul Crumpler.
S. v. Bowman. (8)
S. v. Edmonds. (535)
S. v. Gulley. (323)
S. v. Hasty. (466)
S. v. Reece. (384)
S. v. Richardson. (244)
S. v. Wallin. (533)
Suggs v. Oakley. (173)
Tel. Co. and Jordan v. Hillsboro. (340)
Wilson v. Beasley. (95)

PRESENTATION OF THE PORTRAIT

OF THE LATE

WALTER A. MONTGOMERY

TO THE SUPREME COURT OF
NORTH CAROLINA

BY

HONORABLE T. T. HICKS

OCTOBER 30TH, 1923

The Supreme Court being assembled, Mr. Hicks, on being recognized, addressed the Court as follows:

May it Please Your Honors: The wife and son and daughter of Honorable Walter A. Montgomery, late an Associate Justice of this Court, have caused to be prepared a portrait of him, and have assigned to me the pleasant duty of presenting it to the Court. I now do so; and in connection therewith, since he was blessed with long life and good days, I will, by your leave, speak briefly of him.

But, before beginning this sketch, I will present another but poetic negative that shows some of his features, apparent to the eye of the observant, as well as in this excellent likeness:

> "Thou shalt know him when he comes,
> Not by any din of drums.
> Nor the vantage of his airs;
> Neither by his crown,
> Nor his gown,
> Nor anything he wears."

The chain of events that produced the life and career of Walter Alexander Montgomery has many links. The most remote link we have been able to trace was severed from the chain on the night of Saint Bartholomew's Day, in the year one thousand six hundred and eighty-five, when, on account of the revocation of the Edict of Nantes, a hundred thousand Protestants were slain in France and four hundred thousand more saved themselves by flight. One of the Montgomerys found refuge in Scotland, where, and in the North of Ireland, for a hundred years he and his descendants lived and intermarried. They loved not the Catholic Church, nor the Government of England. Their dislike of the former was because of its persecution of Huguenots, and of the latter because it oppressed the Irish and created by law artificial class distinctions.

The founder of the family in America, from which Judge Montgomery descended, arrived in New York from Ireland about the year

1795. There he practiced for several years the art of the silversmith. His health failing, he came, after five years, to Hertford County, North Carolina, from which he shortly removed to "the hill country" of Warren as it was then called. There he bought a farm, on which he lived to his death on July 6, 1849. His seventh child, Thomas Alexander Montgomery, born May 7, 1818, was the father of Judge Walter A. Montgomery, who was born in Warrenton, N. C., on February 17, 1845. The mother of Judge Montgomery was the daughter of Robert T. Cheek who married in the ancient and honorable family of Alston, of Warren County.

Of Judge Montgomery, he himself has said: "My lot was destined to be that of those who get what they pay for: that and nothing more. My experience in life has been that the natural has ever come to pass."

The war of the Confederacy broke upon the nation when our subject was just sixteen years of age. His father owned many slaves. He supported the cause of Secession with all his heart and all his possessions. His son said that the father regarded General Lee and Jefferson Davis as "the greatest among men." The son early acquired the impression that slavery was wrong, and declared that if any slaves ever came into his possession he would set them free; so that it was an often expressed wish of the slaves of the family that "Marse Walter may draw me."

Yet the call to arms so appealed to the youth that at once after war was declared he tendered himself for military duty, and was a bugler of the company until the military examination came to be made. Dr. Charles O'Hagan, the examining physician, on account of his small size and delicate constitution, declared he had symptoms of consumption, and absolutely rejected him, and could not be prevailed upon by Col. Robert Ransom, the commanding officer, to change his mind. Within ten minutes young Walter had left the camp and was on his way to Warrenton. Within a week he had gone to Norfolk and sought and obtained permission to join the army there.

Judge Montgomery referred to his temperament as "mercurial"; but it is to be noted that his continued purpose ran through those four terrible years; that in the certainty of the failure of the cause after Gettysburg, when at times myriads of soldiers were "absent without leave," Walter A. Montgomery laid down his arms at Appomattox. He knew of and saw the building of the Merrimac, and shared fully all the hopes and expectations of the Southern people as to what it would do. He saw it steam down the river from Norfolk, and he witnessed from the shore the duel between it and the Monitor. He helped to fight the battles of Fredericksburg, Chancellorsville, Gettysburg, Brandy Station, the Wilderness, Spottsylvania Court House, Win-

chester (1864), Bell's Grove, Mine Run, Hatcher's Run, Fort Steadman (Hare's Hill), the last day's battle in the trenches at Petersburg, Sailor's Creek, and Appomattox.

Though early marked for death, according to the opinion of the medical officer at the beginning of the war, the physical training, the outdoor air, the avoidance during the four years of the formative period of his life of excessive eating and drinking, and other forms of improper conduct, fitted him for a life of active labor. The scars of the wounds he received at Chancellorsville and Gettysburg were buried with his mortal remains in Oakwood Cemetery at Raleigh, N. C., in the seventy-seventh year of his age. We seek to shun the Apostle's suggestion of "enduring hardness" as good soldiers; "but the instant case" proves its virtues and exhibits its rewards. Until he was large enough, and strong enough to carry the equipment of a soldier, he carried and blew the bugle. The discipline to which he was subjected, his learning obedience to the laws of the camp and of war, by the things which he suffered, with the opportunities for the study of men, were together quite as valuable to him as would have been the acquisition of four years in college.

The spirit and enthusiasm of the soldiers during the first year of the war were fully shared by him and were most remarkable to him. They were anxious for the fray; they thought the war would last only a few months; they feared it would end before they would be engaged in a battle; they believed one Confederate could whip six "Yankees." The thought of having to go home without a wound was humiliating. But after the Conscript Act of April, 1862, went into effect, the hegira homeward of so many of "the better class," and so many bombproof positions were found by the aid of "the twenty-negro law," that much began to be thought and said about the war being a "rich man's war and a poor man's fight." Many of the men carrying the guns began to realize that their true interests were not involved in the success of the Confederacy. And it is indeed one of the wonders of the world that the fighting spirit, the courage, what has recently been called the morale of the soldiers, continued as long as it did. Robert Toombs and Bishop Polk declared that "the greatest incentive to loyalty to the Confederacy of the poor white men of the South was the fear that the success of the Union armies would enforce the social and political equality of the negroes with the poor white people of the South.

Judge Montgomery saw and endured much of the sufferings, privations, hunger and hardships of the soldiers. His conversation at times sparkled with witticisms and anecdotes of that time. Two will be here given: "General Gordon was with much energy trying to rally his broken ranks at the battle of Hatcher's Run in February, 1865, and

being near a wounded man who was on his way to the rear cried out to him, 'What is the matter with you, sir?' The Irishman replied, 'Faith, and as for me, I have a hole in my stomach as big as your fist.' But moved by Gordon's stirring appeal, he stopped short and, with his cap in his hand, turned on the enemy, shouting, 'Charge 'em, boys, they have chase in their haversacks.' "

The other story relates to the etiquette that prevailed in the matter of pillaging the dead. The first man who found a dead soldier, whose equipment was worth having, was entitled to all he had, and no other soldier would trespass upon his find. No matter how badly wounded or how near dead a Yankee was, he must never be touched so long as he breathed. On one occasion a finely accoutered Yankee was found by one of our men. His belongings were a rich prize of war. The discoverer stood by, waiting anxiously the return of the soul to the God who gave it. On the instant he begun to divest the body of its goods, when the Yankee remarked, "Friend, can't you wait a few minutes longer?" The hungry soldier drew back in amazement, saying, "I beg your pardon; I'm damned if I didn't think you was dead."

Judge Montgomery quoted General D. H. Hill as saying, in an address before the Southern Historical Society: "From first to last our army was the worst equipped, the worst fed, the worst clothed and the worst organized army in the world. That of our enemy was the best equipped, the best organized, the best cared for, and the most pampered army of the nineteenth century."

Of the generals, Judge Montgomery said: "For General Jackson the soldiers had always cheers—in battle and in camp—and the highest admiration of his triumphs and leadership. They loved General Lee. They reverenced his character; they had unlimited confidence in his generalship and awe for his personal greatness. They never cheered him. The Southern armies for the last two years of the war lived, as it were, on the breath of this most remarkable person, both in qualities of the statesman and the soldier, developed or discovered by the war." He quoted General Lee as saying to General Wise: "The men of this war who will deserve most honor and gratitude are not the men of rank but the men of the ranks." Another statement of General Lee to a foreign officer visiting his headquarters: "I am ashamed for you to see my poor, ragged men in camp or on parade, but I would be glad for all the world to see them on the field of battle."

Soldier Montgomery saw, and heard the voices of, Stonewall Jackson and Robert E. Lee. He heard the address of General Lee to his soldiers at Appomattox. On that day he and others of Warren County lifted their eyes from the smoke and noise and sufferings of the camp and battle fields and turned their faces homeward.

A part of Sherman's Army, under General Howard, passed through, and for a while remained in, Warren. Judge Montgomery's account of their visit is that the soldiers were under the very best discipline. There was not the least fear on the part of the people that they, or their homes or property, would be injured by the soldiers. Every possible precaution was taken by the officers and soldiers to protect the people against marauders and hangers-on.

The slave population of Warren was more than twice that of the white, yet we are told that not half a dozen made unnatural exultation over their sudden emancipation. They remained at their homes, worked the crops that had been planted, and divided them generally, under the direction of their former owners. The relations between them and their late masters continued to be not only agreeable, but friendly.

The only schooling in books young Montgomery had was in the schools of Warrenton, until his sixteenth year. Then, for four full years, without vacation or holidays, he attended the College of War, which, better than Bologna or the Sorbonne, Oxford, Harvard, or Columbia, taught him the ways of men and the laws of life. He arrived at home at the age of twenty, with his diploma written on his body, and photographed on every faculty of his mind.

His father was ruined financially, and for his son there was no help except in his own right arm. For some time he and his companions cultivated a musical and theatrical life and gave entertainments, with some success at home and in several of the towns of Eastern Carolina. In the late summer he concluded, as so many others have done, to teach, and opened a school at the home of a kinsman in the county, where he taught until Christmas. Then he returned to Warrenton, begun the study of the law, at the same time pursuing his studies in history and general literature. He had for his guide, philosopher and friend, Mr. William Eaton, Jr., a learned lawyer, author of Eaton's Forms. After a year of study he carried a letter of high recommendation from Mr. Eaton to the Supreme Court and received in January, 1867, his county court license. That summer he attended the commencement at Chapel Hill, saw President Johnson made an honorary member of the literary society, and was himself, on motion, made an honorary member, and signed his name just under that of the president. Mr. Seward excused himself from accepting the honor because he had never been a member of a secret society, when Mr. Fab Busbee, knowing, as ever, what to say, moved a suspension of the rules in the case of Secretary Seward, and he signed up just under the name of Walter A. Montgomery.

The soldier-lawyer was, on the day after taking the oaths of an attorney, promoted to the office of Attorney of the County Court of Warren. This office he held until the court was abolished in the year 1868. During the year 1867, in addition to being county attorney and law student, he edited for Mr. I. H. Bennett the Warrenton *Courier*. In January, 1868, he received his Superior Court license. During that year he edited a newspaper of his own, called *The Living Present*. Mr. Eaton took him to call on the Justices on the night after he received his Superior Court license. He related that "Judge Pearson was plain and blunt, with small, brilliant, black eyes; that Judge Battle was gentle and timid and kindly; how suave and courteous was Judge Reade, and that all of them showed personal regard and marked courtesy for Mr. Eaton. Judge Reade on their departure took young Montgomery by the hand and expressed the wish that he might not only be a great lawyer, but a great man:

"Not great like Cæsar, stained with blood,
But only great as you are good."

That old lawyer, William Eaton, Jr., held a high place in the admiration of the young soldier-lawyer, as he did in the estimation of the State and the Supreme Court. He was not only a great lawyer, but well versed in literature. He would often repeat, said Judge Montgomery, with a depth of feeling, and declare it to be the saddest commentary on life, those familiar lines of Shenstone:

"Who'er hath traveled life's dull round,
Where'er his stages may have been,
Hath sighed to think he still hath found,
His warmest welcome at an inn."

In view of the difficulty of getting a room in an inn, without telegraphing in advance, in these last days of the world, let us hope that Mr. Eaton's fame as a lawyer is not built on such an erroneous foundation as his alleged estimate of human and family and friendly and fraternal regard and affection.

A glimpse at the life and manners of the people of Warren in the youth of Judge Montgomery will be of interest. The "big business" of that time was slavery. The only other business was farming. Many of the farmers produced cotton and tobacco in large quantities. Several years ago, long since automobiles came, your speaker spent two afternoons looking for Jones's Springs and Shocco Springs and the grave of Annie Carter Lee, daughter of General Lee. She died at Jones's Springs, of typhoid fever, during the war. On the second trip, after much travel and inquiry, we found them. One old dilapidated house,

with no spring, was all that was left of Jones's Springs. "Shocco," a few miles eastward, is an overgrown bottom on a small creek. About 150 yards from the path was a portion of a marble gum, from which water flowed. Not a house, not a brick, not a rock was seen. The country, for quite a distance around both spring sites, was occupied almost entirely by negroes. The farms and roads were unimproved, and the roads were almost impassable. Thorns and briars and dilapidated houses were in evidence. Cedars and pines and vines had enveloped the Jones graveyard, where, after being piloted on foot half a mile from the path, we found a beautiful monument, enclosed with a strong iron fence. The monument bears, in addition to name and dates, this inscription, written or selected no doubt by the immortal Lee:

"Perfect and true are all His ways,
Whom heaven adores and earth obeys."

That old house and that old "Spring Gum," and the iron fence and monument and the ground itself, and they only, are left of two of the most fashionable and famous resorts North Carolina has produced.

When Judge Montgomery was a boy the rich and aristocratic of North Carolina and Virginia resorted thither. That whole section was noted for the social habits of its people. They kept open houses. Their tables groaned with luxuries. Their sideboards were well supplied with brandies and whiskies and wines, strong and light, native and foreign. No note was taken of time, and the impression prevailed that none ought to be taken. When, soon after the war, a gentleman bought a London double-case gold watch, using it met with the disapproval of his neighbors and friends. Lord Macaulay said of the statesmen of the time of Lord Bacon and Cardinal Woolsey: "It is impossible to deny that they committed many acts that would justly bring on a statesman of our time censures of the most serious kind." So we of this time are aware of a sense of pained surprise that gambling, horse-racing and cock-fighting were the frequent diversions of the men of Warren in "the days before the war."

It is a remarkable fact that those sections in several of the eastern counties that contained the largest slave populations are now the least prosperous and progressive, the ex-slaves and their descendants being still there in large numbers, while the families of their masters have removed or become extinct. Other sections where there were few slaves are, and have been for years, far more prosperous and progressive. Warrenton, a small town, had great merchants in those old days. They carried large stocks of high-class merchandise to supply the demands

of the wealthy citizenship of the town and county, the patrons of those far-famed resorts and visitors to the community.

Judge Montgomery thought and spoke kindly of the colored population. He had known many of them in his childhood and youth. He drew character sketches of a number of the slaves, and of them and others after they had long been free. He spoke of the kindness with which they were treated by their masters, and of the mutual good will that existed after their emancipation, and of the high character and trustworthiness exhibited by many of them. He had a conversation with one of the older men who many years after the war was boasting to the Judge of the fact that none of their family of negroes had ever been in the courthouse. On being reminded of the case that Cæsar, one of them, had, the old man replied: "Oh! that was 'bout 'er 'oman! I'm talking about stealing and burning and killing and such things."

By the year 1873 conditions had greatly changed in Warren. Many of the heads of wealthy old families had died and their estates had been sold for debt or divided. Living and farming were conducted on a smaller scale. "Black Friday" spread its darkness over Warren County as over Wall Street. Mr. and Mrs. Montgomery, seeing the situation as it was, and having some property interests and friends in Memphis, removed to that city. There they formed many lifelong attachments and friendships. But he did not press his claims for professional recognition upon the attention of the public. He appeared in a number of important cases while his brother looked after their valuable cotton farm near there. After three years in Memphis, they decided to return to Warren County where, and in the adjoining counties, he was actively engaged in the practice of law until his removal to Raleigh in 1893. He was soon out of debt, and he and his family lived most comfortably. His home and grounds comprised fifteen acres which were cultivated successfully and produced, in great abundance and variety, fruits, vegetables, grapes, and flowers.

During this happy period of his life, our friend was saddened by the sickness and death of his two brothers and of his son, Eppes Wilson. Eppes, who was an unusually intelligent child, gifted with many interesting phases of mind, was afflicted from his sixth year with a spinal disease, the result of an accident, which ended his life in 1890, in his fourteenth year. All the love and attention that were possible were lavished upon him by his devoted parents, and he attracted the love and sympathy of many others. He was supported and enabled to live for several years by plaster casts, the use of which had been discovered shortly before by Dr. Hunter McGuire, of Richmond, and applied at proper intervals to the body of little Eppes by that eminent physician and surgeon.

The parents of Judge Montgomery were Episcopalians, devout people, and lovers of their church. So was and is the Judge's wife. He was taught in its tenets by his parents and the minister, but concluded that he should join the Baptist Church, which he did about the time when he was twenty-one years of age. His father was so hurt at this act of his that he never afterward spoke to him on the subject.

One Sunday afternoon Eppes' mother had him in the darkened parlor wrestling with the catechism. They had been for some time on that part of it relating to "The desire" and "My duty to God and my neighbor." It was a difficult subject to Eppes, who was further hindered and delayed by the merry voices of the neighbors' children who had gathered on the lawn outside. Finally his mother said: "Eppes, you have just got to learn these lessons. I have been trying to teach them to you for weeks. You shall not join those children until you learn these lessons." Eppes replied: "Mamma, I can't understand 'the desire,' and it's no use to teach me 'my duty to God and my duty to my neighbor,' for I'm not going to join your church. I'm going to join papa's church, where they don't have any 'desire' nor any 'duty to my God or my neighbor.'"

The tender attachment and affection that existed between these parents and this child, all the stronger because of the affliction which the little boy suffered, drew forth long afterward, from the depth of his father's soul, these pathetic utterances: "I have never recovered that which I lost in his passing. My faith in being reunited with him is not so strong as to share with his mother her great and certain trust, but his life and long suffering, and his untimely death, his devoted love for me and mine for him, his heroism and patience, are the strongest influences and arguments that could induce me to believe in personal immortality; to feel that God in his justice will not disappoint me in the hope that I may sometime be with Eppes again. As did that other agonized father who threw himself upon the Master's loving kindness, I cry: 'Lord, I believe; help thou mine unbelief.'"

The political career of Walter A. Montgomery is an interesting study. He was for about twenty-five years chairman of the executive committee and leader of his party in Warren County. The colored people outnumbered the whites, more than two to one, and they were divided politically in much the same proportion. His party was so well organized that at one time there were only three white men in the county who voted the opposition ticket. These three were men of high character, who had been old-line Whigs in the days of that party.

In the year 1870, Judge Robert B. Gilliam, Congressman-elect, died. Mr. Montgomery aspired to succeed him. His friends busied themselves. He soon had the promise of the votes of enough delegates to

nominate him. But the delegates from Nash who had expressed themselves as being heartily in his favor, did not attend, and the nomination went by a small majority to Hon. John Manning, of Chatham.

In July, 1890, Mr. Montgomery's name was before the Judicial Convention at Weldon with those of Judge Peebles and Judge Bryan. The nomination was lost to him by a very small error in the addition of the votes on one ballot. Truly did the poet say: "So nigh is grandeur to our dust."

In the year 1889 "the crime of '73" became generally known. "Times were hard," and continued so to be until after the Spanish-American War. Corn went down to forty cents a bushel, meat to four cents a pound, and cotton to less than five cents. Just think: it required the price of 12½ bushels of corn to pay a lawyer for writing a deed for land that was perhaps not then worth much, if any, more than the price of writing the deed. Mr. Weaver, speaking in Denver in 1892, said: "What is a Populist? It wasn't necessary for me to come all the way from California to Denver to tell you that. Put your hand in your pocket. There is no money there." Public office became a thing greatly desired. Judge Montgomery related the events connected with the election of 1890 in Warren, and the indictments that grew out of them in the Federal Court at Raleigh, and his protest against the acts that caused the indictments, and his appearing, with other attorneys, for the defendants, and their acquittal. The Legislature in 1889 prescribed stricter rules for registration and voting. This act came up for construction in the spring of 1892 in the case of the State upon the relation of Travis N. Harris v. George N. Scarborough of Montgomery County. Read in the light of all that has since occurred in this State on the subject of the suffrage, that statute and that decision seem stale and dull; but they created an immense impression upon the minds of the people of that time. They changed the personnel of four members of this Court, and were the bud and the blossom of which the elections of 1894 and the years following, and the constitutional amendment so called, attempting to regulate the elective franchise, were and are the fruit. The distressing condition of the people, owing to the scarcity of money, growing, as was then supposed by many, out of the demonetization of silver in 1873, and the election law, were the principal matters discussed in the campaigns of 1892 and 1894, 1896, and 1898.

Mr. Montgomery suffered with the people and sympathized with them. Some gentlemen were tendered nominations for judicial positions as "nonpartisans" by the two opposition parties, and declined to accept the same. Judge Montgomery was offered by them the nomination for Associate Justice of the Supreme Court, and he accepted it and was elected. He declared long afterward that his political status

in the years following was fixed by the Democrats, though he never considered himself a Populist, and the Republicans never considered him a Republican; but that he voted for Bryan every time he was a candidate, and was in sympathy with his policies.

Judge Montgomery saw that questions arise in courts involving office-holding, the revenue, the policies of parties as written in the statute law. He saw that the natures and habits of thought of men are not changed entirely by their translation from private life to the judicial bench, and that they would naturally be influenced to some extent by habits and views they had indulged and entertained for a lifetime. His experiences as a Judge confirmed his convictions of the propriety and usefulness and benefit of the nonpartisan system in the election of judges. Yet he paid his colleagues the high tribute that in conference those of different political sentiments were led to consider all sides of the case from judicial and not from partisan points of view.

He was reëlected in November, 1896, for a full term, and served the State ten years, from January, 1895, to January, 1905.

Those years, and several years that preceded them, were lean years in the life of the State. Any little old office from road supervisor or county commissioner or shell-fish commissioner to those of judge, solicitor, railroad commissioner or a receiver of a defunct corporation or superintendent of a prison, was considered worth a fight involving the most strenuous efforts of learned lawyers, and taxing the skill and patience of the courts.

About that time your speaker was talking with a citizen of Pennsylvania, who had some real "sure enough" property in this State. He said the greatest need of his State at that time was a law compelling a person elected to an office to serve, especially if elected to the Legislature.

In those days Hoke v. Henderson was quoted more than the law of the Twelve Tables or Magna Carta or the Bill of Rights. In 1895 the Fusionists were by it barred from various offices they sought to go up and possess, for an office was "property," and the officer had a vested right in it and obtained his bread from its income. In 1899 and 1900 the same doctrine was successfully invoked to keep the Fusionists in office. Then this Verdun of the office-holders yielded, and it was discovered that an office is not "property." Indeed there were a few during those days, and since, who knew that an office never was property in the sense of being an asset. It couldn't be bought. It couldn't be sold. It couldn't be transferred. It couldn't be taxed. It was indeed a liability to him who held it. Yet, what dweller in our Jerusalem "has not known the things that came to pass in those days?" Who does not recall Carr v. Coke, Caldwell v. Wilson, Wood v. Bellamy,

Ewart v. Jones, Cook v. Mears, McCall v. Gudger, Green v. Owen, Wood v. Elizabeth City, Abbott v. Beddingfield, McCall v. Webb, Cherry v. Burns, Cunningham v. Spruill, White v. Hill, Day's case, Wilson v. Jordan, Railroad v. Dortch, Bryan v. Patrick, White v. Ayer & Worth, Mial v. Ellington, and the Impeachment of the Judges! And who that recalls those times and those cases does not pity their littleness, their insignificance, and regret them and what was said and done about them, and the effect they produced upon the character of the State?

Judge Montgomery wrote many of those decisions. He saw and heard the rancor and passion of the parties and their supporters. Of the final overthrow of Hoke v. Henderson he said—134 N. C., 173: "I am content, as indeed I must be, to abide the judgment of the profession, with the hope and in the belief that the judgment of the future and of calmer times, if an adverse one, may be expressed more charitably than was that of the opponents of the decisions at the time they were made."

Was it "the hard times" or the love of office that impelled the people to strive as they did in the days of "Fusion," and to arrange matters as they did and as they are?

The moralist and the ethnologist see deeper into the problem. They say the struggle had its origin in the Slave Ship; that the curtain was lowered on one act of the drama at Appomattox; that the chains forged for the minds of the mariner and warrior were our war amendments; that the days of Fusion witnessed another struggle to be free from them; and they hope that the words "Third and fourth generation," written by Moses on the table of stone, will not be construed to mean fifth or sixth or seventh at the council table of the Eternal.

Judge Montgomery came to speak of the period to which reference has been made, near the close of his life, and he declared that he found himself bound as strictly by the obligations of truth and moderation of statement as he ever did in any matter; and he said that with the final passing of the great majority of those men who played leading parts in the heated drama of that time, the irritations and bitterness of those days had fallen out of his own mind. He discussed the events referred to with the calmness and the perspective of the historian and the philosopher. He said he felt the silence of his friends in those days a thousand times more keenly than he did the attacks of the insidious or splenetic politician.

But, notwithstanding the temporary coldness of some of his friends and the bitter political animosities of the time, "One continued purpose ran" through all his acts—official as well as private. He had not "the love of power or of popularity which very easily deludes a Judge into

the conviction that he is acting merely with a view to the public good." And no one could or can be found who could truthfully say that in his service to the State and its people Judge Montgomery failed in any case to do what was "fit for a Judge to do."

He was an Associate Justice of the Supreme Court from his fiftieth to his sixtieth year. His work, opinions, are contained in the twenty-two volumes, beginning with Volume 116. His style is smooth, easy-flowing, temperate, clear, and never unduly extended. The most elegant reprehension of a litigant to be found in his opinions is at the end of the case of *Bearden v. Fullum,* 129 N. C., 479, where he said:

"We cannot let this case pass off without an unqualified expression of our disapproval of the conduct of those who have caused this litigation by their refusal to turn over these fines to the proper fund. We are met with an open defiance of two most solemn decisions of this Court on the matter which is the subject of this litigation. In the case of the *Board of Education v. Henderson,* 126 N. C., 689, we decided that all fines for the violation of the criminal laws of the State were appropriated by the Constitution for establishing and maintaining the free public schools. That case was reviewed and approved in *School Directors v. Asheville,* 128 N. C., 249; and yet, in the face of these two decisions, it is sought to raise this question again. We are surprised at the continual violation of the law and the persistent refusal of the authorities of the city of Asheville to conform their actions to the decisions of the Court in the matter before us; and we would be untrue to ourselves if we did not express in unmistakable terms our disapprobation of their conduct. Their course is a dangerous example and an incentive to others to defy the rulings of the Supreme Court of the State." And yet the case was carried to the Supreme Court the third time, after Judge Montgomery's retirement, and again decided in the same way. See 137 N. C., 503.

Judge Montgomery's first published opinion, *Latham v. Ellis,* 116 N. C., 30, involved the right of a father of good character to the custody of his minor child. It has been quoted and approved by this Court eleven times. Another of his early opinions, Carter v. Lumber Company, has been quoted and approved nine times since. *Nichols v. Gladden,* 117 N. C., 497, in which he wrote the opinion, involved Lord Coke's famous "Rule in *Shelley's case,*" of which Lord Campbell says in his "Lives of the Chief Justices," that "It is the most celebrated case that has ever occurred concerning the law of real property in England—a case now read with far more interest by true conveyancers, not only than Macbeth or Comus, but than 'the judgment on ship-money' or 'the trial of the Seven Bishops.'" To the opinion of Judge Montgomery in *Nichols v. Gladden,* defining this famous rule, Mr.

Samuel F. Mordecai, who needs no praise from me, refers his law students in Volume I at page 649 of his lectures, as "One of the clearest expositions of the rule to be found anywhere." He quotes a page of the opinion in his book. The opinion of Judge Montgomery in that case has been cited by this Court seventeen times since. And he a poor boy who spent his four college years out of doors on the battle fields of Virginia, and was without tuition in *belles lettres* or the humanities.

The great case of Gattis v. Kilgo, Duke *et al.* for seven long years kept our legal, political, and religious worlds in arms. It was four times in the Supreme Court—three of them during the incumbency of Judge Montgomery—once on a point of practice and twice on the law of libel. He wrote the two opinions in the case involving the law of libel. The fourth appeal, occurring after his retirement, was decided in harmony with the opinions he had written, and which have been quoted and approved often by the Court since.

On his retirement from the Supreme Court, Honorable James C. McRae, well known in the legal life of the State, retired from the Court by the elevation of Judge Montgomery to that high honor, who in his later career of professor of law at the University of North Carolina observed the conduct and opinions of Judge Montgomery, expressed of him in the North Carolina Law Journal what was, we believe, the general opinion of the legal profession and of the people of the State: "For Judge Montgomery we have none but the kindest words. He has left his impress upon the legal literature of his generation in more than a score of volumes of the Reports, by which he may be well contented to be judged. He carries back to private life that which he brought upon the Bench—an unsullied reputation as a lawyer and a gentleman."

In January, 1905, Judge Montgomery resumed the practice of the law at Raleigh and in the courts of Warren, where he had employment in the important cases. He was also standing master in chancery in the United States courts for several years, and as such heard some important cases. He was much interested in the case of Rodwell v. Rowland, involving the right to office of the Clerk of the Superior Court of Warren between two men of the same political party. He felt a natural gratification in the fact that in the argument of the case before the Supreme Court, having submitted his mental faculties at his advanced age to a supreme test, he found them unimpaired. Judge Walker did him the honor to say to him that his argument was the best he had heard on a constitutional question during his term of office.

Up to this time, though he had been all his life full of its interests and activities, and considered nothing human as foreign to him, he said he had never taken a soft drink, seen a game of baseball, attended

a motion picture show or ridden in an automobile. Whether he later yielded to the fascinations of these worldly temptations this deponent saith not.

In his relations with his fellows, Judge Montgomery formed many and strong attachments. He loved to speak of his friends and of their endearing qualities. His dearest friends in the legal profession during his long life here were William Eaton, Jr., William H. Day, Spier Whitaker, J. B. Batchelor, R. H. Battle, Fabius H. Busbee, and Judge James E. Shepherd.

There was a strong tie that bound him to many of the clergy with whom he dwelt: Dr. J. M. Atkinson, of the Presbyterian Church; Rev. T. J. Taylor, for about 40 years, and still, pastor of the Warrenton Baptist Church; Rev. T. B. Kingsbury, Rev. J. D. Hufham and, perhaps dearest of all, Rev. William Sinclair Pettigrew, brother of General Pettigrew.

Judge Montgomery was fond of relating an incident that occurred one night when this saintly man, a minister of Mrs. Montgomery's communion, was visiting in their home. The conversation turned upon the proposition then much discussed by Bishop Lyman, that the Episcopal Church should direct its missionary efforts to the negro race, which church he contended was the religious home of the negro. Mr. Pettigrew was much opposed to the idea and stood and argued strenuously against it, to which the Montgomerys readily agreed. He closed his argument with the statement, accompanied with a sweeping gesture: "Why, madam, every one of them (meaning the negroes) are natural-born Baptists." Then, realizing that he had said something that might not be pleasing to Mr. Montgomery, he turned to him and said: "Bless my soul, Mr. Montgomery, I beg your pardon; my zeal may have led me to say something offensive to you, and I would not do that for the world." To this Mr. Montgomery replied, in all good humor, "Why, Mr. Pettigrew, you have stated the exact truth; and I, like most all the negroes, have no better sense than to believe just what the Bible says." Then Mr. Pettigrew looked perplexed, and then the humor of it all dawned upon them all, and the delightful social intercourse was not interrupted.

The friendship and esteem of many noble women were cherished, and especially of Mrs. Pendleton, Mrs. Mary Cooke Green, and Mrs. Ellen Mordecai. He declared without hesitation that the very greatest blessing that ever came to him was in the person of his dear wife, Lizzie Holman Wilson. They lived together in mutual confidence through many checkered scenes from their marriage September 27, 1871, until his death. Near the last he declared "she has been my guide and my stay. She never disappoints me. My fondest, my happiest, thought

is that when the light of day is passing from my eyes forever I shall still see her pointing the way upward to a country where our union shall be complete and unending."

Very near the last he said: "I do not like old age. I shy at the old man's weeping eye, his tremulous voice, his faraway look, his motionless form when he sits, his drooping figure as he leans upon his staff. When I see him, as I sometimes do, as represented by the old Confederate soldier, in places of public resort, seated with his comrades on a bench, silent and expressionless, seemingly realizing that he has ceased a quest upon which he had staked his all, although I love his spirit and recall Gettysburg and Shiloh, I hasten with bated breath and a steadier gait."

We have thus viewed this good and useful man as he appeared in his youth, in his young manhood, in his profession, in his family, and in his relations to the State and society. And now we see him, freed from the ambitions and cares and strife of the world, still with smiling face and joyous heart, though meditative, awaiting with profound interest and expectation what lay beyond "the gateway we call death." The day of his departure was the 26th of November, 1921.

> A long time ago a man whose "native hue of resolution
> Was sicklied o'er with the pale cast of thought,"

who brooded over life, death, and immortality, said to me: "If you are allowed to live on, you will at once be set to work on a job of a million years to get a new trial for some Paris, son of Priam, or Judas Iscariot or Benedict Arnold." And in his weariness he expressed the wish that he might rest for myriads of ages under the willows.

Walter Montgomery searched contemporary life, history, philosophy, law, literature—real and imaginative—and religion for the best that has been revealed to man. Through a long life here he reveled in "thinking God's thoughts after Him." It is both reasonable and natural and pleasing to believe that these efforts, this enthusiasm for the good for which men strive, must have commended his spirit on discarding this "vesture of decay" to its great Creator for other delightful work in the accomplishment of His great designs.

ACCEPTANCE BY CHIEF JUSTICE WALTER CLARK

Sharply different views of government were made manifest in the Convention which formed our Constitution at Philadelphia. On the subject, which became a sectional issue, the difference grew more vital and far-reaching as time passed, increasing in bitterness and antagonism until it overshadowed all others and resulted in the great struggle of 1861-65.

The marks left by that struggle were deep and lasted for many years. As one evidence of it, during twenty-five of the years after the war was over, up to 1900, every executive of this State had served in the Confederate Army, and so had both Senators and thirteen members of this Court.

Among the latter, the youngest but one who ascended this Bench, was Walter A. Montgomery. He made a splendid record as a soldier, and after the war did his full duty as a citizen and achieved high reputation as a lawyer.

For ten years he sat on this Bench, showing learning and displaying a conscientious fidelity to his duty, and winning the esteem of his companions and the confidence of the public. His service here began in January, 1895, and lasted to the close of 1904. That is, for the full period of ten years, and his opinions will be found in 21 volumes of this Court, beginning with the 116th and including the 136th North Carolina Reports.

These opinions will be a lasting monument to his ability and industry and to the great service he rendered the State and the profession, of which he was a distinguished ornament. He could have said of them, in the words of the Latin poet, *"Exegi Monumentum Aere Perennius."* "I have built a monument more lasting than bronze, which neither time nor fire nor rust shall destroy, and which will last through the years that are to come."

Those who knew him best, especially those who sat with him here, will have a lasting recollection of his industry, of his ability, and of his consideration for all, especially for those who had the honor to see service with him here.

The Marshal will hang his portrait in its appropriate place on the walls of this chamber.

INDEX.

ABANDONMENT. See Divorce, 1; Criminal Law, 18, 19.

ABATEMENT. See Trespass, 4; Courts, 3; Criminal Law, 18.

ABDUCTION. See Husband and Wife, 3.

1. *Abduction—Elopement—Evidence—Husband and Wife.*—On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home. *S. v. O'Higgins*, 178 N. C., 709. *S. v. Hopper*, 405.

2. *Same—Influence.*—Upon the question of the influence of the defendant over the wife of another with whom he is being tried for abducting and eloping, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that she had used her own money for expenses, is not subject to just exception. *Ibid.*

3. *Abduction — Elopement — Husband and Wife — Innocence—Chastity—Evidence—Statutes.*—The fact that the wife had voluntarily left her husband falls within the definition of the statute, C. S., sec. 4225, when this results from the unlawful scheming of the man to achieve that end. *Ibid.*

ABSENTEE VOTERS. See Taxation, 6.

ACCEPTANCE. See Carriers, 9; Evidence, 11.

ACCESS. See Municipal Corporations, 6.

ACCESSORY. See Murder, 1, 5.

ACCOUNTS. See Courts, 1.

ACKNOWLEDGMENTS. See Clerks of Court, 5.

ACREAGE. See Deeds and Conveyances, 1.

ACTIONS. See Carriers, 7, 14; Clerks of Court, 2; Taxation, 1; Divorce, 3; Trespass, 1; Bastardy, 1; Appeal and Error, 15, 16; Contracts, 13, 17; Intoxicating Liquors, 2; Municipal Corporations, 8; Negligence, 7.

1. *Actions—Misjoinder—Parties—Causes of Action.*—An action brought by the payee of a negotiable note, and the endorser, against the maker, who has defaulted in payment, alleging ownership of the note sued on, is not a misjoinder of causes of action or parties, but a single cause of action by both plaintiffs against the defendant, and a demurrer on that ground is bad. *Brock v. Brock*, 54.

2. *Actions — Mortgages — Trusts — Parties—Sales—Surplus—Judgment Creditors—Statutes—Appeal and Error.*—A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of C. S., sec. 614, may not pay the same to the trustor without incurring liability; and in an action

ACTIONS—*Continued.*

brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. *Barrett v. Barnes*, 154.

3. *Actions—Defenses—Evidence—Issues—Appeal and Error—New Trials.* In an action by the trustee in bankruptcy to recover the value of an automobile alleged to have been taken by the defendant bankrupt, in fraud of the provisions of the Bankrupt Act, the defendant pleaded and offered evidence to show that, holding a registered purchase-money mortgage, it had, preceding a period of six months before petition filed, settled all matters between the bankrupt and itself by taking over the machine: *Held*, error for the trial judge, to the defendant's prejudice, to make his liability depend upon a single issue determinative only as to the question of whether the settlement had been made as alleged by the defendant, relieving the plaintiff of the burden of proof on the issue, and depriving defendant of the defense under the duly registered purchase-money mortgage. *Cullom v. Bank*, 345.

4. *Actions—Defenses—Unincorporated Societies—Process—Principal and Agent—Slander—Corporations—Statutes—Pleadings—Demurrer.*—An unincorporated association or society has no legal entity at common law, and there is none conferred by statute, for liability for libel of an alleged agent, and when it appears that the summons in the action had only been served on one as agent for such society, the court will dismiss the action when the complaint itself shows want of jurisdiction, *ex mero motu*. Nor can a written demurrer to this want of jurisdiction confer it on the courts: *Held further*, the service would not have been sufficient upon a corporation under the facts of this case. C. S., sec. 483 (1); *Tucker v. Eatough*, 505.

5. *Same—Class Representation.*—Our statute permitting the joinder of parties and recognizing representation by common interests, C. S., sec. 457, cannot have application to an attempted suit against an unincorporated society, when no individual has been made a party defendant, or appears to defend the action in behalf of himself or other member of the society. *Ibid.*

6. *Actions—Carriers—Principal and Agent—Joint Agencies—Negligence.* Where railroads are operated by the employees of both, an action against them both will lie for damages resulting from the negligence of the employers. *Sigmon v. R. R.*, 520.

ACTS. See Deeds and Conveyances, 6; Wills, 11; Taxation, 9.

ADMISSIONS. See Pleadings, 13.

AFFIDAVIT. See Appeal and Error, 29; Evidence, 49.

AFTER-ACQUIRED PROPERTY. See Mortgages, 8.

AGENCY. See Government, 1; Highways, 1; Principal and Agent.

AGREED CASE. See Railroads, 8.

AGREEMENT. See Commerce, 1; Bastardy, 2.

AIDERS AND ABETTORS. See Criminal Law, 14.

ALIMONY. See Divorce, 1, 4; Husband and Wife, 2.

ALLOWANCE. See Courts, 5.

ALTERATIONS. See Wills, 18.

AMBIGUITIES. See Insurance, 6, 7; Contracts, 9.

AMENDMENTS. See Pleadings, 6, 14; Attachment; Appeal and Error, 21.

ANSWER. See Parties, 1; Pleadings.

ANTE LITEM MOTAM. See Evidence, 17, 48.

APPEAL. See Boundaries, 1; Clerks of Court, 1; Supreme Courts, 2; Wills, 3; Bastardy, 2; Appeal and Error.

APPEAL AND ERROR. See Carriers, 2, 11; Evidence, 8, 14, 21, 22, 26, 40, 42, 47; Habeas Corpus, 4, 6; Intoxicating Liquor, 1; Mortgages, 1, 10; Negligence, 2; Vendor and Purchaser, 3; Venue, 2; Verdict, 2; Actions, 2, 3; Contracts, 4, 11, 19; Instructions, 3, 4, 6, 8, 9; New Trials, 1, 2; Constitutional Law, 3, 16, 25; Bills and Notes, 5, 7; Divorce, 1; Parties, 2; Criminal Law, 11, 13; Corporations, 12; Employer and Employee, 1, 2; Experts, 1; Insurance, 10; Judgments, 2; Murder, 6; Railroads, 8; Schools, 2; Slander, 1; Taxation, 9.

1. *Appeal and Error—Findings—Habeas Corpus.*—The Supreme Court, on appeal, is bound by the findings of fact by the Superior Court judge in *habeas corpus* proceedings, if supported by any competent evidence.—*Clegg v. Clegg*, 28.

2. *Appeal and Error — Courts — Jurisdiction—Habeas Corpus—Supreme Court—Supersedeas.*—Upon appeal to the Supreme Court from an order of the judge of the Superior Court in *habeas corpus* proceedings between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a *supersedeas* bond in a fixed amount to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. *Ibid.*

3. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Exception to the statement of the contentions of the parties by the trial judge in his charge to the jury must be aptly taken before verdict.

4. *Appeal and Error—Instructions—Objections and Exceptions—Indefiniteness.*—Exceptions to the charge of the court will not be considered on appeal when they are too general and indefinite. *Hale v. Rocky Mount Mills*, 49.

5. *Appeal and Error—Harmless Error—New Trials.*—For a new trial to be granted on appeal, it must not only appear that error has been committed on the trial in the Superior Court, but that it was material and prejudicial, amounting to a denial of some substantial right of the appellant. *Wilson v. Lumber Co.*, 56.

APPEAL AND ERROR—*Continued.*

6. *Same—Negligence—Employer and Employee—Master and Servant—Safe Appliances.*—The plaintiff, while engaged in the course of his employment of the defendant lumber company, fell to his injury from a tree he had been climbing under the instruction of the defendant's foreman and superintendent, while putting up, taking down, etc., skidder lines, or overhead cables, used in connecting with skidding logs out of the woods, and alleged negligence of the defendant in failing to provide him with a proper small wire cable, an end of which was permanently fastened into a ring on his belt, the other, passing around the tree, run through a ring on the opposite side of the belt and twisted around and fastened, so as to hold the plaintiff in the tree while engaged at his work: *Held*, testimony of nonexperts that the wire cable furnished was unsuitable and improper for the work was erroneously admitted, but constituted harmless error, there being no serious contest as to defendant's liability on all the evidence. *Ibid.*

7. *Appeal and Error—Judgment Against One Party Not Appealed From.*—Where there is a judgment against two defendants, from only one of which an appeal to the Supreme Court has been taken, the Court will not consider the other one. *Carstarphen v. Plymouth*, 90.

8. *Appeal and Error—Questions and Answers.*—Where the record shows exceptions to unanswered questions, without more, the exceptions will not be considered on appeal. *Hubbard v. Brown*, 97.

9. *Appeal and Error—Instructions—Requests for Instruction.*—The refusal to give a requested instruction is not error, when correctly stated by the judge in his general charge, or when it is more favorable to appellant than he had requested. *Ibid.*

10. *Appeal and Error—Evidence—Findings.*—Where, by agreement of the parties, the judge finds the facts in the case appealed from, his findings, supported by competent evidence, are conclusive.—*Power Co. v. Power Co.*, 179.

11. *Same—Corporations—Condemnation.*—Where the statute chartering a public-service corporation gives it power of condemnation, and it appears on appeal, the judge finding the facts by consent, that the corporation was duly created, organized and existing thereunder, exceptions by the owner of lands that it had no such power, or corporate existence, for failing in certain respects to have been properly organized, are untenable. Nor is the defendant's position available that the plaintiff's laches had deprived it of this right, when the findings, supported by evidence, are to the contrary. *Ibid.*

12. *Appeal and Error—Instructions—Objections and Exceptions.*—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, C. S., secs. 643, 520 (1). And an exception to a previous intimation of the judge made upon the trial to the effect objected to is not required. *Cherry v. R. R.*, 264.

13. *Appeal and Error—Burden to Show Error—Record—Omissions—Statute of Frauds—Statutes—Certiorari—Motions.*—The appellant must show error on appeal; and where he relies upon the insufficiency of

APPEAL AND ERROR—*Continued.*

letters from the grantor of lands to meet the requirements of the statute of frauds (C. S., sec. 988), the contents of these letters must be made by him to appear in the record on appeal; and the fact that he noted on his case served that the Superior Court clerk, "here copy" the letters, does not legally excuse their omission. In this case a motion for *certiorari* to correct the record, if it had been made, would have been denied. C. S., sec. 630; *Layton v. Godwin*, 312.

14. *Appeal and Error—Objections and Exceptions—Actions—Defenses.*—And where the defendant has duly moved for judgment as of nonsuit in the county court, and has preserved his exceptions in the Superior Court and excepted to an erroneous charge of the Superior Court judge, and has also preserved these exceptions in the Supreme Court on appeal, the position that he had lost his right by acquiescence is untenable. *Cullom v. Bank*, 345.

15. *Appeal and Error—Actions—Defenses—Several Grounds of Defense—New Trials.*—Where the allegations of the complaint and the evidence present two material and complete grounds for defense, it is reversible error for the judge, upon the trial, to deprive the defendant of one of them, and make its liability solely depend upon the determination of the other. *Ibid.*

16. *Appeal and Error—Objections and Exceptions—Verdict—Issues—Immaterial Matter.*—Where a determinative fact at issue has been found by the jury, under proper instructions, for appellee, the exceptions of the appellant to the admission of evidence upon a different phase of the case becomes immaterial in the Supreme Court on appeal. *Lumber Co. v. Briggs-Shaffner Co.*, 347.

17. *Appeal and Error—Stare Decisis.*—Upon this fourth appeal: *Held*, there was no prejudicial error to the appellant in the rulings of law by the trial judge, which is substantially in accordance with the rulings of the decisions heretofore herein rendered by this Court. *Taylor v. Meadows*, 353.

18. *Appeal and Error—Instructions—New Trials.*—Where bales of cotton are sold under contract allowing the seller to draw on the purchaser in a proportionate part of its market value, and to fix the price within a certain period of time at which the cotton was to be sold, and upon the trial a letter from the purchaser is introduced offering to vary the original contract, if accepted at once, the receipt of the letter and its contents being admitted, but the seller denying his acceptance, an instruction that is materially confusing as to the admission of the receipt of the letter containing the offer and its contents, and that of its acceptance, is prejudicial to the seller, and is reversible error. *Hair v. McConnell*, 379.

19. *Appeal and Error—Objections and Exceptions—Rules of Court—Dismissal of Appeal—Instructions—Grouping Exceptions—Briefs.*—The rules of practice in the Supreme Court regulating appeals are mandatory upon all appellants alike, and are necessary for the proper and expeditious consideration of the Supreme Court, requiring that evidence excepted to be stated in its exact words, and also requests for instruction refused, with such accuracy of reference to the pages of the record as not to require the Court to search generally through

APPEAL AND ERROR—*Continued.*

it in order to understand the questions of law involved; and appellant's counsel will be deemed to have waived all exceptions omitted from their grouping thereof, etc., and not properly discussed in their briefs. *Byrd v. Southerland*, 384.

20. *Appeal and Error—Objections and Exceptions—Courts—Verdict Set Aside—Presumptions.*—Where the trial judge sets aside a verdict without stating his grounds therefor, upon exception on appeal he will be presumed to have done so as a conclusion of law, from which an appeal immediately lies. *Likas v. Lackey*, 398.

21. *Same—Burden of Proof.*—An exception to the order of the court setting aside a verdict is alone insufficient to have the matter reversed on appeal, the presumption being that the order was correct in law, and the burden upon appellant to show error. *Ibid.*

22. *Same — Trials — Pending Appeal—New Trials.*—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellant's exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to our statutes (C. S., sec. 655), and a new trial will be ordered on appeal. *Ibid.*

23. *Appeal and Error—Objections and Exceptions.*—In order for the Supreme Court to review, on appeal, the question as to whether evidence on the trial had been erroneously admitted, the appellant must show of record that he had duly excepted thereto. *S. v. Hopper*, 405.

24. *Appeal and Error — Negligence — Indemnity — Evidence — Harmless Error.*—While it is ordinarily error in a personal-injury action for damages to introduce evidence, or comment, in the presence of the jury, upon the fact that the defendant held a policy of indemnity against loss for the injury, it is not erroneous for the plaintiff's attorney, in good faith, to cross-examine the defendant's witness, upon a material phase of the case, as to a conversation he had had with the "insurance agent," without reference to the fact of indemnity, or insinuating it, to defendant's prejudice, and it appears that it could not reasonably have impressed the jury under the circumstances, to the appellant's prejudice. *Bryant v. Furniture Co.*, 441.

25. *Appeal and Error—Objections and Exceptions—Evidence—Waiver.*—The appellant waives his exception to the exclusion of evidence when he asks another question covering the same ground, and the answer is admitted without further objection. *S. v. Barnhill*, 446.

26. *Same—Criminal Law—Rules of Court—Instructions.*—Exception to the charge of the court not insisted upon in appellant's brief is deemed abandoned under Rules of Practice in the Supreme Court, Rule 27 (185 N. C., 798), but *held* an instruction in this criminal action as to the meaning of "reasonable doubt" was correct. *S. v. Schoolfield*, 184 N. C., 723, cited and applied. *Ibid.*

27. *Same—Contentions.*—Appellant must except to the contentions stated by the court in his instructions at the time they were made; otherwise, it will not be considered on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

28. *Appeal and Error—Record—Facts—Injunction.—Semble,* the question of whether the plaintiff railroad company was discriminated against in an assessment made against its property by the board of aldermen of the town of Sanford is apparently adversely determined against it in *Gunter's case,* at this term; but the final determination of this appeal is postponed until the pertinent facts therein are made to appear of record; and the order restraining the assessment is reversed. *R. R. v. Sanford,* 466.

29. *Appeal and Error—Prejudice—New Trials—Evidence—Judgment by Default Set Aside—Affidavit as to Merits.*—Where, upon cross-examination, the defendant admits that a judgment by default had been taken against him, but afterwards set aside, that it was the fault of his attorney and not of his own, whereupon the plaintiff's attorney insinuates that the defendant was laying the blame upon his former attorney, a good man since deceased, it is prejudicial error to the plaintiff for the trial judge to admit the affidavit of the deceased attorney upon which the judgment by default had been set aside, giving his opinion of the merits of the defense, the matter being both irrelevant and not in the form required for the competency of evidence. *Wade v. Gibson,* 478.

30. *Appeal and Error—Motions—Certiorari—Record—Dismissal—Rules of Court.*—It is indispensable for the appellant to conform to the rule requiring that he aptly file the record proper of his case with his motion for a *certiorari* to bring it up to the Supreme Court; otherwise, it will be dismissed upon appellee's motion made in accordance with the rules regulating appeals. *Motor Co. v. Reep,* 509.

31. *Appeal and Error—Service of Case—Settlement of Case—Discretion of Court — Extension of Time to Serve Case — Statutes.* — Before the amendment of 1921, C. S., 643, conferred no power upon the trial judge to enlarge the statutory time for the service of appellant's and appellee's cases on appeal beyond that therein prescribed, and this formerly could only be done by the agreement of the parties; and the power conferred on him by the amendment is limited to his action during term, wherein the parties, being present, are put upon notice of their rights. *S. v. Humphrey,* 533.

32. *Same—Term—Notice.*—Where the appellant has served his case on appeal within the time extended by agreement, and the appellee has served his case beyond that agreed upon, it is not within the statutory discretion of the trial judge to settle the case, thereafter allowing appellee to file exceptions, the appellant's case being the proper case on appeal. *Ibid.*

33. *Same—Districts—Counties—Statutes.*—The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, under the provisions of C. S., sec. 644, except by agreement of the parties, or when the countercase or exceptions had been served, respectively, within the time prescribed by the statute. C. S., sec. 643. *Ibid.*

34. *Appeal and Error — Courts — Judgments — Jurisdiction—Pleadings—Cause of Action.*—The plaintiff has the right to have a judgment signed upon a verdict in his favor, unless the judge sets aside the verdict; and upon the refusal of the trial judge to sign the judgment

APPEAL AND ERROR—*Continued.*

as a matter of law, an appeal will directly lie to the Supreme Court, in order that the judgment may be signed and the appeal upon the merits be proceeded with according to law. *Hospital v. Florence Mills*, 554.

35. *Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.*—An exception to the refusal to admit in evidence an unanswered question will not be considered on appeal unless the materiality and relevancy of the proposed evidence is made to appear in the record. *Hosiery Co. v. Express Co.*, 556.

36. *Appeal and Error—Supreme Court—Laches—Objections and Exceptions.*—The question of appellant's laches in prosecuting his action may not be raised for the first time in the Supreme Court when not falling within the exception as to matters not jurisdictional, or those in the nature of a demurrer to the sufficiency of the complaint to allege a cause of action. *Satterthwaite v. Davis*, 565.

37. *Appeal and Error — Objections and Exceptions — Questions and Answers.*—Exception, on appeal, to the exclusion of an unanswered question is untenable unless it is properly made to appear what the answer would have been. *Austin v. Crisp*, 616.

38. *Appeal and Error — Objections and Exceptions — Records — Briefs — Rules of Court.*—Exceptions of record on appeal not mentioned in appellant's brief are deemed as abandoned on appeal, under the Rules of Court. *Ibid.*

39. *Appeal and Error—Briefs—Rules of Court.*—Exceptions not embraced in the brief of appellant, or where the brief does not conform to the rules of court regulating appeals, will be deemed as abandoned. Rule 28, 185 N. C., 798. *Bank v. Smith*, 635.

40. *Appeal and Error—Schools—Findings of Fact—Review.*—The findings of fact upon the evidence by the judge of the Superior Court, upon which he bases his conclusions of law as to the abuse of its discretion by the county board of education in locating or relocating a place for the erection of its public-school buildings, is not conclusive on the Supreme Court on appeal. *School Committee v. Board of Education*, 643.

APPLIANCES. See Appeal and Error, 6; Negligence, 4.

APPORTIONMENT. See Habeas Corpus, 5.

ARBITRATION AND AWARD. See Contracts, 8.

ARREST.

Arrest—Police—Sheriffs—Officers—Warrants for Arrest.—A policeman of a city is given the same authority as is vested by law in sheriffs (C. S., sec. 2642), and may arrest, without a warrant, a person in his presence violating the statute forbidding the operation of an automobile upon the streets by a person under the influence of intoxicating liquor. C. S., sec. 4506. *S. v. Loftin*, 205.

ARREST OF JUDGMENT. See Criminal Law, 11.

ASSAULT. See Criminal Law, 9, 16; Execution, 1.

ASSESSMENTS. See Constitutional Law, 14, 25; Municipal Corporations, 12.

ASSUMPTION. See Instructions, 1.

ASSUMPTION OF RISKS. See Railroads, 6; Courts, 6; Negligence, 6.

ATTACHMENT.

Attachment — Levy — Process — Amendments — Courts—Statutes—Public Officers.—A warrant in attachment, in substantial conformity with our statute, C. S., sec. 805, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of C. S., sec. 549. *May v. Menzies*, 144.

ATTORNEY AND CLIENT. See Judgments, 1; Courts, 5; Evidence, 34; Municipal Corporations, 15, 18.

AUTOMOBILES. See Taxation, 4, 11; Negligence, 3; Insurance, 8.

BANKS AND BANKING.

Banks and Banking — Bills and Notes — Collaterals — Equity — Intent—Mortgages—Substitution—Redemption.—A general provision of notes given to a bank by the same borrower that collaterals held by the bank may be applied to the surety of each or all of them so held will not be held to apply to an indebtedness not coming within the contemplation of the parties; and where the maker has given his note to the bank in substitution for one given by himself to another, who had placed it as collateral for her own note to the bank, carrying a mortgage on his lands as security, with provision in his mortgage that the title would revest in him upon its payment, the mortgage security will not, under the general provision, inure to the benefit of other indebtedness he may owe to the bank; and *held further*, there being no further consideration for the note given in substitution, it would not be inequitable to permit him to redeem the land by paying the original debt secured by the mortgage. *Belton v. Bank*, 614.

BALLOTS. See Schools, 2.

BASTARDY.

1. *Bastardy—Civil Actions.*—Proceedings in bastardy for an allowance to be made to the woman are civil and not criminal, for the enforcement of police regulations, and C. S., sec. 273, raising the jurisdiction of the justice of the peace to an amount not exceeding two hundred dollars, is not contrary to the provisions of our Constitution, Art. IV, sec. 27. *Richardson v. Egerton*, 291.

2. *Bastardy — Courts — Justices of the Peace — Jurisdiction — Appeal — Agreement—Questions of Law—Judgments.*—Where, on appeal from an award made to the woman in bastardy proceedings, the counsel for both parties have waived a jury trial and agreed that the Superior Court judge should pass upon the questions of law involved, it is error for the judge, under the terms of the agreement, to increase the allowance awarded by the justice of the peace to the woman, and upon his affirmance of the law applicable, the amount awarded by the justice is the amount of the judgment to be awarded in the Superior Court. *Ibid.*

BENEFICIARIES. See Wills, 13; Trusts, 7.

BIDS. See Municipal Corporations, 15, 18.

BILLS OF LADING. See Carriers, 3, 5, 7, 8, 14; Commerce, 1.

BILLS AND NOTES. See Evidence, 39; Banks and Banking, 1.

1. *Bills and Notes—Guarantor of Payment—Evidence—Seller and Purchaser—Endorser.*—Where the defendants deny individual liability as purchasers of plaintiff's fertilizer, but contend they were acting merely as agents for the sale, to others, and refuse to endorse their customer's notes, which the plaintiff insists they had contracted to do, evidence that one of them had agreed to endorse them for a consideration is competent as tending to show he had agreed to become a guarantor of payment. *Hubbard v. Brown*, 96.

2. *Bills and Notes—Endorser—Renewal—Extension of Time—Releasing Endorser.*—Upon the issue of whether the payee of a note had released the defendants from an agreement to become endorsers, by renewals and extension of time of payment without their knowledge: *Held*, competent for plaintiff to show defendants' knowledge and consent, and what one of them had said to its agents in respect thereto; also, admissions of liability made to the agent two years after the execution of the contract of sale. *Ibid.*

3. *Bills and Notes — Negotiable Instruments — Endorser — Principal and Surety—Evidence—Questions for Jury.*—Where the plaintiff has paid a note he had discounted at the bank, which was made by the defendant, with his codefendant as endorser, and sues thereon: *Held*, upon the evidence in this case, it was for the jury to determine whether the one defendant was a cosurety of the other, and it was error in the Superior Court judge to sustain a motion as of nonsuit. *Reel v. Lee*, 165.

4. *Bills and Notes—Negotiable Instruments—Fraud—Burden of Proof—Statutes.*—Where the maker of a note alleges and offers evidence tending to show that it had been obtained by fraud, upon the holder, in his action to recover thereon, is cast the burden of showing that he had acquired it *bona fide*, for value, and without notice. C. S., sec. 3040. *Bank v. Sherron*, 297.

5. *Same—Evidence—Appeal and Error.*—Where fraud in the procurement of a note given for shares of stock in a corporation is alleged in an action thereon, by an endorsee, claiming to be a *bona fide* holder in due course, etc., it is competent for the defendant to show by his evidence that the stock salesman representing the corporation had induced him to make the note by misrepresentations of the company's solvency, and that he was solicited in violation of the "Blue-Sky Law" (C. S., sec. 335), and the endorsee's connection with the corporation and his evident previous knowledge of the fraud alleged to have been perpetrated; and, also, that the stock salesman had made similar misrepresentations to other purchasers of the stock under the same conditions. *Ibid.*

6. *Bills and Notes—Negotiable Instruments—Evidence—Execution—Presumptions—Consideration—Mental Capacity.*—Where the execution of a negotiable instrument has been established in an action thereon, it

BILLS AND NOTES—*Continued.*

is a rebuttable presumption that it had been given for a sufficient consideration, and that the maker had mental capacity to execute it, requiring the defendant, attacking its validity on these grounds, to disprove its validity by his evidence. C. S., secs. 3004, 3005, etc. *Jones v. Winstead*, 536.

7. *Same—Appeal and Error — Objections and Exceptions — Demurrer.*— Where the maker of a negotiable instrument had been confined in an insane asylum twelve years before the execution of his note in suit, but since then had been actively and successfully handling his own large business affairs, the question as to presumption of insanity continuing, unless the contrary has been shown, so as to render the note invalid, should be by an exception to the refusal of a requested instruction to that effect, and not by motion as of nonsuit upon the evidence; but *held*, such a prayer, under the evidence in this case, should have been refused, the evidence being only of a circumstance tending to establish the defendant's position. *Ibid.*

8. *Same — Past Consideration — Executory Promise — Contracts.*—Where one renders valuable services to another at his request, the law implies the latter's promise to compensate him for their reasonable value; and where the evidence is sufficient to show a mutual intent to this effect, a direct promise to pay, later made, is a sufficient consideration, and a note then given therefor is not objectionable as a promise to pay a past consideration without value received by the maker. *Ibid.*

BILLS OF PARTICULARS. See Criminal Law, 8.

BLANKS. See Corporations, 2.

BOARDS OF EDUCATION. See Schools, 3.

BONDS. See Constitutional Law, 6, 7, 8, 20; Statutes, 5, 11; Municipal Corporations, 14, 15, 18; Schools, 3, 6, 7, 8.

BOOKS. See Evidence, 7, 20.

BOUNDARIES. See Evidence, 17, 48.

1. *Boundaries—Proceedings to Establish—Statutes—Clerks—Judgments—Exceptions — Courts — Jurisdiction — Appeal.* — Upon petition to the clerk to establish the true boundaries between the adjoining owners of land, under the provisions of the statute, the clerk is required to order a survey by the county surveyor and that the surveyor make a report thereof with a map, the clerk to determine the true location, with judgment: *Held*, on appeal the cause was then jurisdictional in the Superior Court, and objection by appellant is untenable that the cause was not properly there, on the ground that appellee, having excepted, had not appealed in due time from the clerk's judgment, the only question being whether the line had been run in accordance with the clerk's order. As to whether the clerk should have heard appellant's exceptions is not presented upon the facts of this case. *Mann v. Archbell*, 72.

2. *Boundaries—Proceedings to Establish—Statutes—Burden of Proof.*— The burden is on the plaintiff to show by the greater weight of the

BOUNDARIES—*Continued.*

evidence that the true divisional line is the one he claims it to be, in proceedings originating before the clerk and appealed from, to determine it under the provisions of the statute. *Ibid.*

BREACH. See Contracts, 3.

BRIEFS. See Appeal and Error, 19, 38, 39.

BURDEN OF PROOF. See Boundaries, 2; Evidence, 2, 44; Carriers, 10; Corporations, 5; Constitutional Law, 3; Appeal and Error, 13, 21; Bills and Notes, 4; Divorce, 3; Negligence, 3, 6; Criminal Law, 19; Schools, 8.

BURGLARY.

1. *Burglary — Definition — Statutes.*— The common-law definition of burglary as a capital offense, *i. e.*, the breaking into and entering of the "mansion or dwelling-house of another in the night-time, with an intent to commit a felony therein, whether the intent was executed after the burglarious act or not, has been changed by our statute (C. S., sec. 4232), dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. *S. v. Allen*, 302.

2. *Same—Degree of Burglary.*—Under the provisions of C. S., sec. 4232, burglary as a capital offense is when the dwelling-house so entered is actually occupied at the time of the burglarious entry as a sleeping apartment, and the lesser offense is where the apartment is not then actually so occupied. *Ibid.*

3. *Same—Instructions.*—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though the actual commission of the intended felony is not necessary to be charged or proven, or that it was committed at all. *Ibid.*

4. *Burglary—Intent—Evidence—Drunkenness.*—While voluntary drunkenness may not excuse in law the commission of the crime of burglary in the first degree, it is competent to show that the mind of the prisoner at the time of the offense charged was so under the influence of liquor that he could not have had the intent necessary to constitute the crime. *Ibid.*

5. *Burglary — Rape — Evidence — Verdict.*—Under the charge of the burglarious entry of a dwelling, etc., with intent to commit rape upon a female sleeping therein, and the supporting evidence: *Held*, in this case the judge should have charged the jury, according to their findings of fact, to render one of the five verdicts: (1) guilty of burglary in the first degree; (2) guilty of an attempt to commit burglary in the first degree; (3) guilty of nonburglarious breaking into and entering a dwelling-house of another with the intent to commit a felony or other infamous crime therein; (4) guilty of an attempt to commit the said last offense, or (5) not guilty. *Ibid.*

CANCELLATION. See Wills, 18.

CARNAL KNOWLEDGE. See Criminal Law, 15.

CARRIERS. See Commerce, 1; Vendor and Purchaser, 1, 2; Railroads, 3, 5; Evidence, 37; Actions, 6.

1. *Carriers of Freight — Wrongful Delivery — Damages — Notice — Evidence—Questions for Jury.*—Where there is evidence tending to show that the carrier had delivered to a third person a shipment of logs, who had used them, and that these logs were intended to be used by the consignee for mine props of a higher market value than mill logs, and the evidence is conflicting as to their suitability as mine props, it is reversible error, in the carrier's action against such third person and the consignee for an adjustment of its liability, for the court to instruct the jury that the liability of such third person to the carrier depended upon notice, either to the carrier or to him, that the logs were intended for mine props, it being for the jury to determine, under conflicting evidence, the suitability of the shipment for mill logs or mine props, and answer the issue as to the carrier's damages according to their market value at destination, considering the evidence as to the prepayment of the freight. *R. R. v. Houtz*, 46.

2. *Same—Instructions—Appeal and Error.*—*Held*, under the evidence of this case, the conflict in the charge as to notice and the recovery of damages for the greater value of the logs as mill props was reversible error, to the carrier's prejudice. *Ibid.*

3. *Carriers—Railroads—Bills of Lading—Contracts—Torts—Penalties.*—The liability of a common carrier for loss of shipment is not confined to the carrier's obligation resting under its contract of carriage, or bill of lading, for, aside therefrom, the law, in its policy, charges the carrier with the loss of property in tort entrusted to it for transportation. *Holmes v. R. R.*, 58.

4. *Same.*—A verdict will be interpreted and allowed significance by proper reference to the pleadings, the evidence and the charge of the court, and where one of the issues in an action against the carrier fails to inquire upon the question of negligence, and it properly appears, under the principle stated, that the action was founded in tort, the issue will be construed accordingly. *Ibid.*

5. *Carriers — Railroads — Bills of Lading—Contracts—Damages—Torts—Notice.*—In an action against the carrier, founded on the contract of carriage of an interstate shipment, for damages for the loss of a shipment, the claimant must file his written demand with the proper carrier within four months after a reasonable time wherein the goods should have been delivered; but where the action is for negligence arising in tort, notice or demand upon the carrier, in accordance with the contract of carriage, is not necessary to a recovery. *Ibid.*

6. *Same—Commerce—Interstate—Federal Law.*—The parties to a contract of carriage between the carriers and consignor may agree upon a shorter period in which action may be brought than that allowed by the general statute of limitations, in the absence of any unusual or extraordinary circumstance, and a stipulation in an interstate bill of lading that action must be commenced within two years and a day after a reasonable time has elapsed after the loss of a shipment is *held* valid, and where the shipment is interstate, the Federal law will control. *Ibid.*

7. *Carriers — Railroads — Bills of Lading—Separate Shipments—Torts—Actions.*—Where there are separate shipments of baled cotton by the

CARRIERS—*Continued.*

same common carrier from the same consignor, the delay of a part of each of these shipments constituted a separate and distinct cause of action, and recovery may be had only as to the bales of cotton that the carrier has unreasonably and negligently delayed. *Ibid.*

8. *Carriers — Bills of Lading — Contracts — Interpretation.*—The stipulations of an interstate bill of lading as to the time demand for damages for loss shall be made upon the carrier are interpreted not only with reference to the language therein used, but also with regard to the law bearing on the subject of contracts. *Ibid.*

9. *Carriers — Railroads — Acceptance of Freight—Fires—Presumptions—Damages.*—Where the carrier accepts goods offered to it for immediate shipment, it is presumed that its acceptance was that of a common carrier, and not as a warehouseman; and where the carrier has so negligently delayed the shipment that it was destroyed in the burning of its warehouse, it is responsible to the consignor in damages. *Howell v. R. R.*, 239.

10. *Same—Evidence—Interstate Commerce Commission—Burden of Proof.* Where the evidence conflicting is as to whether the delay was caused by the shipper's instruction for prepayment upon the carrier's later calling at his place of business, according to local custom, and collecting freight, does not affect the carrier's liability upon the facts of this case, nor does the regulation of the Interstate Commerce Commission requiring prepayment when the shipment is so forwarded, it being incumbent upon the carrier to refuse the consignment or forward the same, charges collect, with the burden on it to establish this defense. *Ibid.*

11. *Carriers—Railroads—Employer and Employee—Master and Servant—Negligence—Evidence—Instructions—Appeal and Error.*—Where, in an action to recover damages against a railroad company negligently inflicted upon an immature employee, the questions are presented for the determination of the jury, whether the lad had been killed in consequence of his having negligently been sent by defendant's agent on defendant's business upon a dangerous errand in defendant's freight yard among moving trains, or whether his killing was caused by a pile of cinders negligently left by defendant at the side of its track in violation of a city ordinance, it is reversible error for the trial judge in his instructions to the jury to exclude from their consideration the question of defendant's negligence on the second phase of the case, and confine them solely to the consideration of the evidence on the first one. *Cherry v. R. R.*, 263.

12. *Carriers—Employer and Employee—Master and Servant—Contributory Negligence—Negligence—Federal Employers' Liability Act—Statutes.* A locomotive engineer, in inattention to "meet orders," running his train, at a junction, upon another track upon which the coming train was expected, resulting in a collision therewith, is guilty of contributory negligence in causing the injury that resulted in his death; but in an action for damages against the railroad company therefor, under the Federal Employers' Liability Act, such negligence will not bar recovery, when it is shown that the conductor on the train should have avoided the injury by giving him timely signals

CARRIERS—*Continued.*

to stop the train, and that in his presence the brakeman had signaled to go ahead, which would not have occurred had the conductor and flagman been observant of their duty. *Sigmon v. R. R.*, 519.

13. *Same—Damages—Comparative Negligence.*—Under the provisions of the Federal Employers' Liability Act, where negligence and contributory negligence are shown, the jury are empowered to apportion the recovery according to the ratio which they find existed between the causal effect of the contributory negligence of the plaintiff's intestate, whose death resulted, and that of the negligence of the defendant.—*Ibid.*

14. *Carriers — Express—Receipts—Bills of Lading—Stipulations—Actions.* Where there is a provision in an express receipt excluding liability in an action to recover from the express company for loss, damage or detention of the shipment unless commenced within one year thereafter, the company will not be deemed to have waived its right thereunder, when the claimant has delayed commencing his action and has ceased his negotiations for a settlement for about fourteen months, merely upon the request of the defendant for time for it to make an investigation, without promise of settlement, or request on its part that the action should not be brought. *Hosiery Co. v. Express Co.*, 556.

15. *Same—Contracts—Limitation of Actions.*—A stipulation in an express receipt or bill of lading against liability for loss, damage, etc., to a shipment unless the action is commenced in a year thereafter, is a reasonable agreement resting upon the contract of the parties, and is not a statute of limitations. *Ibid.*

16. *Carriers—Railroads—Employer and Employee—Master and Servant—Negligence — Contributory Negligence—Statutes—Comparative Negligence.*—The common-law principle that there could be no recovery of damages from negligence for a personal injury when the plaintiff was guilty of contributory negligence is now changed by statute (C. S., 3467) as relating to railroad employees, diminishing the recovery in proportion to the negligence attributable to the employee. *Ballew v. R. R.*, 704.

CARRIERS OF FREIGHT. See Carriers. Railroads, 1.

CASE. See Appeal and Error, 31.

CAVEAT. See Wills, 4, 7, 8.

CAUSE OF ACTIONS. See Actions, 1; Appeal and Error, 34.

CERTIORARI. See Appeal and Error, 13, 30.

CHAMBERS OF COMMERCE. See Constitutional Law, 10.

CHARACTER. See Evidence, 25; Criminal Law, 13.

CHARITIES. See Estates, 8.

CHATTEL MORTGAGES. See Mortgages, 7; Corporations, 8, 9.

CHILDREN. See Railroads, 1; Estates, 1.

CITIES AND TOWNS. See Constitutional Law, 2, 7, 10, 14, 25; Taxation, 5, 6, 11; Municipal Corporations, 1, 2, 8, 12, 15, 18; Government, 1; Sunday, 3.

1. *Cities and Towns—Municipal Corporations—Railroads—Public Use—Statutes—Constitutional Law.*—The acquisition of land to be used to connect a railroad in which the State and counties own an interest in the shares of stock, to connect an existing railroad with the city's public wharves and docks for water commerce, and necessary to continue or develop the industries of its citizens, is for a public use, and not subject to the exception that the city, in taking the right of way by condemnation from the owner, according to the provisions of its charter and the general statutes, were acting in violation of the Constitution in taking private property for a public use; and the private statutes specifically authorizing the proceedings is constitutional and valid. C. S., secs. 2791, 2792. *Hartsfield v. New Bern*, 136.

2. *Cities and Towns — Municipal Corporations — Condemnation—Discretionary Powers—Courts.—Held*, the courts will not interfere with the exercise of the reasonable discretion of a city in determining upon the location and condemning lands for railroad purposes, when acting under the provision of constitutional acts of the Legislature. *Ibid.*

CLAIM. See Commerce, 1.

CLAIM AND DELIVERY. See Sheriffs, 1.

CLERKS OF COURT. See Boundaries, 1; Pleading, 8, 12; Wills, 1, 2, 3, 4.

1. *Clerks of Court—Jurisdiction—Appeal.*—If an action or proceeding is instituted before the clerk of which he has no jurisdiction, and on any ground is sent to the Superior Court before the judge, the judge has jurisdiction to retain and hear the cause as if originally instituted in the Superior Court. C. S., sec. 637. *Hall v. Artis*, 105.

2. *Same—Actions—Motions in the Cause.*—Where a suit is brought before the clerk for partition of lands, involving the establishing of a parol trust in favor of one of the tenants against the other, which is resisted upon the ground that the trust had been later discharged by the receipts of rents and profits from the land, an independent equitable action, and not a motion in the original cause, is the defendant's remedy after a final judgment had therein been rendered. *Ibid.*

3. *Clerks of Court—Principal and Surety—Officers—Official Bonds.*—In an action against a corporation, surety on the bond of a defaulted clerk of the Superior Court with whom certain moneys had been deposited for plaintiff and lost through the clerk's defalcation, it appeared that the defendant surety company had given the bond for the first term of the defaulter, and resisted payment upon his succeeding term on the ground that the clerk had then not been properly inducted into office for his failure to take the oath of office: *Held*, the written acknowledgment of the defendant surety company that the bond had then been renewed and was in force from the commencement of the second term of office, and its acceptance of the premiums therefor, estopped it to deny its liability thereon. *Lee v. Martin*, 127.

4. *Same—Statutes.—Held*, under the facts of this case, error for the trial judge to exclude liability of the surety upon the defendant's second

CLERKS OF COURT—*Continued.*

bond, the statute giving the plaintiff the right to sue from time to time until the full penalty incurred under both of the bonds is recovered, limited solely by the amount of the bonds, etc., when incurred thereunder, though the incumbent may have held only under color of his office; and a judgment denying liability upon the ground that the incumbent was "a hold-over" from his preceding term, is reversible error. C. S., sec. 354. *Ibid.*

5. *Same—Renewals—Acknowledgment—Cumulative Liability.*—Where the surety has renewed the bond of a clerk of the court upon his election to that office a second time, acknowledged its liability and received premiums thereon, its liability is cumulative for all defalcations thereunder, whether for the second term its principal was continuing to act *de facto* or *de jure*. *Ibid.*

6. *Same—Oaths of Office—Evidence—Questions for Jury.*—Where the surety sued upon the bond of a defaulting clerk of the Superior Court, resists recovery as such, on the ground that the clerk had not been duly sworn and inducted into office the second and succeeding term, the best evidence is the oath filed in his office; but upon failure of this, parol evidence of the fact is admissible; and when in doubt, the issue should be submitted to the jury. *Ibid.*

7. *Same—Estoppel of Principal.*—A clerk of the court or other official who has been elected to office for a second term and enters into the duties thereof, is estopped to deny the legality of his tenure; and the provisions of our Constitution requiring an oath of office before entering into the duties thereof does not affect his eligibility thereto. *Ibid.*

8. *Same—Estoppel of Surety.*—A surety on the bond required by public official is estopped to deny the facts stated in its obligation. *Ibid.*

9. *Same—Limitation of Actions.*—The six-year statute of limitation (C. S., sec. 439) is applicable to an action against the surety on the bond of a defaulted clerk of the Superior Court. *Ibid.*

10. *Same—Interest.*—Interest which, if added to the principal, would exceed the amount limited in the bond of a surety given for a defaulted clerk, is recoverable in an action by one who has thereby suffered loss. *Ibid.*

11. *Same—Penalties—Statutes.*—The sureties on the official bond of a clerk of the Superior Court are liable, under the provisions of our statute, to those suffering loss through his default, for damages at the rate of 12 per cent per annum from the time of its unlawful detention until the lawful amount has been paid, which is not affected by the consolidation of several separate actions brought by like claimants thereunder. *Ibid.*

COMMERCE. See Railroads, 7, 8; Taxation, 14.

1. *Commerce—Railroads—Carriers of Goods—Bills of Lading—Federal Statutes—Contracts—Invalid Agreement—Notice of Claim—Limitation of Actions.*—The stipulations in a bill of lading accepted by the consignee in interstate commerce for a transportation over connecting lines of carriage, and accepted by the Interstate Commerce Commission, among other things, requiring that when there is a loss of

COMMERCE—*Continued.*

shipment by the carrier, written notice must be given to either the originating or terminating carriers within six months after a reasonable time for delivery has elapsed, and suits for loss or damage in such case must be brought within two years and one day, are reasonable and valid under the provisions of the Carmack Amendment to the Federal statute controlling in such matters, and constitute the sole contract of carriage between the parties, without power on their part to extend the time of such notice or the bringing of the action. *Rogers v. R. R.*, 86.

2. *Commerce—Taxation—Shipment in Bulk—Distribution—Municipal Corporations—Ordinances.*—The shipment of yeast by a manufacturer into this State, to its agent herein, in bulk, to be broken by the agent and the separated packages delivered to present customers and those to be acquired, the agent collecting therefor and remitting to his principal in another State, is an intrastate transaction as between the agent and his customers, and subject to the tax thereon imposed by an ordinance of the town in which he conducted his business. *S. v. Plummer*, 261.

COMMISSIONER OF REVENUE. See Taxation, 15.

COMMON LAW. See Corporations, 8.

COMPARATIVE NEGLIGENCE. See Carriers, 13, 16.

COMPENSATION. See Constitutional Law, 21.

COMPILATION. See Statutes, 1; Cities and Towns, 3.

COMPROMISE. See Verdict, 2; Contracts, 5.

CONDEMNATION. See Appeal and Error, 11; Cities and Towns, 2; Corporations, 6, 7; Municipal Corporations, 6.

CONDITIONS PRECEDENT. See Evidence, 13; Taxation, 7.

CONDONATION. See Divorce, 2.

CONFLICT. See Instructions, 4; Statutes, 6.

CONFLICT OF LAWS. See Municipal Corporations, 4.

CONSIDERATION. See Contracts, 1, 12, 15; Bills and Notes, 8; Statute of Frauds, 1.

CONSOLIDATED STATUTES.

SEC.

34, 39, 33. It is proper for the clerk to issue letters to nonresident named as executor in will, who has taken possession of personalty and refuses to give information peculiarly within his knowledge. *In re Will of Gulley*, 78.

273. This section, raising jurisdiction of justice of peace as to allowance of woman in bastardy proceedings, is constitutional. *Richardson v. Egerton*, 291.

CONSOLIDATED STATUTES—*Continued.*

SEC.

335. Maker of note may show evidence of fraud in its procurement by holder, and that it was obtained contrary to a compliance with this section. *Bank v. Sherron*, 297.

354. Error for trial judge to hold incumbent was a "holder-over" of office and therefore not liable under the facts of this case. *Lee v. Martin*, 127.

437. The ten-year statute applies to grantee's valid promise to pay off a mortgage debt on the lands. *Parlier v. Miller*, 501.

446, 456, 460. Court has authority to order owner of title to land to be made a party to his tenant's action of trespass. *Tripp v. Little*, 215.

454. The right to caveat a will is barred after seven years, and applies to married women. *In re Will of Witherington*, 152.

457. This statute cannot apply when no person having an interest is a party. *Tucker v. Eatough*, 505.

463 (1). Venue of suit to impose a trust on land and for accounting is in county where the land is situated. *Williams v. McRackan*, 381.

483 (1). The service by summons against a corporation held insufficient under the facts in this case. *Tucker v. Eatough*, 505.

497 (1). When only one partner has been served with summons, judgment is only binding upon his share in partnership assets. *Hancock v. Southgate*, 278.

521 (1), (2). Where a counterclaim is alleged in answer upon the basis of plaintiff's demand made, or in nature of cross-action, plaintiff cannot take a voluntary nonsuit as a matter of right. *Cohoon v. Cooper*, 26.

549. The trial court has jurisdiction to allow an amendment to a warrant in attachment. *May v. Menzies*, 144.

595 (1), 596, 597. Judgment by default final will be set aside when complaint not properly verified. *McNair v. Yarboro*, 111.

529. The form of verification prescribed was not sufficiently followed in this case. *McNair v. Yarboro*, 111.

564. The prohibited expression of opinion by trial judge may be shown in other manner than by language in a part of his charge. *S. v. Hart*, 582.

565. Party offering unsigned prayer for instruction may not require the judge to consider it as of right. *Bank v. Smith*, 635.

614. A trustee may not pay surplus from sale of lands to trustor when he has notice by judgment of liens in favor of creditor. *Barrett v. Barnes*, 154.

630. *Certiorari* to correct record denied when appellant has failed to show error, it appearing only that clerk had not incorporated matters therein as directed by case. *Layton v. Godwin*, 312.

637. Superior Court judge has jurisdiction to retain and hear cause on appeal from clerk who has wrongfully assumed jurisdiction. *Hall v. Artis*, 105.

CONSOLIDATED STATUTES—*Continued.*

SEC.

643. The trial judge, since amendment of 1921, can only enlarge time to serve counterclaim on appeal during term, etc. *S. v. Humphrey*, 533.

643. Judge cannot settle case on appeal outside county or district except upon agreement of parties. *S. v. Humphrey*, 533.

643, 620 (1). Exception to judge's charge at the time is not required and aptly taken for the first time in appellee's countercase. *Cherry v. R. R.*, 263.

655. Pending the due prosecution of the appeal, the judge may not force appellant into another trial. *Likas v. Lackey*, 398.

805. A warrant in attachment is sufficient when in substantial conformity with the section. *May v. Menzies*, 144.

836. The absence of his negligence does not exonerate sheriff who gives bond and retains goods replevined. Sec. 3403. *Motor Co. v. Sands*, 732.

900, 901, 902. An adverse party who has been examined may introduce his own testimony at the trial. *Beck v. Wilkins-Ricks Co.*, 210.

987. The grantee's promise by parol, upon a consideration, to discharge a mortgage debt is not within the statute of frauds. *Parlier v. Miller*, 501.

987. Agreement by landlord to pay tenant's debts from proceeds of sale of crops retained by him is not within purview of statute. *Mercantile Co. v. Bryant*, 551.

988. Mortgagor and mortgagee may make a valid parol contract to terminate this relationship. *Stevens v. Turlington*, 191.

988. The appellant must show error by record on appeal. *Layton v. Godwin*, 312.

1145. The secretary of a corporation has implied authority, under the facts of this case, to settle claims against it. *Beck v. Wilkins-Ricks Co.*, 210.

1244. Attorney's fees cannot be allowed as part of court costs. *Ragan v. Ragan*, 461.

1654. Rule 12. The husband holding legal title to lands in trust for wife is tenant by curtesy therein. *Tyndall v. Tyndall*, 272.

1654. Rules 12, 1, 4, 5. A devise contingent upon the birth of the son vests the title in the son upon the happening of the contingency. *Power Co. v. Haywood*, 313.

1666. Superior Court judge must find sufficient facts to sustain order allowing wife alimony *pendente lite*. *Horton v. Horton*, 332.

1657, 1667. Husband liable to support of abandoned wife and child who violates a previous agreement thereto, and venue where wife resides by the force of his abandoning her. *Rector v. Rector*, 618.

1667, 1668. Husband's interest in lands held by entireties may be charged for support of wife and minor children abandoned by him, and for counsel fees; and writ of possession may issue. *Holton v. Holton*, 355.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1734. A devise falling within the rule in *Shelley's case* and carrying a fee tail to remaindermen is converted into a fee simple. *Bank v. Dortch*, 510.

1786, 1787, 1788. Unverified entries of credit appearing on books may not be shown as evidence in behalf of the party offering them. *Branch v. Ayscue*, 219.

1795. Through transactions with deceased persons it may not be shown by those in interest that though appearing to have signed as principals with deceased they in fact signed as sureties, whether among parties plaintiff or defendant. *Rudisill v. Love*, 524.

1795. Identification of handwriting of letters received from deceased husband as to matters bearing upon marital relations are not prohibited by this section. *Satterthwaite v. Davis*, 565.

2241. The court may award custody of minor child to either father or mother, or to them alternately. *Clegg v. Clegg*, 28.

2642. A policeman is given same authority as sheriffs to arrest for offense committed in his presence. *S. v. Loftin*, 205.

2675, 2676. A city is liable for its negligence in maintaining pilasters to a bridge in the drive-way to approaches to a bridge on its streets. *Grantham v. Charlotte*, 649.

2787 (1), (2), (11), (12); 2791-2-3, 2786. A city is liable for damages for negligence in building streets to parks acquired beyond its limits. *Berry v. Durham*, 421.

2714, 2937 *et seq.* In issuing bonds upon the assessment plans that matter be set forth in the exact form of the statutes, if the procedure prescribed be followed, and when appeal is provided, it is not an unconstitutional taking of private property for a public use. *Leak v. Wadesboro*, 683.

2791, 2792. Right of condemnation exists for acquiring right of way within a city to connect railroad tracks of separate companies; it is not unconstitutional. *Hartsfield v. New Bern*, 136.

300, 304, 305. The presumption is for validity of negotiable note sued on when its execution has been established. *Jones v. Winstead*, 536.

3040. Holder of note must show he had acquired it *bona fide* in maker's action alleging fraud. *Bank v. Sherron*, 297.

3311. A chattel mortgage stating it was in recognition of an existing mortgage, does not come within the purview of the statute as to notice by registration. *Bank v. Smith*, 635.

3331. The validity of an irregular probate to a mortgage was established under the facts of this case. *Allen v. Stainback*, 75.

3403. Sheriff retaining possession of goods replevined by giving bond is not excused from payment of damages when goods are destroyed, though he has not been negligent. *Motor Co. v. Sands*, 732.

3467. Contributory negligence is not a complete bar to the recovery of damages. *Ballew v. R. R.*, 704.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3480. This section extends to logging road, and is constitutional. *S. v. Lumber Co.*, 122.

4204. Burglary with intent to commit rape is sufficiently shown by the burglarious entry with the present intent. *S. v. Allen*, 302.

4209. One who, knowingly, leaves defendant and prosecutrix alone for the accomplishment of the unlawful purpose is guilty under this section. *S. v. Hart*, 582.

4215. The evidence of intent and ability to carry out threat is sufficient. *S. v. Williams*, 627.

4225. The offense is not obviated when the defendant has, by scheming and persistent effort, overcome the will of the wife to refuse his advances; and so as to the wife's voluntarily leaving home with him the wife's testimony may be supported by testimony of other witnesses as to her character. *S. v. Hopper*, 405.

4232. Common-law definition of burglary changed by this section. Definition of the two degrees of the felony is given. *S. v. Allen*, 302.

4215, 4512. Presentment must be in two years for assault upon a female, etc. *S. v. Efird*, 482.

4133. Cancellation consists not only of the testator's intent but also of the physical act. *In re Will of William Love*, 714.

4162. Unless by the construction of a will it plainly appears that a devise of land was less than the fee, the devise of the fee will be construed. *Smith v. Creech*, 187.

4162. A devise to the wife of lands with limitation over to "those who have been most kind to us" vests the fee simple in the wife. *Weaver v. Kirby*, 387.

4158. The limitation of action applies to married women. *In re Will of Wetherington*, 152.

4175, 4177. Not required that principal be convicted before trying accessory to the offense. *S. v. Walton*, 485.

5383 *et seq.* Election for issuance of township school bonds not invalidated by chapter 136, Laws of 1923. *Comrs. v. McNear*, 352.

4447. Plea in abatement comes too late after plea of guilty. Place of abandonment presumed to have been as charged in indictment. Venue of action in county where husband's conduct has forced the wife to reside. *S. v. Hooker*, 761.

4453. Evidence in this case *held* insufficient to convict. *S. v. Burgess*, 467.

4506. A policeman may arrest without a warrant an offender for driving when drunk an automobile in the city. *S. v. Loftin*, 205.

4606. A criminal offense is presumed to have taken place as charged in indictment. Defendant's remedy is by plea in abatement. *S. v. Oliver*, 329.

4610, 4615, 4625. Technical words formerly necessary in bills of indictment have been abolished; and certain words of section 4615 may be regarded as surplusage. *S. v. Hawley*, 433.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4613. Defendant in criminal action should request bill of particulars when indictment is in substantial requirements of statute. *S. v. Hawley*, 433.

4639. The jury may acquit of felony and find guilty of an assault under an indictment charging both. *S. v. Efird*, 482.

4643. Exception at close of State's evidence, and of all the evidence, brings entire evidence up for review on appeal in criminal action. *S. v. Kelly*, 365.

5526. Petition for election to issue bonds by school district, with provision taking away discretionary power of commissioners in locating school district, will be disregarded so far as the restriction is concerned. *Lazenby v. Comrs.*, 548.

5960. Absent voters must show conditions required. *Davis v. Board of Education*, 227.

5968. This has no bearing upon the requirements of section 5960, requiring absent voters to show as a condition precedent the conditions necessary to the validity of the exercise of this right. *Davis v. Board of Education*, 227.

7986, 7979, 2815, 7987. Taxpayer before testing validity of tax levy must pay under protest. Lien on personalty attaches at time of levy, and not against purchaser of merchandise who has bought when property was unlisted. *Carstarphen v. Plymouth*, 90.

CONSOLIDATION. See Schools, 3.

CONSTITUTION.

ART.

I, sec. 17. It is not required for the due process clause that total costs of street improvements be referred to a court where right of appeal is given. *Gunter v. Sanford*, 452.

I, sec. 19. Rules of law regarding burden of proof come within the provisions of this article. *McDowell v. R. R.*, 571.

II, secs. 29 and 9. A bond issue by a city for school buildings is not invalid by reason of a later statute enlarging the corporate limits but recognizing the former limits and conferring the liability to it. *Duffy v. Greensboro*, 470.

II, sec. 29. A public-local law may authorize a county to tax and issue bonds for maintenance of highways when not affecting the existence or change of highways therein. *S. v. Kelly*, 365.

IV, sec. 2. Emergency judge has no jurisdiction to determine a matter of *mandamus* at chambers. *Dunn v. Taylor*, 254.

VII, sec. 7. This applies to school districts, requiring a majority of the registered voters. *Davis v. Board of Education*, 227.

IV, sec. 27. C. S., sec. 273, raising jurisdictional amount of justice of the peace in bastardy for allowance to woman, is constitutional. *Richardson v. Egerton*, 291.

V, secs. 3, 5. Lien on personal property attaches from time of levy. *Carstarphen v. Plymouth*, 90.

CONSTITUTION—*Continued.*

ART.

V, sec. 6. Statute authorizing a county to levy special tax upon approval of electors, in excess of general tax limitation, is valid. *S. v. Kelly*, 365.

VIII, sec. 4. Restrictions as to contracting municipal debt apply to those originally formed under the statute. *Waters v. Comrs.*, 719.

VII, sec. 4. A school district is not within the purview of this section. *Felmet v. Comrs.*, 251.

VII, sec. 7. Restrictions of municipality to contract debts (Art. VIII, sec. 4) does not apply to elective measures of this character by the municipality after it has been formed under a statute. *Waters v. Comrs.*, 719.

VII, sec. 7. A school district having voted to pay its share of expense of district with which it is consolidated, a bond issue by the consolidated district will be upheld. *School Committee v. Board of Education*, 643.

VII, sec. 17. The faith and credit clause of the Constitution does not permit a city to give to a chamber of commerce moneys to be expended by a chamber of commerce from its general revenue. *Ketchie v. Hedrick*, 392.

X, sec. 6. Common-law rule giving husband actual or potential ownership of wife's choses in action by reducing them to possession is now changed. *Turlington v. Lucas*, 283.

XIV, sec. 1. The statement as to colored man being guilty of assaulting a young white girl (C. S., 4215) is not in contravention of the Constitution, under the facts of this case. *S. v. Williams*, 627.

CONSTITUTIONAL LAW. See Sunday, 2; Cities and Towns, 1; Corporations, 6; Courts, 2; Estates, 3, 12; Criminal Law, 17; Evidence, 46; Schools, 6; Taxation, 14, 16.

1. *Constitutional Law—Statutes—Presumptions.*—The legal presumption is in favor of the constitutionality of a statute, and the courts will not construe it otherwise unless the conflict with the fundamental law is manifest and without reasonable doubt. *Hartsfield v. New Bern*, 136.

2. *Constitutional Law—Municipal Corporations—Cities and Towns—Taxation.*—Our Constitution, Art. VII, sec. 7, requiring the approval of the electors to a proposition of pledging its faith or loaning its credit by municipalities, applies to taxing school districts, and the validity of the tax or bonds requiring their sanction is determined by a majority of the registered voters. *Davis v. Board of Education*, 227.

3. *Constitutional Law—Appeal and Error—Burden of Proof.*—The burden is upon the appellant attacking as unconstitutional the provisions of a statute to show its unconstitutionality beyond a reasonable doubt. *Felmet v. Comrs.*, 251.

4. *Constitutional Law—Taxation—School Districts.*—A school district is not within the purview of our Constitution, Art. VIII, sec. 4, restricting the power of cities, towns, and incorporated villages, as to taxation, assessment, borrowing money, contracting debts, loaning their credit, etc. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

5. *Constitutional Law—Roads and Highways—Counties—Taxation.*—It is within the legislative power to prescribe by what method the roads of a county shall be worked and kept in repair—whether by labor, taxation on the property, or by funds raised from license tax, or by a mixture of two or more of these methods, varying in different counties and localities, in accordance with the legally ascertained wishes of the people of each, subject to be changed by subsequent legislation not in violation of constitutional requirements. *S. v. Kelly*, 365.

6. *Constitutional Law — Taxation — Bonds—Statutes—Contracts.*—Where an earlier public-local law provides for taxation or a bond issue for the maintenance of highway districts within the county, and a later statute is passed, providing in addition for the working of the roads for several days out of the year by all able-bodied men between certain ages, or, in lieu thereof, the payment of a certain sum of money, the later law does not impair the obligations of a contract and fall within the inhibition of our Constitution, but tends to increase the value of the road bonds issued under the provisions of the earlier statute. *Ibid.*

7. *Constitutional Law — Municipal Corporations — Counties—Taxation—Bonds—Local Statutes—Special Statutes.*—A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of our Constitution (Art. II, sec. 29), where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. *Ibid.*

8. *Constitutional Law—Taxation—Bonds—Elections—Special Tax—Statutes.*—Authority may be given by the Legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. Const., Art. V, sec. 6. *Ibid.*

9. *Constitutional Law—Taxation.*—The courts will not declare a statute invalid as unconstitutional unless it clearly appears to be so. *Ibid.*

10. *Constitutional Law — Taxation — Municipal Corporations—Cities and Towns—Chamber of Commerce.*—Article VII, section 17, of our State Constitution, restricting the power of the Legislature from allowing counties, cities, and towns to contract a debt, pledge its faith or loan its credit, or to levy or collect any tax except for the necessary expense thereof, is with reference to the county, city or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein ascertained by an election duly held for that purpose. *Ketchie v. Hedrick*, 392.

11. *Constitutional Law—Race Discrimination—Public Parks.*—Reasonable regulations may be made as to city parks for the white race, looking to the separation of the races, with the limitation that there shall be equal facilities afforded to both races according to their needs and requirements, without violating the constitutional requirements on

CONSTITUTIONAL LAW—*Continued.*

the subject of race legislation; and where a city has accepted a dedication of lands for the purpose of a park for the white race, it is within the constitutional bounds for the governing municipal authorities to determine the equality of like places for the colored race; and an exception of race discrimination in this respect is untenable, unless it is made to appear that such authorities had violated the constitutional inhibition. *Berry v. Durham*, 422.

12. *Same—Title—Fee Simple—Repugnancy.*—*Semble*, a city or town that had accepted the dedication of a public park in violation of the constitutional inhibition against race discrimination may disregard the unconstitutional qualification annexed as a condition to the fee simple in the lands. *Ibid.*

13. *Constitutional Law—Statutes—Courts.*—The court will not exercise its high prerogative power to declare a statute unconstitutional when by reasonable construction it will comply with the organic law, every presumption being in favor of its validity; and it will not be construed as repugnant unless its invalidity is "clear, complete and unmistakable," or shown beyond a reasonable doubt. *Gunter v. Sanford*, 452.

14. *Same — Due Process — Municipal Corporations — Cities and Towns—Street Improvements—Assessments—Taxation.*—For the purpose of an assessment by a municipal corporation of land abutting upon its improved streets, it is for the Legislature to determine whether the improvements are of benefit to the lands privately owned. *Ibid.*

15. *Same.*—It is not necessarily required for the "due process" clauses of the constitutions (Federal Constitution, Art. XIV, sec. 1, State Constitution, Art. I, sec. 17) that the total cost of street improvements allowed by statute to be made by a city or town should be referred to a regularly constituted judicial tribunal, and a statutory provision making the determination thereof by the board of aldermen of the town final and conclusive, subject to impeachment only for fraud and collusion, upon due notice previously given the private owners of the land assessed, with the right of appeal, is a valid and constitutional grant of such authority. *Semble*, the right of appeal is not always essential to the "due process" clauses of the State or Federal constitutions. *Ibid.*

16. *Same—Notice—Appeal and Error.*—Where the statute authorizes the board of aldermen of a town to assess the adjoining lands on a street improved, and provides that due notice be given such owners to appear before the board and urge their objections to the proposed assessment, with right of appeal to the Superior Court, and thence to the Supreme Court, it is sufficient notice to such landowners under the "due process" clauses of the State and Federal constitutions. *Ibid.*

17. *Constitutional Law—Municipal Corporations—Cities and Towns—Government — Taxation — Discretion—Eminent Domain.*—The statutory power conferred on the board of aldermen of a town to assess lands of owners abutting on a street improved is usually referred to the right of taxation, and not to that of eminent domain. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

18. *Same—State Highways.*—The private owners of land abutting on an improved street of a town, which is assessed therefor, cannot successfully contend that money furnished by the State Highway Commission for a State highway running through the town should be for their sole benefit, and was unlawfully to be applied for the benefit of all of the taxpayers of the town. *Ibid.*

19. *Constitutional Law—School Districts—Local Laws—Statutes.*—In conformity with the Municipal Finance Act, a city voted for the issuance of bonds, in a certain amount, for purchasing land and erecting building for public-school purposes, and issued half thereof and contracted for the use of the full balance of the bonds: *Held*, a later public-local act that enlarged the city limits and recognized therein the independent existence of a public-school district within the former limits is not contrary to the provisions of our recent amendment to our Constitution, Art. II, sec. 29, as an attempt to establish a school district, or to change the limits of those already established. *Duffy v. Greensboro*, 470.

20. *Same—Taxation—Bonds—Injunction.*—Where a city has created debts in view of a bond issue for its public schools, within its corporate limits, under the provisions of the Municipal Finance Act, and thereafter by a local public statute the limits of the city are enlarged, but recognizing the independent school district within the old limits, and having previously issued part of the bonds, proceed to issue more of them to meet the obligations already incurred before the enactment of the local statute, their proposed action is not contrary to the provisions of our Constitution, Art. VII, sec. 9, as the authority previously conferred imports a liability to taxation; and the further issuance of the bonds may not be enjoined at the suit of a taxpayer. *Ibid.*

21. *Constitutional Law—Taking of Property—Just Compensation—Federal and State Constitutions.*—While, so far as North Carolina is concerned, the only organic law requiring just compensation to be paid the owner for taking his land for a public use, as the relocation of a highway thereon, is to be found in the Federal Constitution, and relates to such matters as are cognizable by the United States courts thereunder, the principle is grounded in natural equity and applies to the internal matters of State government as a part of the laws of this State. *Parks v. Comrs.*, 491.

22. *Constitutional Law — Office—Schools—Education—Counties—Boards—Elections.*—Where a county board of education consisting of five members, empowered by statute to elect a county superintendent of schools, vote three for the relator and two for the present incumbent, but one of the three has accepted the position of trustee of a graded school, and entered into the discharge of the duties thereof, he is disqualified by holding two offices, prohibited by the Constitution, and the result being a tie, the present incumbent holds over until his successor may be lawfully appointed. *S. v. Long*, 517.

23. *Same—Chairman of Board—Second Vote—Tie.*—The chairman of a county board of education may not vote as a member for a county superintendent, and also as chairman to break a tie caused by his vote. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

24. *Constitutional Law—Criminal Law—New Trials—Custody of Defendant.*—In preserving to the defendant in a criminal action a fair trial in accordance with the bill of rights preserved to him by our Constitution, and in granting him a new trial in the Superior Court, it does not necessarily follow that he is to be discharged from the custody of the courts. *S. v. Hart*, 582.

25. *Constitutional Law — Municipal Corporations—Cities and Towns—Streets—Assessments—Due Process—Appeal and Error—Statutes.*—The right of appeal to the courts being provided in case of dissatisfaction by an owner of land abutting on a street assessed by the governing body of a municipality for street improvement, the objection that the owner's property is taken for a public use in contravention of the due process clause of the Constitution is untenable. C. S., sec. 2714. *Leak v. Wadesboro*, 684.

26. *Constitutional Law — Schools — Taxation — Municipal Corporations—Faith and Credit—Elections.*—The provisions of Article VIII, section 4, of our Constitution, relates to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting debts or pledging their credit than Article VII, section 7, which requires an election by its voters to do so, when not for necessary expenses; and an exception to the constitutionality of chapter 722, Public Laws of 1915, cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. *Waters v. Comrs.*, 719.

CONTENTIONS. See Appeal and Error, 3, 27.

CONTINGENT REMAINDERS. See Estates, 8; Husband and Wife, 1.

CONTRACTS. See Carriers, 5, 8, 15; Commerce, 1; Deeds and Conveyances, 4, 11; Waters, 2; Evidence, 11; Insurance, 1, 4, 7; Constitutional Law, 6; Bills and Notes, 8; Trusts, 7; Landlord and Tenant, 1; New Trials, 2.

1. *Contracts—New Promise—Consideration—Statute of Frauds—Debt of Another—Writing—Landlord and Tenant.*—Where the owner of lands has executed his note for moneys to be used by his tenant, and agrees with another such owner that he would release his tenant to become the tenant on the other's land for raising a crop thereon, if the latter would pay off or discharge the note held by the bank, and accordingly the tenant makes the change, the promise to become bound to the payment of the note at the bank is a new promise, supported by a sufficient consideration, and does not come within the meaning of the statute of frauds, requiring a signed, etc., writing for one to become bound for the obligation of another. *Davis v. Faulkner*, 439.

2. *Contracts—Deeds and Conveyances.*—The principle affording relief for fraud and deceit applies in proper instances to deeds and contracts concerning both real and personal property, the essential features ordinarily being that there should have been false representations of some material fact, within the knowledge of the party making it, and reasonably relied upon by the other, whereby he was induced to enter into the contract to his pecuniary injury. *Evans v. Davis*, 41.

CONTRACTS—*Continued.*

3. *Contracts—Vendor and Purchaser—Especial Goods—Breach—Measure of Damages.*—Where an executory contract for sale of goods peculiar to the seller's business, and not available for the sale by the vendor to its general trade, in this case art calendars with the purchaser's name printed thereon, with a stipulation in the contract against countermand, and the goods are not presently in existence, but thereafter to be especially manufactured, the seller, upon being notified by the purchaser, in breach of his contract, that he would not accept the goods, may not continue their manufacture and thus increase the purchaser's damages; and the measure thereof is the cost incurred by the seller up to the time he received the notification, together with the profits he would have made had the contract not been breached. *Advertising Co. v. Warehouse Co.*, 197.

4. *Same—Evidence—Instructions—Question for Jury—Appeal and Error.* Where a purchaser has breached his executory contract for the manufacture of goods made especially for him, before their completion, the question of damages is for the jury upon the evidence thereof, and a peremptory instruction from the court that they award the plaintiff the full contract price is reversible error. *Ibid.*

5. *Contracts—Compromise—Promise.*—A promise made and accepted by the proprietor of an automobile garage or its authorized agent, to pay the plaintiff for his automobile, which was claimed to have been negligently delayed under dangerous conditions, in repairing, through the defendant's fault, and consequently burned in the destruction of the garage by fire, is a valid and binding one, upon a sufficient consideration, and enforceable in our courts. *Beck v. Wilkins-Ricks Co.*, 210.

6. *Same—Principal and Agent—Corporations.*—The secretary of an incorporated garage and auto repair company has the implied authority to settle claims made for damages upon the corporation, C. S., sec. 1145, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. *Ibid.*

7. *Same—Judgments.—Held*, the affirmative verdict establishing the defendant's negligence in this case, as the cause of plaintiff's damage, and fixing the amount thereof, was sufficient to support a verdict in plaintiff's favor, there being no further defense claimed. *Ibid.*

8. *Contracts—Arbitration and Award—Evidence—Fraud—Instructions.*—Where there was conflicting evidence upon the trial of an action to recover the purchase price of lumber sold, and acceptance refused upon the ground that it did not come up to specifications, as to whether the parties had agreed to be bound by the conclusion of an official inspector, it is not error for the judge to charge the jury that, in the absence of fraud in the procuring of the contract, to abide by the inspection, if the jury found that there was such contract, the defendant would be bound by the result, and should the jury so find, they need not consider defendant's testimony that the lumber did not come up to grade or quality called for in the original contract. *Lumber Co. v. Briggs-Shaffner Co.*, 347.

CONTRACTS—*Continued.*

9. *Contracts — Writing—Ambiguity—Courts—Questions for Jury—Trials.* While the meaning of a written contract is ordinarily interpreted as a matter of law, this rule is not applicable in case of ambiguity, and under the evidence an issue of fact is presented. *Montgomery v. Ring*, 403.

10. *Same—Evidence.*—Where the plaintiff contracted with the defendant for ten per cent to be paid him for the supervision of the building of the latter's house, if the cost of its erection should not exceed a certain sum, and there is evidence that with the ten per cent added the cost exceeded that sum, and conflicting evidence as to whether the owner added extras with this result, and upon a counterclaim alleging that plaintiff damaged the defendant by his carelessness and the unworkmanlike manner in which he performed his services, issues of fact in these two respects are raised for the determination of the jury. *Ibid.*

11. *Contracts — Vendor and Purchaser — Evidence — Questions for Jury—Appeal and Error—Issues.*—It is necessary to a binding contract that the minds of the parties agree upon its terms; and where, in an action between the parties to recover for goods sold to be delivered by common carrier, and the purchaser refused the shipment, which was afterwards destroyed by fire in the carrier's warehouse, there is conflicting evidence as to whether certain shirts were purchased at a less price than demanded by the seller, in an order for overalls and shirts, which comprised the shipment thus destroyed, it is for the jury to determine whether the order was entire for both the shirts and the overalls, and whether the seller had demanded a higher price for the shirts than that agreed upon; and an instruction directing a verdict in the seller's favor is reversible error: *Held*, further, the issue, "In what sum is the defendant indebted to the plaintiff?" is a proper one. *Overall Co. v. Holmes*, 428.

12. *Contracts — Parol—Statute of Frauds—Promise to Pay Debt of Another—Mortgages—Deeds and Conveyances—Consideration.*—A purchaser of land received his deed therefor and gave back a mortgage, which was registered, for the balance of the purchase price secured by his notes under seal, and thereafter conveyed his equity to a third person in consideration of a certain cash payment and his grantee's parol promise to pay off the mortgage debt: *Held*, the parol agreement for the payment of the mortgage debt was not a promise to pay the debt of another required by the statute of frauds to be in writing (C. S., sec. 987), and is valid and enforceable as a direct obligation of his grantee supported by a sufficient consideration. *Parlier v. Miller*, 501.

13. *Same—Parties—Privies—Actions.*—Where the grantee of the mortgagor has agreed as a part of the purchase price of lands to assume the payment of a mortgage thereon, the mortgagee, as the one for whose benefit the contract was made, though not strictly a privy thereto, may maintain his action thereon, both against his mortgagor and the grantee in the latter's deed. *Ibid.*

14. *Same—Notes Under Seal—Limitation of Actions.*—Where the grantee of a mortgagor of lands has assumed, under a valid agreement, to discharge the mortgage debt, evidenced by notes under seal, the ten-year statute of limitations applies. C. S., sec. 437. *Ibid.*

CONTRACTS—*Continued.*

15. *Contracts — Services—Consideration—Evidence—Questions for Jury.*— Evidence of services rendered by plaintiff to his deceased uncle in the latter's lifetime, in looking after, collecting and disbursing the proceeds of his large crop of tobacco sold on warehouse floors, at his request, is sufficient of a consideration to support an action upon a note he had later given his nephew therefor. *Jones v. Winstead*, 537.

16. *Same—Fraud.—Held*, in this case there was no valid objection to the adequacy of consideration given for the note sued on, in the absence of evidence of fraud or imposition sufficient to vitiate the contract. *Ibid.*

17. *Contracts — Quantum Meruit — Services Rendered — Actions.*—Service rendered by a woman to her husband's brother, of a household nature, are a sufficient consideration to support his promise "to make ample provision for her and to see that she should be well paid for her services," upon which her action to recover upon a *quantum meruit* will lie. *Wood v. Wood*, 559.

18. *Same—Limitation of Actions.*—The statute of limitations for services rendered will run against the one claiming compensation therefor upon an implied promise to pay, upon a *quantum meruit*, three years next before the commencement of the action, in the absence of a prevailing custom to the contrary, such implied promise being to pay for such services as and when rendered. The suggestion in *Hauser v. Sain*, 74 N. C., 552, on the point, is overruled. *Ibid.*

19. *Same — Instructions — Directing Verdict — Appeal and Error—Prejudice—New Trials.*—In an action to recover upon a *quantum meruit* for services rendered to a deceased person immediately preceding the time of his death, involving the application of the three-year statute of limitations, the jury found the issue as to amount in a certain sum, and answered the issue as to the statute in the affirmative, whereupon the judge refused to sign judgment upon the verdict, and directed them to retire and find, in addition to their verdict on the last issue, in effect, that the plaintiff's action was barred "for all time except three years next preceding the death of plaintiff's intestate": *Held*, prejudicial to the defendant, depriving him of the right to have the jury reconsider their verdict as to the amount of the damages to be awarded as falling within the statutory period, in view of the direction given by the judge on the last issue. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Railroads, 1, 6; Negligence, 6, 7; Carriers, 12, 16; Municipal Corporations, 10.

CORPORATIONS. See Evidence, 7; Appeal and Error, 11; Contracts, 6; Actions, 4; Mortgages, 8; New Trials, 2; Taxation, 15.

1. *Corporations—Shares of Stock—Transfer of Shares—Liens.*—While the constitution or by-laws of a corporation may make its shares of stock transferable on the books of the company, the written assignment thereto on the certificate by the owner of his shares, accompanied by delivery, is sufficient as between the parties to pass the full title thereof to the transferee, and the mere delivery, without such written assignment, at least an equitable title thereto. *Castelloe v. Jenkins*, 166.

CORPORATIONS—*Continued.*

2. *Same—Transfer in Blank—Principal and Agent.*—Where the owner of shares of stock in a corporation signs a blank space thereon left for the transfer thereof, with written power of attorney left also in blank, accompanied by delivery, the transferee is *prima facie* presumed to be the owner of the shares, with right to have them transferred on the books of the corporation. *Ibid.*

3. *Same—Title.*—The *prima facie* title to shares of stock in a corporation of one to whom the owner has transferred them, accompanied with delivery, is superior to that of a pledgee thereof, under the terms of a written agreement executed before any shares had been issued by the corporation, when the transferee has acquired them without notice of the pledgee's claim. As to whether the pledgee's agreement was technically a mortgage, or an executory contract for delivering the shares when issued, or that the pledgor should hold for the pledgee's benefit, was not necessary to be decided. *Ibid.*

4. *Same—Delivery of Shares.*—The principle relating to constructive or symbolic delivery of the possession of personal property has no application to a pledge of shares of stock in a corporation under a written agreement made before the corporation had issued its shares, as against a transferee to whom they had been made without notice of the pledgee's claim. *Ibid.*

5. *Same—Burden of Proof.*—The burden of proof is on the plaintiff, claiming as pledgee of shares of stock in a corporation, under a written agreement with the owner, executed before the corporation had issued any, to show priority over the title of one who had acquired as a transferee. *Ibid.*

6. *Corporations—Condemnation—Constitutional Law.*—Under the facts of this appeal: *Held*, the defendant's position is untenable that the powers conferred upon the plaintiff, petitioner in condemnation of their lands, were special privileges, contrary to the Fourteenth Amendment to the Federal Constitution, under the authority of *Power Co. v. Power Co.*, 175 N. C., 668, and other like cases cited. *Power Co. v. Power Co.*, 179.

7. *Corporations—Condemnation—Measure of Damages.*—The measure of damages in proceedings of a public-service corporation to condemn lands for a public or *quasi*-public use is the fair market value of the lands, taking into consideration any and all uses or purposes to which the property is reasonably adapted, and might, with reasonable probability, be applied. *Ibid.*

8. *Corporations — Deeds—Mortgages—Chattel Mortgages—Probate—Statutes—Common Law—Signature of Officer.*—While it is the better course to follow the suggested methods of C. S., sec. 3326, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. *Bank v. Pearson*, 609.

9. *Same—Lands—Interest—Chattel Mortgages.*—The execution of a deed or contract by a corporation concerning lands, or an interest therein, is required by our statute of frauds to be signed, as well as in

CORPORATIONS—*Continued.*

writing, but this does not extend to the execution of a corporate chattel mortgage, and it is sufficient as to the latter, in the absence of charter provisions to the contrary, that the subscribing witness testify in the probate that he knows the common seal of the corporation, that he saw the presiding member attach it thereto, and that he became a subscribing witness in his presence, the same being in accordance with the general law relating to instruments of this character. *Ibid.*

10. *Same — Registration — Liens — Judgments—Execution—Sales—Purchaser.*—Where a corporation has executed its chattel mortgage in accordance with the general law, and it has been regularly admitted to probate, and accordingly registered in the proper county, the lien thereof is superior to that of levy under a later judgment, and the purchaser at the execution sale acquires the personalty subject to the prior registered mortgage. *Ibid.*

11. *Corporations — Subscriptions — Conditions — Waiver.*—A subscriber to shares of stock in a corporation proposed to be formed waives certain of the stipulations contained in his written subscription when he has afterwards become an incorporator and active trustee for its formation for the purposes set forth in his subscription, and has attempted to deal with it under the provisions of its incorporation. *Hotel Co. v. Latta*, 709.

12. *Corporations — Officers — Declarations—Evidence—Prejudicial Error—Appeal and Error.*—Declarations of an officer of a corporation that took over the assets of another corporation, that his company had assumed its liabilities also, are incompetent in an action to recover upon a note given plaintiff by the absorbed corporation, when not made in the declarant's line of official duty, or while not discharging it in reference to a transaction for the company. *Bank v. Mfg. Co.*, 744.

CORRECTION. See Verdict, 1; Deeds and Conveyances, 12.

COSTS. See Habeas Corpus, 6; Pleadings, 6.

COUNTERCLAIM. See Pleadings, 1.

COUNTIES. See Constitutional Law, 5, 7, 22; Statutes, 6, 8; Highways, 1; Appeal and Error, 33; Schools, 1, 3.

COURTS. See Appeal and Error, 2, 20, 21, 34; Boundaries, 1; Habeas Corpus, 2; Pleadings, 6, 14; Verdict, 1; Wills, 1, 2, 3, 4; Attachment, 1; Venue, 2; Cities and Towns, 2; Trespass, 3; Bastardy, 2; Husband and Wife, 2; Contracts, 9; Constitutional Law, 13; Highways, 3; Deeds and Conveyances, 12; Schools, 4; Taxation, 13, 15.

1. *Courts—Jurisdiction—Accounts Severable—Evidence—Demurrer.*—The plaintiff owned a store, and agreed with the defendant, who operated a sawmill, that the former would pay, in goods, etc., the orders on him by the latter, evidenced by "plucks," or brass checks, given to his mill employees, and the latter would make weekly settlements therefor in cash: *Held*, the agreement for a weekly settlement was divisible and may be split up into several causes of action and

COURTS—*Continued.*

brought before a justice of the peace when the amount is jurisdictional in his court; and the fact that an account was stated between the parties, showing a total balance due from various weekly accounts within the jurisdiction of the Superior Court, does not oust the jurisdiction of the justice of the peace or confer exclusive jurisdiction on the Superior Court; and a demurrer to the evidence tending to establish such facts is properly overruled. *Mayo v. Martin*, 1.

2. *Courts — Emergency Judges—Mandamus—Jurisdiction—Statutes—Constitutional Law.*—Emergency judges, appointed under the provisions of our statute as to Supreme and Superior Court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of *mandamus*, or when he is not holding a term of court assigned to him. Const., Art. IV, sec. 11. *Dunn v. Taylor*, 254.

3. *Courts — Criminal Law—Jurisdiction—Pleas—Abatement.*—Under our statute, a criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by plea in abatement. C. S., sec. 4606. *S. v. Oliver*, 329.

4. *Same—Waiver.*—While the court's jurisdiction of the subject-matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late. *Ibid.*

5. *Courts—Allowance—Attorney and Client—Attorney's Fees—Partition—Dower.*—In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorney's fees as a part of the costs, there being no statutory provision to that effect (C. S., sec. 1244). The case differentiated from those wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases. *Ragan v. Ragan*, 461.

6. *Courts — Discretion — Issues—Negligence—Assumption of Risks.*—The fact that the defense of contributory negligence and assumption of risks was submitted by the trial judge under one issue is not alone erroneous, but a matter within his discretion. *Hall v. Chair Co.*, 469.

7. *Courts—Discretion—Verdict Set Aside—Criminal Law.*—The granting or refusal to set aside a verdict by the trial judge in a criminal prosecution on the ground that the verdict is contrary to the weight of the evidence is discretionary with him, and not reviewable on appeal. *S. v. Edmonds*, 623.

COVENANTS. See Pleadings, 5.

CREDITORS. See Executors and Administrators, 2.

CRIMINAL ACTION. See Evidence, 28.

CRIMINAL LAW. See Sunday, 1, 3; Instructions, 2; Courts, 3, 7; Evidence, 31, 34, 35; Husband and Wife, 3; Appeal and Error, 26; Intoxicating Liquors, 2; Constitutional Law, 24; Murder, 6.

1. *Criminal Law—Pleas—Presumptions—Evidence—Questions for Jury—Trials.*—The plea of not guilty raises a presumption of innocence of the defendant, disputes the credibility of the State's evidence, and raises the question of his guilt for the jury to determine. *S. v. Murphey,* 113.

2. *Criminal Law—Rape—Intent.*—By our statute, C. S., sec. 4204, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indictment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. *S. v. Allen,* 303.

3. *Same—Instructions.*—Where there is evidence of a burglarious entry into a dwelling-house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. *Ibid.*

4. *Same.*—Where a burglarious breaking into a dwelling-house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. *Ibid.*

5. *Criminal Law—Indictment—Statutes.*—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. C. S., secs. 4610, 4625. *S. v. Hawley,* 433.

6. *Same—Perjury.*—A bill of indictment is sufficient to constitute the charge of perjury if it is in the words prescribed by C. S., 4615; Though on the trial the State must show beyond a reasonable doubt that the evidence as charged was false, that it was corruptly and wilfully done, and upon a point material to the issue in the case set out in the bill of indictment. An indictment drawn in the form prescribed by the statute is sufficient. *S. v. Cline,* 150 N. C., 854, overruled. *Ibid.*

7. *Same—Surplusage.*—The words "suit, controversy, or investigation" (C. S., sec. 4615) may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. *Ibid.*

8. *Same—Bill of Particulars.*—Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars (C. S., sec. 4613) if the indictment is in the form prescribed by C. S., sec. 4615. *Ibid.*

CRIMINAL LAW—*Continued.*

9. *Criminal Law — Felony — Assault — Misdemeanors — Conviction—Sentence—Indictment.*—Upon an indictment for a felony, including an assault against the person and supporting evidence, the jury may acquit of the felony, and find the defendant guilty of an assault, and upon the return of the verdict of guilty, the defendant may be sentenced to imprisonment for any term allowed by law for a conviction on an indictment of like character. C. S., sec. 4639. *S. v. Efird*, 482.

10. *Same—Grand Jury.*—An assault on a female by a man, or by a boy over eighteen years old, is a misdemeanor, and the offense charged in the indictment must be presented or found by the grand jury within two years from the time it was committed. C. S., secs. 4215, 4512. *Ibid.*

11. *Criminal Law — Misdemeanors — Statutes — Limitation of Actions—Motions—Arrest of Judgment—Appeal and Error.*—Where there is only evidence that a misdemeanor for which a defendant is being tried is barred by the two-year statute, a motion in arrest of judgment after verdict will not be sustained, it being required that to do so the fact upon which the motion may be sustained appear of record proper, the "case on appeal" not being a part thereof. *Ibid.*

12. *Same—Instructions.*—Where there is evidence tending to show that the State has failed of its proof that the misdemeanor charged by the indictment had been committed within the two years, the exception of the defendant may be based upon the refusal of the court to give a proper prayer for instruction upon this evidence, and not by a motion in arrest of judgment after verdict, time not being of the essence of the offense charged. *Ibid.*

13. *Criminal Law — Evidence — Character — Issues—Appeal and Error—Prejudice.*—The solicitor may not comment to the jury, in a criminal action, on the failure of the defendant to testify at the trial, in his own behalf, or the bad character of the defendant as a substantive fact to show guilt, when the defendant had not himself put his character in evidence on the issue. *S. v. Humphrey*, 533.

14. *Criminal Law—Principals—Aiders and Abettors.*—An aider or abettor is one who advises, counsels, or procures, or who encourages another to commit a crime, whether personally present or not at the time and place of the commission thereof, and when two persons aid and abet each other therein, both being present, both are principals and equally guilty. *S. v. Hart*, 582.

15. *Same—Statutes—Females—Carnal Knowledge.*—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under eighteen years of age, in violation of C. S., sec. 4209; and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abettor in the commission of the offense, and punishable as a principal therein. *Ibid.*

16. *Criminal Law — Assault Upon a Female — Statutes—Evidence.*—Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town,

CRIMINAL LAW—*Continued.*

with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, *is held* to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of C. S., sec. 4215, making it a crime for a man or boy over eighteen years of age to assault any female person. *S. v. Williams*, 627.

17. *Same — Instructions — Constitutional Law — Equal Rights — Races.*— Where there is evidence, upon the trial of an assault by a negro man twenty-three years of age upon a white girl fifteen years of age, sufficient for conviction under the provisions of our statute (C. S., sec. 4215), the recitation thereof by the judge in his instructions to the jury is not objectionable as coming under the inhibition of Article XIV, section 1, of the Federal Constitution, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty, or property without due process of law, or of the equal protection of the laws. *Ibid.*

18. *Criminal Law—Husband and Wife—Abandonment—Statutes—Pleas—Abatement.*—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of C. S., 4447, on appeal: *Held*, his plea in abatement comes too late after his plea of not guilty. *S. v. Hooker*, 760.

19. *Same—Place of Abandonment—Indictment—Burden of Proof.*—The law presumes that the offense of abandonment by the husband of his wife and child, C. S., 4447, took place as alleged in the indictment, and the burden is on the defendant to show otherwise. *Ibid.*

20. *Same—Venue.*—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of C. S., 4447, is in that county. *Ibid.*

21. *Same—Limitation of Actions.*—Where the abandonment by the husband of the wife consisted in his failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case. *Ibid.*

CUSTODY. See Constitutional Law, 24.

CUSTODY OF CHILD. See Habeas Corpus, 1, 3, 5.

CUSTOMS AND USAGES. See Evidence, 10; Railroads, 5.

DAMAGES. See Carriers, 1, 5, 9, 13; Deeds and Conveyances, 2; Waters, 1; Instructions, 6; Insurance, 3; Municipal Corporations, 7, 8; Negligence, 4; Highways, 3.

DANGER. See Railroads, 1.

DEBT. See Contracts, 1, 12; Statute of Frauds, 1.

DEBTOR AND CREDITOR. See Estates, 12; Statute of Frauds, 1.

DECEASED PERSONS. See Evidence, 39, 41, 43.

DECEIT. See Deeds and Conveyances, 1, 2, 3; Pleadings, 4, 5; Vendor and Purchaser, 4, 5.

DECLARATIONS. See Evidence, 4, 17, 18, 19, 48; Corporations, 12.

DEEDS. See Corporations, 8; Contracts, 2, 12; Executors and Administrators, 1; Mortgages, 1; Pleadings, 4, 5, 13; Wills, 6, 10, 15; Estates, 11; Trusts, 4, 14; Landlord and Tenant, 1.

1. *Deeds and Conveyances — Fraud — Deceit — Acreage — Ignorance of Fraud—Misrepresentations.*—In order to recover damages against a grantor of lands for fraud and deceit in misrepresenting the number of acres contained within the designation of the land in the deed, it is not always required that the party to be charged had known that the land did not contain the number of acres he has represented it to contain, when he is consciously and knowingly ignorant as to whether his representation has been true or false. *Evans v. Davis*, 41.

2. *Deeds and Conveyances—Fraud—Deceit—Damages—Evidence.*—In an action for damages for fraud and deceit for misrepresenting the number of acres contained in a tract of land designated in a deed by metes and bounds, and accessible to the plaintiff, he is required to have protected himself by proper covenants in that respect; and in the absence of positive fraud, or allegation, or evidence sufficient to correct the deed for mistake, etc., he is ordinarily without remedy. *Ibid.*

3. *Deeds and Conveyances — Fraud — Deceit — Misrepresentations—Evidence.*—Where the basis of the cause of action is fraud and deceit in the defendants' misrepresentation of the acreage of a tract of land he had conveyed to the plaintiff, the complaint must allege the facts necessary for the granting of the relief specifically and definitely, and general allegations that defendant breached his covenants contained in his deed, and deceit and fraud have therein been practiced on the plaintiff, are not sufficient. *Ibid.*

4. *Deeds and Conveyances—Contracts—Interpretation—Intent—Evidence.* In construing deeds or other written contracts, the intent of the parties is to be given effect as expressed in the instrument by the language used, when it is explicit in terms and plain in meaning, which may not be explained or modified by parol evidence unless it is capable of more than one construction, in which event the court may admit evidence of extraneous circumstances relevant to the inquiry, and which may naturally tend to aid it to a correct conclusion of the meaning intended by the parties. *Sawyer v. Pritchard*, 52.

5. *Same.*—The heirs at law of the original owner of forty acres of land, after the death of his widow, took possession of twenty acres thereof which had been assigned to her as her dower, as against her grantee thereof, who sued to recover possession. It was made to appear that the defendants, during the existence of the dower interest, filed their petition to sell the whole of the forty-acre tract for a division, the decree directed a sale of the land described in the petition, the commissioner appointed to sell reported he had sold to the

DEEDS—*Continued.*

plaintiff the entire tract of forty acres, and upon decree conveyed to the plaintiff, the purchaser, the entire tract by metes and bounds, reserving so much as had been allotted to the widow as her dower: *Held*, the commissioner's deed conveyed the entire forty acres to the plaintiff as purchaser, including the dower estate, excluding the admission of parol evidence to show a contrary intent of the parties. *Ibid.*

6. *Deeds and Conveyances — Mortgages — Contemporaneous Acts—Registration—Liens.*—A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. *Allen v. Stainback*, 75.

7. *Same—Description—Reference to Prior Mortgage.*—Where a mortgage is executed and registered contemporaneously, a reference in the former to a sufficient description in the latter makes it a part thereof, supplying any deficiency of the description therein. *Ibid.*

8. *Same—Reference to Prior Mortgage—Notice.*—A note secured by a mortgage, reciting that the note constituted a lien upon the lands, puts a subsequent mortgagor upon inquiry, and fixes him with notice as to the amount of the prior lien, and it does not lose its priority upon prior registration by the failure of the mortgage to recite it. *Ibid.*

9. *Same—Omission to State Amount of Lien.*—The omission of a prior registered mortgage to state the amount of the lien created by it cannot prejudice the rights of the holder of a second and later registered mortgage, wherein is recited that this mortgage was subject to the first one. *Ibid.*

10. *Deeds and Conveyances — Mortgages — Probate — Irregularities—Presumptions—Statutes.*—The admission to registration of a mortgage raises a presumption that the probate was by the proper officer and regular, which has to be met by the evidence of a later registered mortgage claiming its invalidity: and *Held further*, the validity of the probate of the mortgage in this case was established by C. S., sec. 3331, validating orders of probate by the clerk made prior to 1 January, 1919. *Ibid.*

11. *Deeds and Conveyances—Contracts—Timber Deeds—Extension Period —Registration—Notice.*—A contract for cutting and removing timber growing upon lands given by the owner, with privilege of extension thereof upon certain conditions, when registered, is notice to subsequent purchasers of the title of the conditions upon which the grantee or optionee of the extension period had acquired the right, and upon his performing them, according to the terms of the instrument, it is not required that he register the instrument under which he has extended the original term as against a subsequent purchaser of the title. *Dill v. Reynolds*, 293.

12. *Deeds and Conveyances—Descriptions—Mistakes—Correction—Courts.* The court will correct, as a matter of law, the call in a deed for land from so many degrees "east" to that many degrees "west," when it clearly appears from the other calls therein that this was the unmistakable intent of the parties and the mistake is obvious. *Elias v. Arthur*, 756.

DEFAULT. See Appeal and Error, 29.

DELIVERY. See Carriers, 1; Vendor and Purchaser, 2; Corporations 4.

DEMURRAGE. See Railroads, 8, 9.

DEMURRER. See Courts, 1; Pleadings, 4, 7; Railroads, 2; Evidence, 31; Parties, 2; Actions, 4; Bills and Notes, 7; Taxation, 15.

DESCENT AND DISTRIBUTION. See Trusts, 2.

DESCRIPTION. See Deeds and Conveyances, 7, 12.

DEVISE. See Estates, 1; Wills, 13, 16; Trusts, 5.

DIRECTING VERDICT. See Intoxicating Liquors, 1; Vendor and Purchaser, 3; Contracts, 19.

DISCONTINUANCE. See Waters, 3.

DISCRETION. See Cities and Towns, 2; Taxation, 6; Constitutional Law, 17; Municipal Corporations, 9, 13; Schools, 1, 3; Courts, 6, 7; Trusts, 1; Appeal and Error, 31; Trials, 1.

DISCRIMINATION. See Constitutional Law, 11; Railroads, 10; Taxation, 14.

DISMISSAL. See Appeal and Error, 19, 30.

DISQUALIFICATION. See Wills, 4.

DISTRIBUTION. See Commerce, 2.

DISTRICTS. See Appeal and Error, 33; Schools, 3.

DIVORCE.

1. *Divorce—Abandonment of Wife—Alimony—Appeal and Error—Findings of Fact—Conduct of Husband—Marriage.*—The Superior Court judge, in allowing alimony to the wife *pendente lite*, under the provisions of C. S., sec. 1666, must find the essential and issuable facts and set them out in full for the purposes of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient; and where her action is for a divorce *a mensa* on the ground of abandonment, for that she was compelled to leave home by the conduct of her husband, the judge must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. *Horton v. Horton*, 332.

2. *Divorce — Marriage — Condonation. — Held*, in a suit for divorce *a vinculo*, condonation of the wife's adulterous act is the forgiveness of the offense on condition that she will abstain from like offense thereafter, and upon the condition violated, the original offense is revived. *Blakely v. Blakely*, 351.

3. *Same — Pleadings—Evidence—Burden of Proof—Defenses—Actions.*— Where the wife relies upon the condonation of her adulterous conduct in defense to the husband's suit for a divorce *a vinculo*, it is not required that the husband negative the defense of condonation in his complaint, but it is for the wife to allege and prove it, as an affirmative defense. *Ibid.*

DIVORCE—*Continued.*

4. *Divorce — Venue — Husband and Wife—Alimony Without Divorce—Statute.*—When the acts and conduct of the husband make the wife's condition so intolerable and burdensome as to compel her to leave home and remain therefrom, and, after he has refused to contribute to her support, they eventually enter into a contract of separation, with an allowance to her of a certain sum of money to be periodically paid, and then the husband breached his contract by refusal to pay, she may maintain her action in the county wherein she had been forced to reside by the conduct of her husband, under the provisions of C. S., secs. 1667, 1657. *Rector v. Rector*, 618.

5. *Same—Transfer of Causes—Removal of Causes—Motions—Procedure.* Venue is not now a matter of jurisdiction of the courts, and when the suit has been brought in the wrong county, the defendant should therein move to have it transferred to the proper one, and failing therein, he will lose his right thereto. *Ibid.*

DOWER. See Executors and Administrators, 2; Husband and Wife, 1; Courts, 5.

DRAINAGE. See Waters, 1, 3.

DRUNKENNESS. See Burglary, 4.

DUE PROCESS. See Constitutional Law, 14, 25.

EDUCATION. See Constitutional Law, 22; Statutes, 9.

ELECTIONS. See Constitutional Law, 8, 22, 26; Statutes, 5; Schools, 3.

ELOPEMENT. See Abduction, 1, 3; Husband and Wife, 3.

EMERGENCY JUDGE. See Courts, 2.

EMINENT DOMAIN. See Constitutional Law, 17.

EMPLOYER AND EMPLOYEE. See Appeal and Error, 6; Railroads, 1, 2, 6; Carriers, 11, 12, 16; Negligence, 4.

1. *Employer and Employee—Master and Servant—Negligence—Instructions—Appeal and Error—Harmless Error.*—It is not the imperative duty of an employer to furnish his employee a safe place to work and safe appliances with which to perform the services required of him in a hazardous employment so as to make him, in effect, liable as an insurer, for he is only required to do so in the exercise of ordinary care; but an erroneous instruction in this respect will not constitute reversible error when it is made to appear on appeal that the actionable negligence of the employer was not questioned on the trial, and no issue as to contributory negligence was submitted to the jury. *Murphy v. Lumber Co.*, 746.

2. *Employer and Employee—Instructions—Appeal and Error—Objections and Exceptions—Requested Instructions.*—An exception to the charge, in an action to recover damages for a negligent permanent injury sustained by the plaintiff, will not be held for error on appeal upon the ground that the instruction too generally permitted a recovery for prospective damages without limiting them to the present cash value, or that he should have charged in a particular way, when he

EMPLOYER AND EMPLOYEE—*Continued.*

had so charged in general effect, in the absence of a refused requested instruction, correctly and more particularly stating the principles applicable to the evidence. *Ibid.*

3. *Employer and Employee—Master and Servant—Negligence—Explosives—Safe Place to Work.*—The employer is held to the highest degree of care in custody of dangerous explosives, such as dynamite, in regard to the safety for those employees whose work exposes them to such menace. The employer cannot delegate to another the duty imposed upon him to provide a reasonably safe place for employees to work in performing the duties of their employment, in release of his own liability, the degree of such care to be measured by the dangerous character of the article. The evidence in this case is sufficient for the determination of the jury of the defendant's actionable negligence. *Beal v. Coal Co.*, 754.

ENDORSEMENTS. See Evidence, 35.

ENDORSER. See Bills and Notes, 1, 2, 3.

ENTIRETIES. See Estates, 2, 12; Husband and Wife, 2.

ENTRY. See Estates, 9; Evidence, 20.

EQUALITY. See Criminal Law, 17.

EQUITY. See Mortgages, 4; Banks and Banking, 1; Landlord and Tenant, 1; New Trials, 2.

ESTATES. See Wills, 5, 16; Husband and Wife, 1.

1. *Estates—Rule in Shelley's Case—Wills—Devise—Heirs—Children.*—A devise to the testator's two sons for the term of their natural lives, and, at the death of either of them, to their heirs, if any, and if at their death they leave no heirs of their body, then the lands to go to their nearest relatives, respectively: *Held*, the use of the words "heirs or heirs of the body of the first takers," the two sons, is not to be taken in the sense of words of general inheritance under our canons of descent, but are construed in the sense of children, to whom the estate was limited in remainder, and the rule in *Shelley's case* does not apply: and *Held further*, the words "nearest relatives of my two sons" are construed as their next of kin, carrying the estate to a restricted class of heirs of the first taker, taking them without the rule in *Shelley's case*, and the two sons taking only a life estate, cannot make a valid conveyance of the fee simple. *Fields v. Rollins*, 221.

2. *Estates—Husband and Wife—Entireties—Right of Survivorship.*—The right of survivorship exists between husband and wife in devises or conveyances of land to them in entirety, which, during the continuance of this estate, is not subject to execution for the debts of either, and this estate may not be severed without the conveyance of the sole title by the one to the other, and except by a divorce *a vinculo*. *Turlington v. Lucas*, 283.

3. *Same—Personal Property—Constitutional Law.*—The common-law rule giving to the husband the actual or potential ownership of the separate *choses in action* belonging to his wife by reducing them into pos-

ESTATES—*Continued.*

session, is now changed by the Constitution of 1868, St. Const., Art. X, sec. 6, giving to the wife the sole ownership of her separate estate. *Ibid.*

4. *Same.*—The right of survivorship recognized as now existing between husband and wife as to lands held by them in entirety does not apply to personal property so held. *Ibid.*

5. *Same—Mortgages—Executors and Administrators.*—Where a husband and wife convey to a third person lands held by them in entirety and receive bonds from the purchasers, secured by a mortgage thereon for part payment of the purchase price, the bonds so received are regarded and dealt with as personal property to which the *jus accrescendi* is inapplicable; and where the husband then dies, one-half the value of such bonds goes to his administrator, or personal representative, and the other half thereof is the property of his wife. *Ibid.*

6. *Same—Limitation of Actions.*—The statute of limitations will not run against the estate of either the husband or wife in lands held by them in entirety, unless it is a bar to them both. *Ibid.*

7. *Estates—Remainders.*—An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument. *Power Co. v. Haywood*, 313.

8. *Same—Contingent Remainders—Vested Interests—Statutes—Charitable Interests.*—Upon an estate to W. during his life, and at his death to his eldest son, not then *in esse*, with residuary clause to testator's children; upon the happening of the contingency of the birth to W. of a son: *Held*, the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. C. S., sec. 1654; Rule 12; also Rules 1, 4, 5. *Ibid.*

9. *Estate—Possibility of Reverter—Entry—Possession.*—Where land is conveyed on certain conditions upon a possibility of reverter, only the grantor and his heirs, upon condition broken, can enter and revest the estate, and, such entry being a necessary condition subsequent, it cannot be otherwise conveyed or alienated. *Blue v. Wilmington*, 321.

10. *Same—Judgment—Estoppel.*—Where one claiming the possibility of reverter in lands from the original owner has brought action to establish his right, and a final judgment has been rendered against him, upon demurrer, the judgment so rendered estops a grantee under him, claiming the same right, against the same defendants. *Ibid.*

11. *Same—Municipal Corporations—Deeds and Conveyances—Title—Fee Simple—Qualifications.*—Where the citizens of a city subscribe the purchase price for lands to be used by the State as an encampment for white soldiers, and conveyance is made to the Governor and his successors for that purpose, but upon its cessation to be so used the title shall immediately become divested and "revert" to and vest in the board of aldermen of the city for the purpose of a public park, by this expressed ulterior disposition to the city in fee the principles

ESTATES—*Continued.*

affecting a reverter can have no application, and the city in that event acquires the fee-simple title. The application of the principles upon which a case or qualified fee is held void, discussed by CLARK, C. J. *Ibid.*

12. *Estates—Entirety—Husband and Wife—Debtor and Creditor—Homestead—Constitutional Law.*—An estate conveyed in entirety in fee to husband and wife is one to which the right of survivorship is applicable, the husband, during the joint estate, having the right of possession and to the rents and profits, though he is not entitled to a homestead therein as against the interest of the wife (C. S., sec. 1667), the title thereto vesting in the one on the death of the other, and not subject to execution for the debts of either during the continuance of the joint estate. *Holton v. Holton*, 355.

ESTOPPEL. See Clerks of Court, 7, 8; Mortgages, 4; Estates, 10; Landlord and Tenant, 2.

EVIDENCE. See Carriers, 1, 10, 11; Appeal and Error, 10, 24, 25, 29, 35; Bills and Notes, 1, 3, 5; Clerks of Court, 6; Mortgages, 7; Courts, 1; Criminal Law, 1, 13, 16; Deeds and Conveyances, 3, 4; Instructions, 1, 2; Principal and Agent, 1; Railroads, 1; Vendor and Purchaser, 4; Supreme Court, 1; Contracts, 4, 8, 10, 11, 15; Wills, 11; Trusts, 1, 10; Burglary, 4, 5; Actions, 3; Divorce, 3; Negligence, 3, 4, 6, 8; Abduction, 1, 3; Husband and Wife, 4; Experts, 1; Insurance, 8, 10; Corporations, 12; Trials, 1; Intoxicating Liquors, 1, 2; Murder, 1, 4, 6; Municipal Corporations, 18; Schools, 8; Slander, 1.

1. *Evidence—Nonsuit.*—The evidence must be taken most strongly in favor of the plaintiff for the purpose of defendant's motion of a nonsuit and dismissal of the action. *Mayo v. Martin*, 1.

2. *Evidence—Burden of Proof—Orders—Defendant's Possession of Evidence of Indebtedness.*—The plaintiff agreed to accept the orders of defendant given on him to the latter's employees, in goods, etc., evidenced by "plucks," or brass checks, settlements to be made weekly between them, which the defendant failed to do. The defendant admitted that he had got from the plaintiff the merchandise accordingly, but claimed he had paid for them: *Held*, the possession by the defendant of these "plucks," or brass checks, and produced at the trial, could only be considered by the jury as evidence of payment. *Ibid.*

3. *Evidence—Nonsuit.*—Upon a motion as of nonsuit upon the evidence, the evidence must be considered in the light most favorable to the plaintiff. *Pettitt v. R. R.*, 9.

4. *Evidence—Declarations of Witness—Corroboration.*—Where the credibility of the testimony of a witness is impugned on a trial, either by proof of his bad character or his contradictory statements, or by contradictory testimony, or by cross-examination tending to impeach his veracity or memory, or by his relation to the cause or the party for whom he testified, it is competent to corroborate and support his credibility by evidence tending to restore confidence in his veracity and the truthfulness of his testimony; and such corroborating evidence may include previous statements, whether near or remote, made either pending the controversy or *ante litem motam*. *S. v. Bethea*, 22.

EVIDENCE—*Continued.*

5. *Same—Witnesses—Relationship—Res Gestæ.*—Where the mother has testified in behalf of her son, on trial for murder, that the deceased, on the occasion, had followed her son into her home, cursing, and that she saw on him what looked like the handle of a gun, etc.; that she was in an adjoining room when the prisoner shot the deceased; that she told her husband at the time that the deceased was after the prisoner with a gun: *Held*, the relationship subjected the mother's testimony to suspicion, if not to discredit, making competent the admission of her evidence of her declarations made to her husband at the time; and upon the admission of this evidence, the testimony of others to like effect was also admissible, and its rejection was reversible error, to the prisoner's prejudice: *Held further*, it was competent as *pars rei gestæ*, being spontaneous and springing out of the occurrence, and relating to the contemporaneous acts and language of the deceased. *Ibid.*

6. *Evidence — Nonsuit — Negligence—Machinery.*—Evidence in this case that plaintiff, an employee of the defendant cotton mill company, was uninstructed and inexperienced, and had his hand caught and injured by a concealed belt with sharp pins therein, rapidly revolving in a cylinder, to carry off lint cotton, which the plaintiff was required to clean at certain intervals of the day: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and to refuse defendant's motion as of nonsuit. *Hale v. Rocky Mount Mills*, 49.

7. *Evidence—Corporations—Books—Secondary Evidence.*—Upon an issue of plaintiff's fraud and deceit in this action in inducing the defendant to purchase stock on the former's misrepresentation of the indebtedness of a corporation: *Held*, parol testimony was unobjectionable as secondary evidence, when it was made to appear that the corporation's books did not disclose the amount of its indebtedness. *Sanders v. Mayo*, 109.

8. *Evidence—Questions for Jury—Findings of Judge—Appeal and Error.* Upon the denial of liability as a partnership by defendant for fertilizer sold and delivered, the evidence was conflicting as to whether it was purchased and used by the firm, or one of two members thereof, presenting an issue of fact to the jury: and *Held*, error for the judge, without the consent of the parties, to find that it was a partnership indebtedness and render judgment accordingly. *Woodland v. Southgate*, 116.

9. *Evidence — Written Contracts — Parol Evidence.*—Exception that the written contract is the best evidence of its contents is without merit when the parties to the action have admitted its terms and no dispute has arisen on the trial in respect to them. *May v. Menzies*, 144.

10. *Evidence—Trade—Custom.*—Those whose knowledge of a custom in trade, from their own personal dealings and otherwise, are competent to give testimony on the trial as to the established custom therein. *Ibid.*

11. *Same—Vendor and Purchaser—Contracts—Reasonable Time for Acceptance—Presumptions.*—Where a traveling salesman receives orders from a customer of his house, subject to its acceptance, without stat-

EVIDENCE—*Continued.*

ing the time in which such right shall be exercised, the law presumes that a reasonable time therefor is given; and upon competent evidence as to what duration is reasonable, a question is presented for the determination of the jury. *Ibid.*

12. *Evidence — Written Contracts — Parol Evidence.*—Matters resting in parol leading up to the execution of a written contract are considered as merged in the written instrument, and may not contradict or vary its terms. *Overall Co. v. Hollister Co.*, 208.

13. *Same—Condition Precedent.*—The rule excluding parol evidence that contradicts or varies a written contract into which it has merged does not apply, when it tends to show a condition precedent to the effectiveness or the operation or binding effect of the written instrument. *Ibid.*

14. *Same—Appeal and Error—Prejudice—New Trials.*—The purchaser of goods gave the salesman of the vendor a written order therefor, and offered evidence tending to show that it was agreed that the written instrument should be effective only if he could countermand in time an order for like goods he had theretofore given another concern, which he had been unable to do: *Held*, sufficient as tending to show a condition precedent to the effectiveness of the written instrument, and its exclusion by the trial court was reversible error. *Ibid.*

15. *Evidence—Examination Before Trial—Statutes.*—It is competent for a party who has been examined under the provisions of the statutes before the trial of the cause, at the instance of the adverse party, to introduce the testimony so taken as evidence in his own behalf at the trial. C. S., secs. 900, 901, 902. *Beck v. Wilkins-Ricks Co.*, 210.

16. *Same—Definition of Promise.*—A promise is a declaration by any person of his intention to do, or to forbear from doing, anything, at the request or for the use of another; and a proposal when accepted becomes a promise. *Ibid.*

17. *Evidence—Declarations—Requisites—Ante Litem Motam—Boundaries.* In order that unsworn declarations may be received upon the trial as evidence of the true location of a contested private boundary involving title, it is required that they must have been made *ante litem motam*, by a declarant who was disinterested when they were made, and who was dead at the time of trial; and to be competent as *ante litem motam*, they must have antedated the time when the dispute had arisen, as well as that of action commenced. *Tripp v. Little*, 215.

18. *Evidence—Declarations—Interest.*—Evidence that a declarant on question of boundary is a relative of one of the owners will not affect the competency of his declarations, the disqualifying interest being of a necessary or proprietary nature. *Ibid.*

19. *Evidence—Declarations—Trespass—Title.*—It is not objectionable, as unsworn declarations of the absent tenant, for the plaintiff in claim and delivery to testify, in his action against the landlord for the possession of the tenant's share of the crop, that the tenant had assigned his share to him for the support of his children, it being competent to show how he had acquired the title thereto. *Branch v. Ayscue*, 219.

EVIDENCE—*Continued.*

20. *Evidence—Book Entries.*—A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of C. S., secs. 1786, 1787, 1788, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction. *Ibid.*

21. *Same—Appeal and Error—Prejudice—New Trials.*—The erroneous admission of book entries in this case *is held* for reversible error, being material to the principal issue in the cause, and prejudicial to appellants. *Ibid.*

22. *Evidence—Instructions—Appeal and Error.*—This action presents the issue as to whether the plaintiffs were entitled to take cash for their stock in the defendant corporation absorbed by its codefendant, under offer to sell by the one and acceptance by the other by respective resolutions of each, in evidence and undisputed, giving the plaintiffs this option, with further evidence that the plaintiffs had elected to take cash for their shares of stock so absorbed: *Held*, the plaintiffs' testimony that they had elected to take the cash was material and relevant to the issue, and properly admitted in evidence; and, there being no conflicting evidence as to their right to make this selection, an instruction to that effect was not erroneous. *Way v. Transportation and Storage Co.*, 224.

23. *Evidence—Questions for Jury.*—In this action to recover upon a note given for balance of a stock of goods: *Held*, upon establishing the defense of fraud, the question was for the jury, and the judgment below adjusting the relative claims of the parties, as to the cash payment and the evidently increased value of the merchandise from date of purchase, was a proper one. *Harvey v. Hughes*, 236.

24. *Evidence — Nonsuit—Title to Lands—Inheritance.*—Upon defendant's motion to nonsuit, the evidence will be construed in the light most favorable to the plaintiff, and where the defendant is in possession of the lands in controversy and plaintiff has shown title thereto by possession and by inheritance, through successive ancestors, for a long period of time, the defendant's motion as of nonsuit is properly denied. *Sorrell v. Stewart*, 237.

25. *Evidence—Character—Expert Witnesses—Skill.*—Where a physician, a witness for plaintiff on the trial in a personal-injury case, has been attacked, on cross-examination of the defendant, as to his truthfulness and skill, it is competent for the plaintiff to prove his general character and his ability as a physician and surgeon by other medical expert witnesses. *Belshe v. R. R.*, 246.

26. *Evidence—False Arrest—Malicious Prosecution—Instructions—Appeal and Error—Reversible Error.*—An instruction in an action of false arrest and malicious prosecution, that if the defendant in the civil action believed the plaintiff therein was the person guilty of the larceny, then they should also find that the defendant was not actuated by malice in causing the arrest, constitutes reversible error in the judge expressing his opinion, upon the evidence, as the existence of malice may exist, independent of probable cause, and upon the evidence the jury may find the one and not necessarily find the other. *Turnage v. Austin*, 266.

EVIDENCE—*Continued.*

27. *Same—Presumptions—Requests for Instruction.*—In an action of false arrest and malicious prosecution, plaintiff's exception to the judge's charge for failure to instruct the jury that their finding the absence of probable cause would be *prima facie* evidence of malice, requiring the defendant to satisfy the jury that the prosecution was not actuated by malice, is untenable, in the absence of a special request to that effect. *Ibid.*

28. *Same—Termination of Criminal Action—Questions for Jury.*—In order to recover in an action of false arrest and malicious prosecution, the criminal action, the basis of the civil one, must have terminated, which is a question for the jury in cases of uncertainty or doubt. *Ibid.*

29. *Evidence—Nonsuit—Trials—Questions for Jury—Partnership—Vendor and Purchaser—Instructions.*—Defendant's motion as of nonsuit, upon the evidence introduced at the trial of the cause, is properly denied, though the evidence is circumstantial, if the plaintiff's evidence, taken collectively, is more than a scintilla tending to establish the plaintiff's demand; and upon conflicting evidence the issue is for the determination of the jury; and in this case *held* there was more than a scintilla of evidence tending to show the liability of an alleged partnership, for goods sold and delivered to it through one who purchased for himself, but in the name of the defendant partnership, denying liability. The court's instruction is approved. *Hancock v. Southgate*, 278.

30. *Same—Judgments—Statutes.*—Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. C. S., 497 (1). *Ibid.*

31. *Evidence—Demurrer—Criminal Law.*—Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under our statute (C. S., 4643), at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence, brings his exception, to the Supreme Court on appeal, upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. *S. v. Kelly*, 365.

32. *Evidence—Nonsuit—Trials.*—Upon defendant's motion to nonsuit, the plaintiff's evidence should be construed in the light most favorable to the plaintiff, and any legal evidence introduced at the trial to support his demand is for the jury to pass upon and determine. *Allgood v. Ins. Co.*, 415.

33. *Evidence — Instructions—Trials—Interested Witnesses—Credibility of Evidence.*—An instruction that the jury should scrutinize the evidence of defendant in a criminal action, and that of his near relations, tending to show an *alibi* at the time he was charged with the commission of the offense, but should they find this evidence is entitled to be believed, they would "have a right" to accept it, and to give it the same weight as they would give the testimony of a disinterested witness, *is held* not erroneous, though the word "duty" to accept it would be in better form. *S. v. Barnhill*, 446.

EVIDENCE—*Continued.*

34. *Evidence — Maps — Illustrations — Witnesses — Attorney and Client— Criminal Law—Robbery.*—A witness may illustrate his testimony as to objects and their relative position material to the inquiry, by a map made by another than himself, when he testifies to the accuracy of the map in relation to his evidence, and directly of matters within his own knowledge, and the map is confined to this purpose and excluded as substantive evidence; and an attorney under a like restriction may in like manner illustrate his argument by drawing a diagram on the floor before the jury. *S. v. Kee*, 473.

35. *Evidence — Indictment — Witnesses — Endorsement—Criminal Law.*— Where two bills of indictment have been drawn for the same offense at different terms, and one of them has been ignored by the grand jury, but the other returned "a true bill," it was competent for the State to show by endorsement on the indictment being tried that the names of additional witnesses appeared thereon. *Ibid.*

36. *Evidence—Witnesses—Opinion—Facts at Issue—Questions for Jury.*— The opinion of a nonexpert witness is generally restricted to proof of facts within his personal knowledge; and this does not permit him to express his opinion concerning matters which the jury are required to decide. *Hill v. R. R.*, 475.

37. *Same — Expert Witnesses — Negligence—Carriers—Railroads.*—An expert witness may only testify his opinion, within the confines of his professional experience, upon a suppositious statement of facts if found by the jury to exist upon the evidence, and where common carriers are sued for damages caused by their alleged negligence to a shipment of a carload of mules, while *in transitu*, he may not testify that, from their condition after the arrival of the shipment, as he then saw them, the damages were caused by exposure to the weather, or that the mules which had pneumonia had been so exposed, these questions being of *facts in issue* for the jury to decide, and incompetent as expert opinion. *Ibid.*

38. *Evidence—Motions—Nonsuit.*—Upon a motion to nonsuit plaintiff, the evidence will be considered in the light most favorable to him. *Parlier v. Miller*, 501.

39. *Evidence — Deceased Persons — Statutes—Transactions—Parties—Adverse Interests—Executors and Administrators—Bills and Notes— Negotiable Instruments.*—In an action to recover upon a note against the personal representative of a deceased person, and others whose names appear thereon as joint principals, the admission in the pleadings that the others whose names appeared on the instrument as makers were in fact but sureties thereon, is incompetent as being a personal transaction, etc., with a deceased person, C. S., 1795, it being in the interest of those thus claiming it, and against that of the deceased; and these interests being conflicting, the fact that they were all parties defendant does not vary the rule. *Rudisill v. Love*, 524.

40. *Evidence — Nonsuit — Waiver — Appeal and Error.* — The defendant waives his right to insist on his motion as of nonsuit after the close of plaintiff's evidence, by the introduction of his evidence in defense. *Satterthwaite v. Davis*, 566.

EVIDENCE—*Continued.*

41. *Evidence—Deceased Persons.*—Where an attorney for a deceased person has testified in behalf of the estate of transactions between his client and himself, it is competent for the plaintiff, having testified that she had shown the attorney all telegrams she had received from the deceased, to introduce in evidence a telegram materially bearing upon the fact at issue, and contradictory of the evidence of the attorney, when properly confined to that purpose. *Ibid.*

42. *Same — Appeal and Error — Instructions — Presumptions — Record.*— Where the testimony excepted to is competent for a certain purpose, it will be presumed that the instructions of the trial judge properly confined it thereto, when the charge is not sent up in the record on appeal. *Ibid.*

43. *Evidence—Deceased Persons—Statutes—Transactions—Letters—Handwriting.*—Where the widow of her deceased husband seeks in her suit to set aside an agreement of separation given upon consideration, and to dissent from his will, and it is controverted as a material matter whether they were reconciled before his death and lived together in the marital relations, letters received from her husband by others bearing thereon may be identified by the plaintiff as in the handwriting of the deceased, and introduced in evidence. C. S., 1795. *Ibid.*

44. *Evidence—Issues—Burden of Proof—Questions for Jury—Railroads—Fires—Negligence.*—Upon conflicting evidence as to whether defendant railroad company's train, in passing the plaintiff's premises adjoining the right of way over which it passed, set afire and destroyed the plaintiff's dwelling, the finding of the fact by the jury that the fire was caused by sparks from the train is only sufficient evidence upon which the jury may find the issue of negligence in the plaintiff's favor, and does not relieve him of the burden to establish the issue of negligence by a preponderance of the evidence. *McDowell v. R. R.*, 571.

45. *Same—Instructions.*—Where the burden of the issue remains upon the plaintiff to show the negligence of the defendant railroad company in causing him damage by setting fire to his property by the passing of its train, with a defective spark-arrester, it is reversible error for the trial judge to charge the jury that if they found the fire was caused by sparks from the defendant's locomotive, the burden of the issue would shift to it to disprove its negligence as the cause of the damage, the plaintiff's evidence being sufficient only to sustain a verdict on the issue, if rendered in the affirmative. *Ibid.*

46. *Same—Constitutional Law—Trials by Jury—Substantial Rights.*—The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the Federal Constitution, and more emphatically by our State Constitution, Art. I, sec. 19, requiring "that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." *Ibid.*

47. *Same—Instructions—Appeal and Error.*—Where there is evidence in plaintiff's behalf, and *per contra*, that sparks coming from defendant's passing locomotive set fire to and destroyed his dwelling, in his

EVIDENCE—*Continued.*

action to recover damages for the railroad's negligence therein, the trial judge should instruct the jury properly upon the law as to the burden of the issue, and an instruction that the burden of proof of the issue would shift to the defendant should they find the plaintiff's evidence to be true, is reversible error. *Ibid.*

48. *Evidence—Boundaries—Declarations—Interest—Ante Litem Motam.*—Declarations bearing upon the true placing of dividing lines in controversy in an action between adjoining owners of lands are competent if made by a disinterested declarant, since deceased, *ante litem motam—i. e.*, before the controversy arose resulting in the suit, and in such case the lapse of time is not always controlling. *Randolph v. Roberts*, 621.

49. *Same—Affidavits.*—A dispute between a deceased declarant, a predecessor in title, and a witness at the trial, concerning the location of a fence line between them, when not bearing upon the location of a divisional line, between the present owners, the subject of the action, is not such interest on the part of the witness as will exclude his testimony of the declarations from the evidence; and this position is not changed merely because the declaration had been made by affidavit. *Ibid.*

EXAMINATION. See Evidence, 15.

EXECUTION. See Corporations, 10; Pleadings, 13.

Execution Against the Person — Assault — Issues—Verdict—Pleadings.—The complaint in an action for damages alleged that the defendant did "unlawfully, wilfully and maliciously" commit an assault upon the plaintiff, with pistols, to his great hurt and injury, and the verdict of the jury established the fact that the assault was wrongful and unlawful, assessed the damages, excluding recovery of punitive damages: *Held*, upon the return of the execution against the defendant's property unsatisfied, execution against his person could not be issued in the absence of evidence sustained by the verdict, that the assault was wilful and malicious, and the answer of the first issue, that the assault was wrongful and unlawful as "alleged in the complaint," is insufficient for the purpose. *Coble v. Medley*, 479.

EXECUTORS AND ADMINISTRATORS. See Wills, 1, 2, 3, 4; Estates, 5; Evidence, 39.

1. *Executors and Administrators—Deeds and Conveyances—Sales—Purchaser — Fraud — Irregularities—Instructions.*—The presumption is, certainly after the long lapse of years, in favor of the validity or regularity of a deed made by a mortgagee of the deceased owner of lands to the administrator who became the purchaser at the mortgage sale individually, and received the surplus as administrator and accounted for it to the clerk in his final settlement of the estate; and the burden of showing any irregularity in the execution of the power of sale being upon the heirs at law, whose action is to declare the sale void, a peremptory instruction of the judge to answer the issue in their favor is reversible error. *Jessup v. Nixon*, 100.

2. *Same—Heirs—Creditors—Homestead—Dower.*—Where the deed of a mortgagee in executing the power of sale to the administrator of the deceased owner, who became the highest bidder, individually,

EXECUTORS AND ADMINISTRATORS—*Continued.*

recites that the widow's dower and homestead had been reserved, and it is found as a fact by the verdict that the price was a fair one, and that nothing was done by him at the sale to suppress or chill the bidding, and it appears that as administrator he had received and accounted for the surplus without objection from the creditors of the estate, who received only a proportionate and less amount of their claims: *Held*, the reservation from the sale and deed made in pursuance thereof, of the dower and homestead exemptions, was not an irregularity of which the heirs at law could complain; and a peremptory instruction in their favor in their action to set aside the sale for irregularity or fraud was reversible error. *Ibid.*

3. *Same—Statute of Limitations.—Held*, under the evidence in this case, it was reversible error for the court to instruct the jury that the plaintiff's cause of action was not barred by the ten-year statute of limitations. *Ibid.*

EXECUTORY CONTRACTS. See Bills and Notes, 8.

EXEMPTIONS. See Statutes, 7.

EXPERT TESTIMONY. See Evidence, 25.

Experts—Evidence—Findings—Appeal and Error—Objections and Exceptions.—When upon the trial a witness is apparently an expert upon the testimony he has given, the appellant may not sustain an exception to the evidence he has given on the ground that the judge had not found him to be an expert, it being required that he should have requested the judge to rule thereon. *Ramsey v. Oil Co.*, 739.

EXPLOSIVES. See Employer and Employee, 3; Negligence, 8.

EXPRESS COMPANIES. See Carriers, 14; Taxation, 11.

EXTENSION. See Bills and Notes, 2; Deeds and Conveyances, 11; Appeal and Error, 31.

FEDERAL COURTS. See Removal of Causes, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads, 7; Carriers, 12.

FEDERAL STATUTES. See Carriers, 6; Commerce, 1; Intoxicating Liquors, 4.

FEES. See Courts, 5.

FEE SIMPLE. See Estates, 11; Constitutional Law, 12; Wills, 17.

FEE TAIL. See Wills, 17.

FELONY. See Criminal Law, 9.

FINDINGS. See Appeal and Error, 1, 10, 40; Evidence, 8; Instructions, 2; Divorce, 1; Experts, 1.

FIRES. See Carriers, 9; Insurance, 2; Evidence, 44.

FRAUD. See Deeds and Conveyances, 1, 2, 3; Executors and Administrators, 1; Pleadings, 4, 5; Vendor and Purchaser, 4, 5; Bills and Notes, 4; Contracts, 8, 16; New Trials, 2; Removal of Causes, 1.

FREIGHT. See Carriers, 9.

GOOD FAITH. See Municipal Corporations, 18.

GOVERNMENT. See Constitutional Law, 17.

Government—Municipal Corporations—Cities and Towns—Streets—State Highways—Agencies.—When a new governmental agency is established by statute, it takes control of the territory and affairs over which it is given authority as a governmental agency of the State to the exclusion of other governmental instrumentalities, and when the board of aldermen of a town, in the exercise of its statutory power, assesses the owners of land adjoining a street improved, the fact that a State highway extends through the corporate limits does not deprive the municipality of its exclusive control over its streets, or relieve it of its duty of improving and keeping them in repair.—*Gunter v. Sanford*, 453.

GRAND JURY. See Criminal Law, 10.

GUARANTOR. See Bills and Notes, 1.

HABEAS CORPUS. See Appeal and Error, 1, 2.

1. *Habeas Corpus—Husband and Wife—Custody of Children.*—Where the husband and wife are living in a state of separation, without divorce, the Superior Court has jurisdiction to award the custody of the minor children of their marriage to either the husband or the wife for such time, under such provisions, restrictions and directions as will, in the opinion of the court or judge, best promote the interest and welfare of the children, and retain the cause, and thereafter annul, vary or modify the same on good cause shown. C. S., 2241. *Clegg v. Clegg*, 28.

2. *Same—Courts—Jurisdiction—Juvenile Courts.*—The jurisdiction of the Superior Court or judge thereof in *habeas corpus* proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the juvenile court. *Ibid.*

3. *Habeas Corpus—Husband and Wife—Custody of Children.*—While as a general rule and at common law the father has *prima facie* the paramount right to the control and custody of his minor children until they arrive at age, the mother, in *habeas corpus* proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it. *Ibid.*

4. *Same—Appeal and Error.*—When the Superior Court judge has entered judgment in *habeas corpus* proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment, and affirm, reverse or modify it. *Ibid.*

5. *Same—Nonresident Wife—Jurisdiction—Bond—Apportionment of Custody of Children.*—Upon the wife's petition in *habeas corpus* it was made to appear that she and her husband were living apart by mutual consent, but not divorced, when she carried the minor children of their marriage to live with her in Virginia, from which

HABEAS CORPUS—*Continued.*

place the husband surreptitiously took them back to his home in this State. Each were equally worthy to have their custody and control, and the welfare of the children was equally safeguarded: *Held*, proper to order a division of the time of the children between the parents, with full right of each to visit and associate with them when living with the other, requiring of the wife a bond in a certain sum, conditioned upon her not taking the children out of the State and complying with the order of the court, made payable to the State of North Carolina, and filed with and approved by the clerk of the Superior Court, the cause retained to be further determined on change of conditions properly established. *Ibid.*

6. *Same—Appeal and Error—Costs.*—On this appeal from the judgment of the Superior Court judge in *habeas corpus* proceedings, brought by the wife against her husband for the control and custody of the minor children of their marriage, the costs of the appeal and hearing are taxed against the respondent, with order that the cost in the lower court be made out and judgment entered by the clerk thereof. *Ibid.*

HANDWRITING. See Evidence, 43.

HARMLESS ERROR. See Appeal and Error, 5, 24; New Trials, 1; Instructions, 6; Employer and Employee, 1.

HEARINGS. See Injunction, 3.

HEIRS. See Executors and Administrators, 2; Estates, 1.

HIGHWAYS.

1. *Highways—Counties—Statutes—Repeal—Agencies for Relocating Highways.*—Construing the various statutes comprising the road laws of Lenoir County, *held* those of 1907 were repealed by the Public-Local Laws of 1913, ch. 46, and the later act was modified to the extent subsequent statutes were in conflict with any of its provisions, leaving in force and effect section 13, requiring, for the change or relocation of a highway, the matter be referred to the county superintendent of roads and the patrol superintendent, who shall make report to the board of county commissioners for their action, and *held* that this procedure must be followed, leaving no other course discretionary with the board of commissioners. *Parks v. Comrs.*, 490.

2. *Same — Statutory Powers — Discretionary Powers.*—Where a county road law provides that certain officials or agents of the county shall go upon the lands for the purpose of relocating a county highway, and make recommendation for the action of the county commissioners, giving the owner of the lands sixty days to file his petition for the ascertainment of his damages, with right of appeal to the courts, etc., no notice of the entry by the county's agents upon the lands is required to be given the owner, and he must proceed, if he so desires, by petition, within the time limited by the statute for the ascertainment of his damages for the relocation of the highway on his lands. *Ibid.*

3. *Highways — Relocation—Statutes—Damages—Notice—Local Boards—Courts.*—Notice must be given to the owner of land for the assess-

HIGHWAYS—*Continued.*

ment of damages claimed by him in accordance with a statute, for the relocation of a highway thereon, before final determination thereof by the local board to which the statute refers it. *Ibid.*

HOMESTEADS. See Executors and Administrators, 2; Estates, 12.

HOSPITALS. See Trusts, 14.

HOTELS. See Sunday, 3.

HUSBAND AND WIFE. See Habeas Corpus, 3; Estates, 2, 12; Trusts, 1; Divorce, 1, 4; Abduction, 1, 3; Criminal Law, 18.

1. *Husband and Wife—Dower—Estates—Contingent Remainders.*—Under a devise to testator's daughter and son, equally, and in the event of either dying without issue, then the whole estate to the other, with ulterior contingent limitations over, upon the death of the son, his widow is entitled to dower in his lands, he having been seized thereof during coverture, with the possibility of a child of the marriage taking by descent. *Pollard v. Slaughter*, 92 N. C., 72, cited and applied. *Allen v. Saunders*, 349.

2. *Husband and Wife—Estates by Entirety—Title—Alimony—Statutes—Courts—Judgments—Orders.*—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of C. S., 1667, and for her counsel fees by chapter 123, Public Laws of 1921, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue (C. S., 1668) to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee-simple title for the purpose of paying the allowance is erroneous. *Holton v. Holton*, 354.

3. *Husband and Wife—Abduction—Elopement—Criminal Law—Statutes.* In order to constitute the offense of abducting or eloping with a married woman, C. S., 4225, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it is shown that the wife had not thus yielded herself to any other man than the defendant. *S. v. Hopper*, 405.

4. *Same—Innocence or Chastity of Wife—Evidence—Supported Testimony.*—The provision of C. S., 4225, that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. *Ibid.*

IMPROVEMENTS. See Constitutional Law, 4; Municipal Corporations, 12.

INDEBTEDNESS. See Evidence, 2.

INDEMNITY. See Appeal and Error, 24.

INDICTMENT. See Criminal Law, 5, 9, 19; Evidence, 35.

INHERITANCE. See Evidence, 24.

INJUNCTION. See Appeal and Error, 28; Constitutional Law, 20.

1. *Injunction—Schools—Taxation.*—Where, in an action of the citizens, it appears from the findings of the judge, upon the evidence, that the county board of education and superintendent of public instruction had temporarily arranged to divide the attendance of children of this and another such district between the schoolhouses of each, and that a substantial issue has been raised as to legality of this arrangement, an order continuing the preliminary restraining order to the hearing is a proper one, to be vacated only when the defendants may have complied with the requirements of the law. *Cain v. Rouse*, 175.

2. *Injunction—Issues—Material Facts—Questions for Jury.*—An order to restrain the sale under a purchase-price mortgage of a lot of land for industrial purposes, upon proper affidavits, tending to show that a railroad siding thereon was a part of the consideration and that the plaintiff was damaged by the acts of the defendant in depriving the plaintiff of this benefit, should be continued to the hearing to determine the amount actually due the defendant mortgagee. *Johnson v. Jones*, 235.

3. *Injunction—Grist Mills—Statutes—Dissolution of Temporary Restraining Order—Trial Hearing.*—Ordinarily, in cases relating to the establishment and maintenance of grist mills, the remedy given by statutes must be pursued when their provisions apply, but in the present case, it appearing that though the plaintiff's land has been trespassed upon, the principal damage complained of is caused by the erection and maintenance of a dam to operate a grist mill by defendant on his land, and the restraining order heretofore issued will be dissolved without prejudice to the relief demanded, should the demand be renewed upon the establishment of the facts in plaintiff's favor at the final hearing, in view of the harm that may otherwise presently come to the defendant and the community which the defendant's grist mill now serves. *Kinsland v. Kinsland*, 759.

INSPECTION. See Vendor and Purchaser, 1.

INSTRUCTIONS. See Appeal and Error, 3, 4, 9, 12, 18, 19, 26; Carriers, 1, 11; Executors and Administrators, 1; Intoxicating Liquors, 1; Negligence, 2; Vendor and Purchaser, 3; Contracts, 4, 8, 19; Evidence, 22, 26, 27, 29, 33, 42, 45, 47; Burglary, 3; Criminal Law, 3, 12, 17; Employer and Employee, 1, 2; Mortgages, 10.

1. *Instructions — Requests for Instructions — Evidence — Assumption of Fact.*—A request for instruction that assumes as a fact an issuable question is properly denied. *Hubbard v. Brown*, 97.

2. *Instructions—Jury—Belief of Evidence—Findings of Fact—Criminal Law.*—The verdict of a jury must not be solely based upon their belief of the evidence on the trial, but upon their findings of fact therefrom, and in criminal cases, beyond a reasonable doubt. *S. v. Loftin*, 205.

3. *Same—Appeal and Error—New Trials.*—The Court disapproves again an instruction for the jury to render their verdict upon their belief of the evidence, and where the evidence is conflicting, this instruction will be held for reversible error. *Ibid.*

INSTRUCTIONS—*Continued.*

4. *Instructions—Conflicting—Appeal and Error—New Trials.*—An instruction upon the evidence that is conflicting upon material points is *held* to be reversible error. *Byrd v. Hicks*, 242.

5. *Same.*—The mortgagee, resisting the foreclosure of the mortgage, pleaded and introduced evidence to show that the mortgagor had agreed to cancel several notes thereby secured upon being repossessed and seized of the lands; and there was further evidence that a new party, made to the proceedings, had been duly served with summons and had failed to plead or appear at the trial: *Held*, an instruction to find for defendant upon his reconveying the lands, and an instruction requiring him upon appropriate findings of the jury to pay off the note he had acquired from the plaintiff, are conflicting upon a material matter, upon which a new trial will be ordered on appeal. *Ibid.*

6. *Instructions — Damages — Negligence — Appeal and Error — Harmless Error.*—In an action against a railroad company to recover damages for a personal injury, a charge otherwise unexceptionable will not be held for reversible error to the defendant's prejudice for the use of the words, upon the measure of damages allowing a recovery, "for the reasonable present value of the diminished earning capacity forever," it being the apparent endeavor of the judge, taken in connection with other portions of the charge, to impress upon the jury that plaintiff could not recover for the entire difference caused by the injury, but only the present value of such difference so caused, it appearing from the charge, considered as a whole, that any juror of average intelligence must have understood the application of the proper instructions, and that recovery was not permitted for all time to come, or that the injury was permanent, or otherwise. *Belshe v. R. R.*, 246.

7. *Instructions—Statutes—Expression of Opinion.*—It is not required by C. S., 564, that the judge intimate in the direct language of his charge his opinion of whether, upon the evidence, a fact is fully or sufficiently proved, and if such intimation is reasonably inferred from his manner or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of the statute, and a new trial will be ordered on appeal. *S. v. Hart*, 582.

8. *Instructions—Prayers for Instructions—Rules of Court—Appeal and Error.*—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it, as required by the statute. C. S., 565. *Bank v. Smith*, 635.

9. *Instructions—Appeal and Error—Objections and Exceptions.*—An isolated paragraph of the charge of the court will not be held for reversible error, if considered with the other portions of the charge, the jury must have understood the correct principles of law in relation to the evidence. *Beal v. Coal Co.*, 754.

INSURANCE.

1. *Insurance, Fire—Policies—Contract—Principal and Agent—Waiver.*—Where a clause in a fire insurance policy provides that it is upon condition of unconditional and sole ownership of the property insured, and the agent writing the policy is aware of the fact that it was owned by the insured and certain others whose names do not appear therein, the knowledge of the agent will be imputed to the insurer, and the provision will be deemed as waived by it. *Ins. Co. v. Lumber Co.*, 269.

2. *Same—Fires—Negligence—Tort-Feasor—Subrogation—Parties.*—Where the property insured has been destroyed by the negligence of a third person, and the insurer has paid the loss, it is subrogated to the right of the insured and has a right of action against the tort-feasor, and the defendant may not set up any defense that the insurer may have had under the policy contract, not being a party thereto. *Ibid.*

3. *Same—Damages.*—Where the property insured has been destroyed by fire by the negligence of a third party, and the insurer by paying the loss has been subrogated to the rights of the insured, the measure of damages in the insurer's action against the tort-feasor is the actual market or cash value of the property at the time of the fire, unaffected by any stipulation in the policy to the contrary, the tort-feasor not being a party thereto. *Ibid.*

4. *Insurance, Accident — Policies—Contracts—Interpretation.*—While the terms of a policy of accident insurance, when ambiguously expressed, are to be construed more strongly in favor of the insured, this rule cannot apply when, from the wording of the instrument, the clear intent of the parties may be interpreted. *Powers v. Ins. Co.*, 336.

5. *Same—Public Policy.*—In interpreting a policy of accident insurance, the clear intent of the parties, as expressed in the policy contract, will be given effect, when not in conflict with public policy. *Ibid.*

6. *Same—Ambiguity.*—A policy of accident insurance, relieving the company from liability for the death of the insured caused by "firearms," is not contrary to our public policy, and when clearly expressed in the instrument, is enforceable; nor will a contrary intent be construed from the wording of another provision in the contract relieving the insurer from liability only when the death is intentionally caused, it appearing from the language of the further provisions that they must necessarily be applicable only to certain causes of death therein enumerated. *Ibid.*

7. *Insurance — Policies—Contracts—Ambiguity.*—Ambiguity appearing in the language of the form of a policy of theft insurance of an automobile used by the company, raising a doubt as to its meaning, should be resolved in favor of the insured, giving effect to the intention of the parties, if it can be ascertained under the rules of interpretation, though imperfectly or obscurely expressed. *Allgood v. Ins. Co.*, 415.

8. *Same—Automobiles—Locking Device—Evidence—Rule of the Prudent Man—Nonsuit—Questions for Jury—Trials.*—A provision in the policy insuring the owner of an automobile against theft, reading, "The insured undertakes, during the continuance of this policy, to use all diligence and care in maintaining the efficiency of a certain

INSURANCE—*Continued.*

locking device and in locking the automobile when leaving the same unattended," does not deprive the plaintiff of his right to recover for the theft of the automobile by leaving it unlocked under such circumstances as the jury may find that the plaintiff used reasonable care, under the rule of the prudent man, though leaving the machine unlocked for a few minutes at the time of the theft; and a motion as of nonsuit is improvidently sustained. *Ibid.*

9. *Insurance — Life — Principal and Agent — Local Agent—Negligence—Policies—Premiums.—Held,* this case was tried in accordance with the decision in the former appeal on the question as to whether the negligence of the defendant's local agent was the cause of the first premium not being paid, it being the condition upon which the company's liability thereon was made to depend. *Fox v. Ins. Co.*, 762.

10. *Same—Evidence—Appeal and Error.*—In this case *held,* the evidence of statements made by the agent of the defendant life insurance company's local agent for the delivery of the policy as to his acts and conduct therein related to the question of his negligence at that time, and was competent upon the trial. *Ibid.*

INSURANCE, ACCIDENT. See Insurance, 4, 5, 6.

INSURANCE, FIRE. See Insurance, 1, 2, 3.

INSURANCE, LIFE. See Insurance, 9, 10.

INSURANCE, THEFT. See Insurance, 7, 8.

INTENT. See Deeds and Conveyances, 4; Banks and Banking, 1; Statutes, 2; Wills, 9, 14; Burglary, 4; Criminal Law, 2; Mortgages, 7.

INTEREST. See Clerks of Court, 10; Evidence, 18, 33, 39, 48; Wills, 12; Venue, 1; Corporations, 9.

INTERSTATE. See Carriers, 6, 10.

INTERVENING CAUSE. See Negligence, 9.

INTOXICATING LIQUOR.

1. *Spirituous Liquor—Evidence—Instructions—Verdict Directing—Appeal and Error.*—In an action for the unlawful sale of liquor the evidence tended to show that the witness, a physician, obtained the liquor from the defendant for a patient, for which the defendant received money offered by the witness: *Held,* the transaction was an unlawful sale, coming within the inhibition of the statute, and an instruction by the court for the jury to find a verdict of guilty, if found to be true, was correct, there being no other evidence in the case. *S. v. Murphrey,* 113.

2. *Intoxicating Liquor — Spirituous Liquor — Manufacture — Statutes—Criminal Law—Actions—Joinder—Evidence.*—As to the exception to consolidating the separate indictments against the two defendants for the unlawful manufacture of intoxicating liquors, *quere?* And *held,* that the insufficiency of the evidence to convict one of them renders the consideration of the exception unnecessary. *S. v. Burgess,* 467.

INTOXICATING LIQUOR—*Continued.*

3. *Same.—Held*, the circumstantial evidence in this case was sufficient to convict one of the defendants for the unlawful manufacture of intoxicating liquor, but the only evidence as to the other being that a few minor implements were found in the room which he was occupying as a boarder with the sons of the first defendant, and also a wet place upon the floor of the room, were insufficient to sustain a conviction of the other defendant. C. S., 4453. *Ibid.*

4. *Intoxicating Liquor—Spirituous Liquor—Statutes—Federal Statutes—Turlington Act—Defenses.*—The legislative purpose in the enactment of chapter 1, Public Laws of 1923 (Turlington Act), was to make the State statutes in the matter of unlawful manufacture or sale and transportation of intoxicating liquor, etc., conform to the Federal statute on the subject, and both are liberally construed to prevent, as a matter of public policy, the use of intoxicating liquor, as defined, for beverage purposes; and the defense is untenable that the defendant should not be convicted of violating our prohibition law because the Turlington Act became effective on the day he was tried in the Superior Court. *S. v. Edmonds*, 623.

ISSUES. See Injunction, 2; Evidence, 36, 44; Actions, 3; Appeal and Error, 16; Contracts, 11; Courts, 6; Execution, 1; Criminal Law, 13; New Trials, 2; Schools, 6.

Issues.—Issues are sufficient when they present to the jury proper inquiries as to all the essential matters or determinative facts in dispute. *Mann v. Archbell*, 72.

JOINDER. See Intoxicating Liquors, 2.

JOINT AGENCIES. See Actions, 6.

JUDGE. See Evidence, 8; Pleadings, 11.

JUDGMENTS. See Appeal and Error, 7, 29, 34; Boundaries, 1; Wills, 3; Contracts, 7; Parties, 1; Pleadings, 12; Evidence, 30; Bastardy, 2; Estates, 10; Husband and Wife, 2; Corporations, 10; Railroads, 8; Taxation, 9.

1. *Judgments—Attorney and Client—Laches—Motion to Set Aside Judgment.*—The laches of an attorney will not be imputed to his client when the latter is free from blame; and where the client, upon being served with summons as a defendant in an action, immediately employs counsel having the reputation of diligence in his practice, who promises to notify him when necessary to give further attention to his case, and soon thereafter a judgment by default final for the want of an answer is rendered against him, ignorant of the course and practice of the court, it will be set aside upon motion aptly made upon a showing of merits, with permission to make new parties if necessary to the full determination of the controversy. As to whether such judgment was the proper one in this case, *quere? Edwards v. Butler*, 200.

2. *Judgments—Appeal and Error.*—When, upon the facts agreed, the plaintiff is entitled to judgment, it should be rendered, as a matter of law, without the intervention of a jury. *Davis v. Storage Co.*, 676.

JUDGMENT CREDITORS. See Actions, 2.

JUDGMENTS SET ASIDE. See Pleadings, 9.

JURISDICTION. See Appeal and Error, 2, 34; Boundaries, 1; Clerks of Court, 1; Courts, 1, 2, 3; Habeas Corpus, 2, 5; Bastardy, 2; Removal of Causes, 1; Taxation, 15.

JURY. See Instructions, 2; Evidence, 46.

JUSTICES OF THE PEACE. See Bastardy, 2.

JUVENILE COURTS. See Habeas Corpus, 2.

KNOWLEDGE. See Taxation, 13.

LACHES. See Judgments, 1; Trusts, 13.

LANDS. See Evidence, 24; Venue, 1; Corporations, 9.

LANDLORD AND TENANT. See Trespass, 1; Contracts, 1.

1. *Landlord and Tenant—Contracts—Deeds and Conveyances—Equity.*—The relation of landlord and tenant rests upon contract between the parties and does not exist without their mutual intent and the mutuality of consideration, as in other contracts, nor preclude the supposed tenant from showing there was no such tenancy, or from invoking the interposition of a court of equity for his equitable relief, in proper instances. *Austin v. Crisp*, 616.

2. *Same—Estoppel.*—Where a supposed tenant has rented a tract of land included in the boundaries of several tracts in a deed he has theretofore received from his supposed landlord, in his action to correct his deed for mistake he is not estopped to show that because of his illiteracy and ignorance of the description of the lands in the deed he has taken, he has afterwards leased the *locus in quo* by mistake. *Ibid.*

LEGISLATIVE POWERS. See Municipal Corporations, 1.

LETTERS. See Wills, 2; Evidence, 43.

LEVY. See Taxation, 2; Attachment, 1.

LICENSES. See Taxation, 4.

LIENS. See Deeds and Conveyances, 6, 9; Taxation, 2; Corporations, 1, 10; Mortgages, 9.

LIFE ESTATES. See Wills, 8.

LIFE INSURANCE. See Insurance, 9.

LIMITATION OF ACTIONS. See Clerks of Court, 9; Commerce, 1; Wills, 7, 8; Estates, 6; Contracts, 14, 18; Criminal Law, 11, 21; Carriers, 16.

Limitation of Actions—Pleadings—Defenses.—The statute of limitations must be pleaded in the answer to be available as a defense to the cause of action. *Satterthwaite v. Davis*, 565.

LOCAL LAWS. See Statutes, 4; Constitutional Law, 7, 19; Municipal Corporations, 4.

LOGS AND LOGGING. See Sunday, 1.

LUMBER. See Mortgages, 8.

MACHINERY. See Evidence, 6.

MALICIOUS PROSECUTION. See Evidence, 26.

MANDAMUS. See Courts, 2; Taxation, 15.

MANDATORY LAWS. See Taxation, 7.

MAPS. See Evidence, 34.

MARRIAGE. See Divorce, 1, 2.

MARRIED WOMEN. See Wills, 7.

MASTER AND SERVANT. See Appeal and Error, 6; Railroads, 2; Carriers, 11, 12, 16; Employer and Employee.

MEASURE OF DAMAGES. See Negligence, 2; Contracts, 3; Corporations, 7.

MERITS. See Appeal and Error, 29.

MILLS. See Injunction, 3.

MISDEMEANOR. See Criminal Law, 9, 11.

MISJOINDER. See Actions, 1; Parties, 2; Removal of Causes, 1.

MISREPRESENTATIONS. See Deeds and Conveyances, 1, 3.

MISTAKE. See Deeds and Conveyances, 12.

MONEY. See Pleadings, 1; Mortgages, 5; Trusts, 1.

MORTGAGES. See Deeds and Conveyances, 6, 7, 8, 10; Actions, 2; Wills, 10; Estates, 5; Contracts, 12; Banks and Banking, 1; Corporations, 8; Pleadings, 13; Trusts, 14.

1. *Mortgages—Deeds and Conveyances—Patent Error—Sales—Irregularities.*—The recitation in a mortgage authorizing and empowering the mortgagor to execute the power of sale upon default in payment, upon giving notice to the party of the first part (himself), is patently a clerical error, which will not nullify the sale or deed to the purchaser thereat. *Jessup v. Nixon*, 101.

2. *Mortgages—Statute of Frauds—Release—Parol Evidence.*—A contract made between a mortgagor and mortgagee after the making of the mortgage on lands, which are intended to terminate that relationship as between themselves, does not fall within the intent and meaning of the statute of frauds (C. S., 988), requiring contracts concerning land, etc., to be put in writing, etc.; and where the mortgagee has agreed by parol to release certain lands embraced in the description of the mortgage to a purchaser thereof from the mortgagor and take a mortgage in lieu thereof on other lands, it is enforceable. *Stevens v. Turlington*, 191.

3. *Same—Title.*—While the legal title to lands vests in the mortgagee, it is only for the purpose of securing to him the mortgage debt, and certainly until foreclosure, or perhaps his rightful possession taken

MORTGAGES—*Continued.*

upon condition broken by the mortgagor, the mortgage is regarded only as a pledge, with all the other incidents of title remaining in the mortgagor, subject to the conditions of title upon which he had given it, as expressed in the written instrument. *Ibid.*

4. *Same—Equity—Estoppel.*—Where there is an existing mortgage upon lands, and a purchaser of a part of the lands from the mortgagor, a parol agreement taken with the mortgagee, later made, that the latter would release the lands from the terms of the mortgage upon receiving in lieu of his lien a mortgage upon other lands, creates an equitable estoppel against the mortgagee's position that the parol agreement was ineffectual under the statute of frauds (C. S., 988). *Ibid.*

5. *Same—Purchase-Money.*—The principle upon which the giving of a deed taking back a mortgage for the balance of the purchase price is regarded as one transaction, giving the purchase-price mortgage a superior equity, and that the mortgagor acquires title subject to the mortgage lien, etc., has no effect upon the principle that the mortgagee is estopped in equity by his parol agreement, later made, to take a mortgage on other lands in lieu of a part thereof embraced in a description of the mortgage, as against a purchaser in good faith, in reliance upon the parol agreement. *Ibid.*

6. *Mortgages—Discharge—Parol Evidence.*—Evidence of a parol discharge of a written contract within the statute of frauds, or of an equitable estoppel by matter *in pais*, must be positive, unequivocal and inconsistent with the contract; and where the evidence is conflicting, it raises an issue to be determined by the jury. *Ibid.*

7. *Mortgages, Chattel—Parol Agreements—Intent—Evidence.*—It is not necessary to the validity of a chattel mortgage between the parties that it be in writing or in any particular form, and where the seller takes from the purchaser a chattel mortgage unintentionally left unsigned by the purchaser, the intent of the parties may be evidenced thereby, as well as by their admissions and other relevant circumstances tending to show their intent at the time of the transaction. *Kearns v. Davis*, 522.

8. *Mortgages—After-Acquired Property—Corporations—Lumber.*—A mortgage will be held to extend to and include after-acquired property when it so states in express terms, or it clearly appears from the language used, that such was its manifest intention; and where a corporation has mortgaged lumber on certain of its yards, and shall keep thereon a certain quantity during the life of the mortgage, with the mutual agreement that the mortgagor replace it when sold to its customers, the successive replacements of the lumber fall within the terms of the mortgage and are subject to its lien, in the absence of allegation and proof of fraud. *Bank v. Pearson*, 609.

9. *Mortgages—Subject to Prior Mortgage—Registration—Statutes—Notice.* A chattel mortgage stating that it was made subject to a prior mortgage on the same property to secure the payment of a certain sum of money is, by its express terms, in recognition of the existing prior mortgage, and only purporting to convey the mortgaged property to that extent, does not require registration of the prior mortgage, or

MORTGAGES—*Continued.*

the notice therein required by statute (C. S., 3311), to make the obligation more effective between the parties to the agreement and the prior encumbrancer. *Bank v. Smith*, 635.

10. *Same—Instructions—Appeal and Error.*—Where a chattel mortgage is given and accepted subject to a prior mortgage, an instruction in an action thereon that makes registration of the first mortgage in the proper county necessary to the enforcement of the condition upon which the later mortgage was given, is reversible error. *Ibid.*

MOTIONS. See Clerks of Court, 2; Vendor and Purchaser, 5; Judgments, 1; Appeal and Error, 13, 30; Criminal Law, 11; Evidence, 38; Divorce, 5.

MUNICIPAL CORPORATIONS. See Cities and Towns, 1, 2; Constitutional Law, 2, 7, 10, 14, 17, 25, 26; Taxation, 5, 6, 11; Commerce, 2; Estates, 11; Statutes, 5; Government, 1; Sunday, 3.

1. *Municipal Corporations—Cities and Towns—Title—Legislative Powers —Statutes.*—Where title to lands is conveyed to a city, to be used for the purpose of a park, no parol trust is therein created in the city, and, holding the lands subject to the legislative will, it can convey a valid fee-simple title thereto under the provisions of a statute authorizing it. *Blue v. Wilmington*, 321.

2. *Municipal Corporations—Cities and Towns—Corporate Limits—Ultra Vires Acts.*—Ordinarily, a city or town government, without legislative authority, has no power to acquire lands outside of its corporate limits for public purposes, or maintain or improve the same, and it is not responsible in damages for injury to lands of the private owner, done by its agents and employees while engaged in enterprises of this *ultra vires* character, though undertaken for the benefit of the public. *Berry v. Durham*, 421.

3. *Same—Statutes.*—Under the provisions of our general statutes, a city or town is given authority to acquire and maintain parks for the use of its citizens beyond its corporate limits, and to provide suitable streets or ways of access thereto for the purpose. C. S., 2787 (1), (2), (11), (12); also 2791, 2792, 2793, 2786. *Ibid.*

4. *Same—Conflicting Statutes—Local Laws.*—The general statutes giving power to cities and towns to acquire parks for its citizens outside of the corporate limits, and provide access for the public thereto, prevail whenever and to the extent there is no irreconcilable repugnancy with special charter provisions on the same subject. *Ibid.*

5. *Same.*—The city of Durham has legislative authority, under the provisions of the general statutes, to acquire and maintain parks for the public use, outside of its corporate limits, and to acquire and open up adequate and proper ways or streets thereto, and grade and improve the same. (C. S., 2793.) *Ibid.*

6. *Same—Parks—Access—Streets—Condemnation.*—Where a city or town has statutory authority to acquire a park for a public use outside of the corporate limits, it necessarily follows that the right is given to open up and maintain a right of way thereto, by condemnation or in other ways recognized by law. *Ibid.*

7. *Same—Negligence—Damages.*—Where a city or town has been given the statutory power to acquire and maintain a public park beyond

MUNICIPAL CORPORATIONS—*Continued.*

its corporate limits, and the necessary ways of access thereto, it is liable for the negligent wrongs and injuries committed by its employees and agents in the course of the work. *Ibid.*

8. *Municipal Corporations — Cities and Towns—Damages—Notice—Statutes—Action.*—A statutory provision that written notice shall be given to the board of aldermen of a city, of an injury, in order to render it liable in damages for its negligence therein, stating the date and place of the happening or infliction of such injury, its manner and the amount of damages claimed, within a certain time thereafter, requires only a substantial compliance therewith, without the technical nicety necessary to pleadings; and the notice given in this case is held sufficient. *Graham v. Charlotte,* 649.

9. *Same—Discretionary Powers—Negligence.*—Where a city, under the provisions of special and general statutes, is authorized to open new streets, erect bridges therefor, etc., and required to keep them in proper repair, and permitted to pass laws for abating public or private nuisances of any kind, and preserving the health of its citizens, the authority is also conferred on them to properly construct the approaches of the streets to the bridges they may construct; and the city is liable in damages, as in case of maintaining a nuisance, for an injury to one driving an automobile across one of these bridges caused by the negligence of the city in leaving concrete pilasters extending into the road intended for the travel of vehicles. C. S., 2675, 2676. *Ibid.*

10. *Same—Contributory Negligence—Ordinances.*—Where there is evidence that the defendant city was guilty of negligence in constructing concrete pilasters at the approach of its street to a bridge, insufficiently lighted at the place at night to be observed by one traveling across the bridge in an automobile as a passenger, the fact that the one so injured was violating an ordinance of the city prohibiting him from sitting on the side of the truck with his feet hanging over, is not such contributory negligence as will bar his recovery, as a matter of law, but leaves to the jury to determine under the evidence, as an issue of fact, whether the defendant's negligence was, notwithstanding, the proximate cause of the injury. *Ibid.*

11. *Same—Nonsuit—Questions for Jury—Trials.*—In this action to recover damages against the city for a personal injury, evidence that the injury was caused by the defendant's letting two concrete pilasters remain in the way for vehicles to travel, at the approach of a bridge on its street, and that the plaintiff's injury was caused thereby on a dark night, with insufficient light provided there by the city, and that the plaintiff at the time was being carefully driven in an autobile as a passenger by another, with the other evidence in this case, *is held* sufficient, upon defendant's motion as of nonsuit, to take the case to the jury. *Ibid.*

12. *Municipal Corporations—Cities and Towns—Streets—Improvements—Assessments.*—In proceedings by petition by property owners of a city whose land abuts on streets to have the streets improved upon the assessment plan prescribed by statute, it is not required that the streets to be improved be then connecting, or that to constitute a single improvement there should be then a physical connection

MUNICIPAL CORPORATIONS—*Continued.*

between the different portions of the designated area, if the municipal plan is to make them so; and a petition by the majority owners in number and frontage along the streets in the designated area, taken as a whole, is sufficient. *Leak v. Wadesboro*, 683.

13. *Same—Discretionary Powers—Statutes.*—It is within the discretionary power of the Legislature or of the municipality to which it is delegated to designate the area for street improvement upon the assessment plan (C. S., sec. 56, art. 9), and when such delegated power is exercised in good faith and is free from abuse, the courts, generally, will not interfere. *Ibid.*

14. *Same—Ordinances—Bonds.*—It is not required by the various statutes on the subject that a bond ordinance of a municipality set forth in express terms the proportion of the cost of the proposed improvements which has been, or is to be, assessed against the property of each owner abutting upon the streets to be improved or the terms and method of making the payment, if the procedure follow the direction of the statutes relating to the subject. C. S., 2937, 2938, 2942, 2938 (4), 2141, 2708, this last section requiring, among other things, that the preliminary resolution designate by general description the improvements to be made and the street or streets, or part or parts thereof, whereon the work is to be done, and the proportion of cost to be assessed upon the abutting property, and the terms and manner of payment. *Ibid.*

15. *Municipal Corporations — Cities and Towns — Bonds — Sales—Bids—Conditions—Attorney and Client.*—Where a competitive bidder for the purchase of municipal bonds makes his bid upon condition of approval by his attorney as to the legality thereof, the stipulation is a condition precedent to a binding agreement to purchase, and in the absence of bad faith, the stipulation will be upheld, though the attorney's opinion against the validity of the bonds proves to be erroneous. *Slayton v. Comrs.*, 690.

16. *Same.*—When the bidder for a proposed issue of municipal bonds incorporates in his written offer the condition that the municipality furnish certain record information of the proceedings leading up to and culminating in the issuance and delivery to the satisfaction of his attorney: *Held*, the record to be furnished was to afford the attorney reliable data for his opinion on the validity of the proposed bonds as a binding municipal obligation enforceable by taxation, and his opinion that the bonds would be legally invalid is binding between the parties, when made by the attorney in good faith. *Ibid.*

17. *Same—Contracts, Written—Parol Evidence.*—When a foreign bidder for the purchase of municipal bonds specifies in his written offer, in effect, that it was upon condition that the validity of the bonds be approved by the opinion of its attorney regularly employed for the purpose, verbal statements made by a local attorney at the time he submitted the bid that varies, alters, or contradicts the written stipulations cannot be received in evidence. *Ibid.*

18. *Municipal Corporations — Cities and Towns — Bonds—Attorney and Client—Sales—Bidders—Good Faith—Evidence.*—When a nonresident bidder for the purchase of municipal bonds refuses to accept them upon the adverse opinion of his attorney, made a condition precedent

MUNICIPAL CORPORATIONS—*Continued.*

to their acceptance by the terms of his bid, the fact that the opinion was not in accordance with an opinion recently rendered by the Supreme Court will not be considered as evidence of bad faith, upon the assumption that the attorney has seen the opinion of the Court, when it is made to appear that the attorney had investigated our statutes and decisions on the subject and there is no evidence that in giving his opinion he had acted in bad faith. *Ibid.*

MURDER.

1. *Murder—Evidence—Accessories—Questions for Jury—Trials—Nonsuit.* Evidence in this case that the defendants, charged with being accessories before and after the fact of murder, were with the principals in an automobile, aiding and abetting them, at the time and place of the offense committed, who had since fled the country to avoid the trial; that the deceased was found unconscious and in a dying condition the morning following the night in which the deed was done, and circumstances tending to show that the defendants had afterwards aided the escape of the principals in the automobile: *Held*, sufficient upon the facts of this case to sustain a verdict of conviction of the charge of being accessories to the murder before and after the fact; and their motion as of nonsuit at the close of all of the evidence was properly denied. *S. v. Walton*, 485.

2. *Same—Statutes.*—Under the provisions of C. S., 4175-4177, it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. *Ibid.*

3. *Same.*—Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient, both as to them as accessories and the principals directly charged with the murder. *Ibid.*

4. *Murder—Evidence—Anger.*—Where the anger of the parties towards the deceased is a circumstance to be considered with other evidence as tending to show the act of murder by the principals, and that the defendants were accessories thereto, a witness may testify the conclusion of his mind that they were angry when he saw them together just preceding commission of the offense. *Ibid.*

5. *Same — Identity of Principal — Motive—Effect Upon Accessory.*—Evidence was competent on this trial of the defendants as accessories to a murder, as to the identity of one charged as principal thereto; and the effect of his acts and conduct upon the accessories upon the former's hearing a statement which evidenced a motive for the killing. *Ibid.*

6. *Murder—Evidence—Criminal Law—Appeal and Error.*—Upon the trial of a father for the murder of his son: *Held*, the admission of testimony of a witness in explanation of an impeaching question asked by the defendant, and the statements of the defendant that he would "whip that boy," notwithstanding his weakened condition, tending to show *animus* or ill feeling, was not erroneous under the circumstances of the case. *S. v. Vaughan*, 758.

NECESSARIES. See Taxation, 5.

NEGLIGENCE. See Appeal and Error, 6, 24; Insurance, 2, 9; Evidence, 6, 37, 44; Railroads, 1, 2, 3, 6, 7; Carriers, 11, 16; Instructions, 6; Municipal Corporations, 7, 9; Courts, 6; Actions, 6; Carriers, 12; Employer and Employee, 1, 3; Sheriffs, 1.

1. *Negligence—Personal Injury—Permissive Use of Alley.*—Where the owner of a building in a town has continuously permitted his alley between his and an adjoining building to be used as a passage-way by the public, and knowingly and negligently allowed it to become obstructed and dangerous, causing injury therein to the plaintiff, it is sufficient evidence upon the issue of actionable negligence, etc., to be submitted to the jury, and defendant's motion as of nonsuit is properly overruled. *Batts v. Telephone Co.*, 120.

2. *Negligence — Personal Injury — Measure of Damages—Instructions—Appeal and Error.*—An instruction on the issue as to the measure of damages in a personal-injury case, not resulting in death, failing to limit such damages to the present net cash value of the diminution of the plaintiff's earning capacity, caused by the injury, is reversible error; and the rule of damages in such instances given in *Ledford v. Lumber Co.*, 183 N. C., 614; *Johnson v. R. R.*, 163 N. C., 451, cited and approved. *Ibid.*

3. *Evidence—Burden of Proof.*—Where there is evidence that a father has prohibited his son from driving his automobile except at such times as he had expressly permitted him to do so, but there is further evidence that the son had driven the automobile while riding the family, etc., and occasionally for his own private purposes, the knowledge whether on a certain occasion the son had inflicted the injury while using the car for his own purposes is peculiarly within the knowledge of the father, the defendant in an action to recover damages for such injuries, and the burden of proof is on him. *Wallace v. Squires*, 339.

4. *Negligence — Damages — Employer and Employee—Safe Appliances—Duty of Employer—Evidence—Simple Tools.*—A machine furnished by an employer to his employee for him to do his work in the course of his employment, though simple in its construction and operation, does not relieve him of liability for an injury received by the employee in doing his work with this implement, when the employer knew, or by due inspection or otherwise should have known, of a defect therein, importing serious menace, which caused the injury in suit, without means or opportunity afforded the employee to remedy the defect or condition that proximately caused the injury which occurred without contributory fault on his part. *Bryant v. Furniture Co.*, 441.

5. *Same—Questions for Jury—Trials.*—Where a furniture manufacturing company has furnished its employee a certain implement called a "case clamp," detached from the power-driven machinery, for the crating of its products for shipment, the operation of which was by the working of a lever from perpendicular in the arc of a circle, pressing down from right angle, and there is evidence tending to show that this machine was old and worn, and defective in part, and would unexpectedly fly upward from right angle instead of downward, as it was designed to do, and serious injury was done

NEGLIGENCE—*Continued.*

to the employee's eye on the occasion complained of, by its flying upward from right angle, and that this undesired movement had been heretofore called to the attention of the company's vice-principal, or should have been known to it upon proper inspection: *Held*, sufficient for the determination of the jury upon the issue of the defendant's actionable negligence. *Ibid.*

6. *Negligence — Contributory Negligence — Assumption of Risks—Burden of Proof—Evidence.*—The burden of proof is on the defendant, relying upon its plea of contributory negligence and assumption of risks as a defense, and he may not complain on appeal for his failure to establish it by the verdict of the jury on its evidence, on a trial otherwise free from error. *Hall v. Chair Co.*, 469.

7. *Negligence — Contributory Negligence—Defenses—Actions.*—The plaintiff's contributory negligence will not bar his recovery of damages in his action when the defendant has intended to inflict the injury, with either actual or constructive intent, but it is otherwise if it is admitted that he had not this intent, and his contributory negligence will bar his recovery. *Ballew v. R. R.*, 704.

8. *Negligence—Explosives—Evidence—Nonsuit.*—In this action to recover damages for the wrongful death of plaintiff's intestate, caused by an explosion of a certain admixture of kerosene and gasoline, sold and purchased for good kerosene oil, that would not have produced the result under the circumstances, there was evidence of negligence of the defendant through its employees in the distribution of the admixture, etc., sufficient to take the case to the jury, and defendant's motion as of nonsuit was properly disallowed. *Ramsey v. Oil Co.*, 739.

9. *Same—Proximate Cause—Intervening Cause.*—When a dangerous admixture of kerosene and gasoline has been sold by the defendant through a local merchant as good kerosene oil, and bought by the husband, who carried it to his wife, and caused the death of the latter by its explosion, which would not have occurred except for the extra danger of the admixture, the proximate cause of the death was the negligence of the defendant in making the sale of the admixture for the more harmless fluid, and not that of an intervening agency, when both the retailer and the husband who bought it were without knowledge, actual or constructive, of its more dangerous character. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 3, 4; Evidence, 39.

NEWLY-DISCOVERED EVIDENCE. See Supreme Court, 1.

NEW PROMISE. See Contracts, 1.

NEW TRIALS. See Appeal and Error, 5, 15, 18, 22, 29; Supreme Court, 1, 2; Actions, 3; Verdict, 2; Evidence, 14, 21; Instructions, 3, 4; Constitutional Law, 24; Contracts, 19.

1. *New Trials—Appeal and Error—Harmless Error.*—A new trial will not be awarded on appeal for harmless error upon the former trial that was not prejudicial to the appellant. *May v. Menzies*, 144.

2. *New Trials — Contracts—Equity—Rescission—Issues—Verdict—Appeal and Error — Partial New Trial—Vendor and Purchaser—Corpora-*

NEW TRIALS—*Continued.*

tions—Shares of Stock—Fraud.—The complaint alleged two causes of action to rescind a sale of certain shares of stock in a corporation, as induced by defendant's fraud, upon different grounds, and to recover the purchase price. The second one was answered in defendant's favor, and no error was committed on the trial; but there was error in the verdict upon the several issues as to the first cause of action material to the inquiry, and *held*, the judgment in defendant's favor on the second cause of action will be sustained on appeal, but a new trial alone is awarded for the error committed in relation to the first cause of action. *Irvin v. Jenkins*, 752.

NONSUIT. See Evidence, 1, 3, 6, 24, 29, 32, 38, 40; Railroads, 1, 7; Vendor and Purchaser, 5; Insurance, 8; Trials, 1; Murder, 1; Municipal Corporations, 11; Negligence, 8; Slander, 1.

NOTES. See Contracts, 13.

NOTICE. See Carriers, 1, 5; Commerce, 1; Deeds and Conveyances, 8, 11; Constitutional Law, 16; Highways, 3; Appeal and Error, 32; Mortgages, 9; Municipal Corporations, 8; Railroads, 9.

OATHS. See Clerks of Court, 6.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 3, 4, 12, 14, 16, 19, 20, 23, 25, 35, 36, 37, 38; Bills and Notes, 7; Employer and Employee, 2; Experts, 1; Instructions, 9; Schools, 2.

OFFICERS. See Clerks of Court, 3; Arrest, 1; Attachment, 1; Corporations, 8, 12.

OFFICIAL BOND. See Clerks of Court, 3.

OPINIONS. See Evidence, 36; Instructions, 7.

ORDINANCES. See Commerce, 2; Municipal Corporations, 10, 14; Sunday, 3.

PARKS. See Constitutional Law, 11; Municipal Corporations, 6.

PAROL. See Trusts, 4, 9, 13; Contracts, 12.

PAROL AGREEMENTS. See Mortgages, 7; Statute of Frauds, 1.

PAROL EVIDENCE. See Evidence, 9, 12; Mortgages, 2, 6; Municipal Corporations, 17.

PARTIES. See Actions, 1, 2; Appeal and Error, 7; Trespass, 2; Insurance, 2; Contracts, 13; Evidence, 39; Removal of Causes, 1.

1. *Parties — New Parties — Failure to Answer — Verdict—Judgments.*— Where a new party has been suggested to make a complete and final conclusion of the matters at issue, and the party has been duly served with summons, and fails to plead or appear in his own interests, it becomes immaterial as to whether the verdict rendered is sufficient to disprove his rights. *Byrd v. Hicks*, 242.

2. *Parties—Misjoinder—Demurrer—Appeal and Error.*—It is a misjoinder of parties for plaintiffs to sue in the same action the administrator or personal representative of a deceased person for the separate

PARTIES—*Continued.*

value of their services rendered to the deceased before his death, and upon their appeal from a ruling sustaining defendants' demurrer, the action will be dismissed without prejudice to their rights. *Weaver v. Kirby*, 387.

PARTITION. See Courts, 5.

PARTNERSHIP. See Evidence, 29.

PAYMENT. See Bills and Notes, 1; Taxation, 1, 10.

PENALTIES. See Carriers, 3; Clerks of Court, 11.

PENDENCY OF ACTION. See Appeal and Error, 22.

PERJURY. See Criminal Law, 6.

PERSON. See Execution of Process, 1.

PERSONAL PROPERTY. See Taxation, 2; Estates, 3.

PETITION. See Removal of Causes, 1; Schools, 1, 8.

PLEADINGS. See Railroads, 2; Vendor and Purchaser, 5; Divorce, 3; Actions, 4; Execution, 1; Appeal and Error, 34; Limitation of Actions, 1; Slander, 1; Taxation, 15.

1. *Pleadings — Counterclaim — Voluntary Nonsuit—Statutes.*—Where defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross-action, and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. C. S., 521 (1). *Cohoon v. Cooper*, 26.

2. *Same—Verdict.*—Where the defendant has set up a counterclaim as allowed by C. S., 521 (2), as to a cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of that section, he may, as a matter of right, take a nonsuit thereon at any time of the trial before verdict. *Ibid.*

3. *Same.*—Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge had held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. C. S., 521 (1) and (2). *Ibid.*

4. *Pleadings — Demurrer—Fraud—Deceit—Deeds and Conveyances.*—The grantee of the codefendant conveyed to plaintiff certain designated lands, and the complaint in the action alleged false and fraudulent representation made by plaintiff's immediate grantee in the number of acres within the description of the lands conveyed, which was identical with that of his codefendant in the deed to him, it appearing from the pleadings that these alleged misrepresentations were made solely upon the representations made to him by his grantor, with no allegation to show any connection between the two transactions or any concert of the defendants concerning them: *Held*, the complaint did not state a cause of action either against the

PLEADINGS—*Continued.*

grantee of the codefendant or against the plaintiffs' immediate grantor in failing to allege facts to show knowledge on his part of the deficiency in the acreage of land at the time he executed his conveyance or at any other time, or that he was guilty of fraud as to the quantity of the land conveyed, and a demurrer as to both should have been sustained. *Evans v. Davis*, 41.

5. *Pleadings — Deeds and Conveyances — Fraud — Deceit—Allegations—Covenants.*—Where there is no specific allegation of the facts constituting fraud and deceit in the misrepresentation by the defendant grantor of the number of acres contained within the description by metes and bounds in his deed, the general warranty of title, with no covenant as to the acreage, in the absence of allegation and evidence sufficient to correct the deed for mistake, etc., attach to the land conveyed by the description, which is not affected by a recitation that the boundaries given contained a certain number of acres, "more or less." *Ibid.*

6. *Pleadings—Amendments—Costs—Courts.*—Where, in an action to recover damages for fraud and deceit in the misrepresentation of the acreage contained in the description of lands by metes and bounds in the deed, there is no allegation or evidence sufficient to correct the deed for mistake, etc., it is competent for the court to enter an order allowing the plaintiff to amend his complaint, and tax the costs against him. *Shore v. Davis*, 185 N. C., 312. *Ibid.*

7. *Pleadings—Demurrer—Allegations of Complaint.*—Upon demurrer to a complaint, the allegations therein are taken for the purpose as correct and as made. *Brock v. Brock*, 55.

8. *Pleadings—Verification—Statutes—Clerks of Court.*—A verification to a complaint that the statements therein contained are true, to the best knowledge, information and belief of the plaintiff, save those matters which are stated on information and belief, and as to those, he believes it to be true, is not sufficient compliance with C. S., 529, requiring a statement that "the facts set forth in the designated pleadings are true, except those stated on information and belief, and as to those matters he believes them to be true." *McNair v. Yarboro*, 111.

9. *Same—Money Demand—Judgments Set Aside.*—Sufficient verification, as the statute (C. S., 529) requires, not appearing in the complaint in an action upon a money demand in an amount certain, etc., will be treated as a nullity and irregularity, and judgment by default final, etc., thereon will be set aside on motion of defendant made before the clerk in apt time, on a proper show of merit. C. S., 595 (1). *Ibid.*

10. *Same.*—The requirement of C. S., 595 (1), that to obtain judgment by default, etc., in an action upon a money demand, the complaint must be properly verified (C. S., 529), is not affected by chapter 92, Extra Session of 1921, requiring a copy of the verified complaint to be served on the defendant with the summons; C. S., 595, 596, and 597, expressly affirming the provisions of section 595 (1). *Ibid.*

11. *Same—Powers of Trial Judge.*—Chapter 92, Laws of 1921, sec. 3, prohibits the clerk of the court only from extending the time for de-

PLEADINGS—*Continued.*

fendant to answer, and does not impair the broad powers conferred by C. S., 536, upon the judge, to the effect that when the cause is properly before him "he may in his discretion, and upon such terms as may be just, allow an answer or reply to be made or other acts done after the time, or by an order to enlarge the time." *Ibid.*

12. *Pleadings—Clerks of Court—Time to Plead—Statutes—Judgments.*—Under the present practice of having the summons returnable before the clerk and the issues made up by the pleadings before him, the object of the statute is to expedite the proceedings and give information of the cause by serving a copy of the complaint with the summons, and to require an answer filed by the defendant within twenty days from the time of its receipt or its filing in the clerk's office, extending the time accordingly when in the exercise of his discretion the clerk has extended further time to the plaintiff to file his complaint; and upon the failure of the defendant to file his answer accordingly, a judgment by default is properly rendered against him. *Lerch v. McKinne*, 244.

13. *Pleadings — Admissions—Deeds and Conveyances—Mortgages—Execution of Instrument.*—Where the plaintiff claims certain lumber under a corporate chattel mortgage, the question of its due execution is not presented, where the answer admits it was properly executed. *Bank v. Pearson*, 609.

14. *Pleadings—Amendments—Courts.*—The trial judge is given authority to allow an amended answer to be filed in proceedings to assess owners of land abutting upon a city street to be improved by a municipality. *Leak v. Wadesboro*, 684.

PLEAS. See Criminal Law, 1, 18; Courts, 3.

POLICE. See Arrest, 1.

POLICIES. See Insurance, 1, 4, 7, 9.

POSSESSION. See Evidence, 2; Wills, 5; Trespass, 1; Estates, 9.

POWERS. See Pleadings, 11; Wills, 6, 13; Cities and Towns, 2; Taxation, 6; Highways, 2; Municipal Corporations, 9. 12.

PRAYERS. See Instructions, 8.

PREJUDICE. See Evidence, 14, 21; Appeal and Error, 29; Criminal Law, 13; Contracts, 19; Corporations, 12.

PREMIUMS. See Insurance, 9.

PRESUMPTIONS. See Criminal Law, 1; Evidence, 11, 27, 42; Deeds and Conveyances, 10; Carriers, 9; Constitutional Law, 1; Wills, 9; Appeal and Error, 20; Schools, 8.

PRINCIPAL. See Clerks of Court, 7; Murder, 5; Criminal Law, 14.

PRINCIPAL AND AGENT. See Contracts, 6; Corporations, 2; Insurance, 1, 9; Negligence, 3; Actions, 4, 6.

Principal and Agent—Evidence—Seller and Purchaser.—Defendants having apparently signed a contract for the purchase of fertilizer individually, denied in the seller's action individual liability, and con-

PRINCIPAL AND AGENT—*Continued.*

tended they were acting only as agents in the sale to others: *Held*, competent for the plaintiff to show that a defendant gave orders as to whom the fertilizers were to be shipped, and introduce a contract of the previous year, executed in like manner, showing individual liability, and introduce evidence that plaintiff had sold the fertilizer upon the defendants' individual responsibility, after investigating them. *Hubbard v. Brown*, 96.

PRINCIPAL AND SURETY. See Clerks of Court, 3; Bills and Notes, 3.

PRIVIES. See Contracts, 13.

PRIVILEGE. See Statutes, 7; Taxation, 11.

PROBATE. See Deeds and Conveyances, 10; Corporations, 8.

PROCEDURE. See Venue, 2; Divorce, 5.

PROCESS. See Attachment, 1; Actions, 4.

PROMISE. See Contracts, 5, 12; Evidence, 16.

PROPERTY. See Constitutional Law, 21; Sheriffs, 1.

PROTEST. See Taxation, 1, 11.

PROXIMATE CAUSE. See Negligence, 9.

PUBLIC POLICY. See Insurance, 5.

PUBLIC USE. See Cities and Towns, 1.

PURCHASERS. See Executors and Administrators, 1; Corporations, 10.

QUALIFICATION. See Wills, 1; Estates, 11.

QUANTUM MERUIT. See Contracts, 17.

QUESTIONS AND ANSWERS. See Appeal and Error, 8, 35, 37; Carriers, 1; Criminal Law, 1.

QUESTIONS FOR JURY. See Evidence, 8, 23, 27, 28, 36, 44; Vendor and Purchaser, 4, 5; Bills and Notes, 3; Contracts, 4, 9, 11, 15; Injunction, 2; Insurance, 8; Negligence, 5; Murder, 1; Trusts, 11; Municipal Corporations, 11.

QUESTIONS OF LAW. See Bastardy, 2.

RACES. See Constitutional Law, 11; Criminal Law, 17.

RAILROADS. See Carriers, 3, 5, 7, 9, 11, 16; Commerce, 1; Vendor and Purchaser, 1; Sunday, 1; Cities and Towns, 1; Evidence, 37, 44.

1. *Railroads—Carriers of Freight—Negligence—Evidence—Employer and Employee — Children — Dangerous Employment—Contributory Negligence—Nonsuit.*—The employment by the defendant of a lad under twelve years of age as a messenger to carry train orders from the dispatcher's office to numerous trains shifting and moving upon the extensive freight yard, without evidence that he had been instructed or made aware of his dangerous employment, is evidence of defendant's actionable negligence in causing his death while he was engaged

RAILROADS—*Continued.*

in the course of his employment in delivering one of these messages; and evidence that he was then riding on the step at the end of a box car on a moving train, according to an established custom known to the officers or superior employees of the railroad company, and killed by being struck by a passing train on a near-by parallel track, is not sufficient to bar his recovery on the issue of his contributory negligence, and defendant's motion as of nonsuit should be denied. *Semble*, a boy of that age, under the circumstances, could not be guilty of contributory negligence. *Pettitt v. R. R.*, 9.

2. *Railroads — Pleadings—Allegations—Negligence—Demurrer—Employer and Employee—Master and Servant.*—In order to recover damages in an action against a railroad company, there must be a breach of some duty owed by the defendant to the plaintiff, contractual or otherwise; and a demurrer to the complaint is properly sustained that alleges, in effect, that the foreman took a motor car of defendant and carried the plaintiff a distance on its track at plaintiff's request and sole personal convenience, and that plaintiff was injured by an automobile crossing the railroad track and colliding with the car on which he was thus riding. *Gardner v. R. R.*, 64.

3. *Railroads—Carriers—Negligence—Safe Place to Work—Rule of Company.*—It is required of railroad companies to provide reasonably safe conditions under which the employees on their freight or inferior trains are required to do their dangerous work; and should a rule of the company be in conflict with this rule of law, the former is to that extent ineffectual. *Belshe v. R. R.*, 246.

4. *Same.*—In this action by an employee to recover damages against a railroad company for negligently injuring him while serving as a lookout on the caboose car of a backing train, at night, in a town, by running into a car left unguarded on the main-line track, and without signals, there was evidence tending to show that the train on which the plaintiff was employed was regarded as an "inferior" train, and a rule of the defendant was introduced in evidence to the effect that the usual method of lights and signals were not required to give warning, under the circumstances, to trains of this character: *Held*, the question of defendant's actionable negligence in failing to exercise reasonable care to provide its employee a proper place, or reasonably safe conditions under which to do his work, was properly a question for the jury to determine. *Ibid.*

5. *Railroads — Carriers — Rules of Company — Custom — Abrogation of Rules.*—A rule of a railroad company in regard to not displaying lights upon a freight car left at night on the main-line track of a station, under certain conditions, may become abrogated by a long-continued custom to display red lights under these conditions. *Ibid.*

6. *Railroads—Employer and Employee—Negligence—Contributory Negligence—Assumption of Risks.*—It is sufficient evidence of defendant railroad company's negligence to refuse a motion as of nonsuit which tends to show that the plaintiff's intestate was seen absorbed in his duty of conductor of a freight train, standing on the end of a sill of the railroad track busily checking the cars of his train, and was run over and killed by an extra passing along that track, in full view of the engineer and fireman on the extra, who saw him in

RAILROADS—*Continued.*

sufficient time, and who approached without signal or warning, either upon the issue of defendant's actionable negligence, the intestate's contributory negligence, or assumption of risk; and the fact that the locomotive just before the killing obstructed the view of the engineer does not vary the result, as to the defendant's negligence. See *S. c.*, 185 N. C., 189. *Moore v. R. R.*, 257.

7. *Same — Commerce — Federal Employers' Liability Act—Negligence—Nonsuit.*—Under the Federal Employers' Liability Act for injuries inflicted upon railroad employees by the railroad company while engaged in interstate commerce, the rule of comparative negligence in awarding damages applies, and the contributory negligence of the intestate does not bar his recovery if the railroad is negligent in producing his death. *Ibid.*

8. *Railroads—Demurrage—Tariff—War—Case Agreed—Commerce—Judgments—Appeal and Error.*—In an action by the Director General of Railroads under war control to recover demurrage charges against a shipper, the question does not arise as to whether the printed tariff applies to intrastate as well as interstate shipments, at law and in fact, when the tariff is set out in the case agreed as a fact proven, and it is therein so stated; and when the amount is likewise agreed upon, the judgment will be so entered by the Supreme Court on appeal. *Davis v. Storage Co.*, 676.

9. *Railroads — Demurrage — Notice to Consignee.*—It is unnecessary to literally comply with the printed tariff requiring notice as a condition upon which a railroad company may recover its demurrage charges from a consignee, if the latter is substantially put upon notice thereof, as under the facts and circumstances of this case; nor under such circumstances could the railroad company be held to have waived its rights to enforce these charges. *Ibid.*

10. *Same—Waiver—Discrimination.*—Demurrage charges are required to be collected by the railroad company without discrimination among consignees, and one of them who has received the shipments with notice of their accrual is required to pay them. *Ibid.*

RAPE. See Burglary, 5; Criminal Law, 2.

REASONABLE TIME. See Evidence, 11.

RECEIPTS. See Carriers, 14.

RECORD. See Appeal and Error, 13, 28, 30, 38; Evidence, 42.

REDEMPTION. See Banks and Banking, 1.

REFERENCE. See Deeds and Conveyances, 7, 8.

REFERENDUM. See Schools, 5.

REGISTRATION. See Deeds and Conveyances, 6, 11; Corporations, 10; Mortgages, 9.

RELATIONSHIP. See Evidence, 5.

RELEASE. See Bills and Notes, 2; Mortgages, 2.

RELOCATION. See Highways, 1, 3.

REMAINDERS. See Wills, 5; Estates, 7.

REMOVAL OF CAUSES. See Venue, 1; Divorce, 5.

Removal of Causes—Federal Courts—Jurisdiction—Misjoinder of Parties Petition—Fraud.—When the nonresident petitioner sufficiently sets forth facts in his petition to remove a cause from the State to the Federal Court under the Federal statute, for diversity of citizenship, that a resident defendant was improperly joined to fraudulently defeat the jurisdiction of the latter court, the question of determining the right of the petitioner to remove is within the jurisdiction of the Federal Court, and the cause should be removed for that purpose. *Stevens v. Lumber Co.*, 749.

RENEWALS. See Clerks of Court, 5; Bills and Notes, 2.

REPEAL. See Statutes, 2, 4, 6, 9, 10; Highways, 1; Taxation, 9.

REPLEVIN. See Sheriffs, 1.

REPRESENTATION. See Actions, 5.

REQUESTS. See Appeal and Error, 9; Instructions, 1; Evidence, 27; Employer and Employee, 2.

RES GESTÆ. See Evidence, 5.

RESIDUARY CLAUSES. See Trusts, 8.

RESOLUTION. See Schools, 8.

RESTAURANTS. See Sunday, 3.

RESULTING TRUSTS. See Trusts, 1.

REVERTER. See Estates, 9.

REVIEW. See Wills, 3; Appeal and Error, 40.

REVOCATION. See Wills, 18.

RIGHT OF SURVIVORSHIP. See Estates, 2.

RIGHTS AND REMEDIES. See Taxation, 1, 3.

RIGHTS. See Evidence, 46.

ROADS AND HIGHWAYS. See Statutes, 3, 6, 8: Constitutional Law, 5.

ROBBERY. See Evidence, 34.

RULE IN SHELLEY'S CASE. See Estates, 1; Wills, 16.

RULES. See Railroads, 3, 5; Wills, 12.

RULES OF COURT. See Appeal and Error, 19, 26, 30, 38, 39; Instructions, 8.

SALES. See Executors and Administrators, 1; Mortgages, 1; Actions, 2; Corporations, 10; Municipal Corporations, 15, 18.

SCHOOLS. See Injunction, 1; Statutes, 5, 9, 11; Constitutional Law, 22, 26; Appeal and Error, 40; Taxation, 9; Constitutional Law, 4, 19; Statutes, 4.

1. *Schools — Statutes — Taxation—Special Tax—Petition—Counties—Discretion.*—Where the electors of a school district of a county have voted for a special tax for the erection of a public school building, based upon a petition filed with the county commissioners, and approved by the county board of education in conformity with the requirements of C. S., 5526, except that the petition attempted to take away the discretionary power of the commissioners in locating it, this restrictive provision in the petition is contrary to law, and will be disregarded, and the election being free from fraud and giving the electors full opportunity to vote, the special tax thereby approved will be held valid. *Lazenby v. Comrs.*, 548.

2. *Same — Ballots—Unrelated Questions—Appeal and Error—Objections and Exceptions.*—Where the exception on appeal to the validity of a special tax approved by the voters of a school district for public school purposes is upon the ground that the question was submitted on several unrelated propositions upon one ballot, it will not be sustained when it properly appears from the findings of the lower court that the only question voted upon and approved by the electors, and involved in the controversy, was the levying of the special tax. *Ibid.*

3. *School—Districts—Consolidation—Taxation—Bonds—Elections—Counties—Board of Education—Discretion.*—Where, prior to an election of a school district to vote upon the question of issuing bonds and levying a special tax for the location and erection of public school buildings, assurance is given by the county board of education that the buildings would be located in the geographical center of the district, and upon this assurance the bonds and special tax were approved, the change in the location of the school buildings is a matter within the discretion of the board, when it is further made to appear that another district had since been added to the original one, with its approval, by consolidation according to law, which had voted to contribute their proportional part of the expenses of the district thus consolidated. *School Committee v. Board of Education*, 643.

4. *Same—Courts.*—The courts will not interfere with the exercise of its discretion by the county board of education in locating public school buildings within a school district therein, when not in abuse of the discretion vested in the board. *Ibid.*

5. *Same—Referendum.*—Where the county board of education has by referendum ascertained the approval of a school district as to the relocation of a place previously proposed by it for its public school buildings, it will be received as evidence of its good faith in the exercise of its discretion, notwithstanding the referendum was not made in strict accordance with law. *Ibid.*

6. *Schools—Taxation—Bond Issues—Constitutional Law.*—Where a school district has been consolidated with another having valid authority to issue bonds for public school purposes, and levy a special tax therefor, and has complied with Article VII, section 7, of the Constitution, as to the payment of its proportionate part, the bonds when issued will be a valid obligation upon both of the districts so consolidated. *Ibid.*

SCHOOLS—*Continued.*

7. *Schools—Taxation—Bonds—Statutes.*—Where two school districts have been consolidated and have voted for bonds and a special tax levy for public school purposes under the provisions of chapter 87, Public Laws, Extra Session of 1920, but have not issued the same or incurred obligations thereunder, the bonds to be issued should be in the name of the consolidated district, under the provisions of the Public Laws of 1923, ch. 136, sec. 266. *Ibid.*

8. *Schools — Bonds — Petition—Resolution—Orders—Evidence—Presumption—Burden of Proof.*—The recitations of the school board for the district and of the county commissioners calling an election for an issuance of bonds for school purposes, declaring a full investigation had been made as to the sufficiency in number of the signers of the petition to the school board for that purpose is *prima facie* evidence of the fact, and the bonds accordingly to be issued will not be declared invalid on the ground of the insufficiency of the investigation unless the presumption is overcome by the plaintiff seeking to declare them invalid. *Waters v. Comrs.*, 719.

SEALS. See Contracts, 14.

SELLER AND PURCHASER. See Vendor and Purchaser.

SENTENCE. See Criminal Law, 9.

SERVICE. See Appeal and Error, 31; Contracts, 15, 17.

SETTLEMENT. See Appeal and Error, 31.

SEWERS. See Taxation, 5.

SHERIFFS. See Arrest, 1.

Sheriffs—Claim and Delivery—Replevin—Retention of Property—Statutes—Negligence.—When the sheriff of the county retains possession of the goods replevined in claim and delivery under C. S., 3403, instead of surrendering possession to the plaintiff, who has given the replevin bond prescribed by C. S., 836, the status of his possession is changed from that of a custodian of the law, and his liability is to be determined under the provisions of C. S., 836, and those of his official bond, and he is responsible for the loss of the goods when destroyed by fire in his possession, irrespective of any question of negligence on his part in keeping it. *Motor Co. v. Sands*, 732.

SHIPMENT IN BULK. See Commerce, 1.

SIGNATURE. See Corporations, 8.

SLANDER. See Actions, 4.

Slander—Pleadings—Evidence—Nonsuit—Appeal and Error.—The complaint in an action alleging that while the plaintiff was manager of the business of a corporation in which the two defendants were interested they falsely represented that he had wrongfully appropriated its funds; that he was "a low-down, sneaking, grand rascal," and had pretended to be sick on a certain occasion in order to avoid facing its board of directors at a directors' meeting, etc., is sufficient to admit of plaintiff's evidence to that effect in his action for slander, as to each or both; and it was reversible error for the

SLANDER—*Continued.*

trial judge to hold as a matter of law that a recovery was permissible only against one for wrongful interference with plaintiff's trade or business, and enter a judgment of nonsuit as to the other. *Chesson v. Lynch*, 625.

SOCIETIES. See Actions, 4.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STARE DECISIS. See Appeal and Error, 17; Supreme Court, 1.

STATE HIGHWAY. See Constitutional Law, 18; Government, 1.

STATUTES. See Boundaries, 1, 2; Bills and Notes, 4; Clerks of Court, 4, 11; Deeds and Conveyances, 10; Pleadings, 1, 8, 12; Taxation, 3, 4, 9, 10, 11; Waters, 3; Wills, 1, 7, 8, 9, 13, 17, 18; Trespass, 3; Actions, 2, 4; Attachment, 1; Cities and Towns, 1; Constitutional Law, 1, 6, 7, 8, 13, 19, 25; Evidence, 15, 30, 39, 43; Venue, 1; Courts, 2; Husband and Wife, 2, 3; Trusts, 2; Abduction, 3; Appeal and Error, 13, 31, 33; Burglary, 1; Criminal Law, 5, 11, 16, 18; Estates, 8; Municipal Corporations, 1, 3, 8, 13; Intoxicating Liquor, 2, 4; Highways, 1, 3; Murder, 2; Carriers, 16; Corporations, 8; Divorce, 4; Injunction, 3; Instructions, 7; Mortgages, 9; Schools, 1, 7; Sheriffs, 1.

1. *Statutes—Interpretation—Compilation.*—Whether a statute is private or public depends upon its purport and not upon the judgment of the person who directs the compilation in which it shall be published. *Hartsfield v. New Bern*, 137.

2. *Statutes — Interpretation — Intent—Repugnances—Repeal.*—The provisions of a later statute that are rpugnant to those of a former one will be construed to repeal so much thereof as is repugnant without any specific repealing clause, and in construing the later act, the intent of the Legislature will be given effect primarily as interpreted from the language therein used, and where this is free from ambiguity and expresses plainly, clearly and distinctly the sense of its framers, a resort to other means of interpretation is not permitted. *Comrs. v. Comrs.*, 202.

3. *Same—Taxation—Roads and Highways.*—A statute entitled to limit the amount of tax authorized for road district purposes, authorized by a prior law, and in the body of the act requiring that the amount of the levy should not exceed a certain rate on the $100 valuation of the taxable property, repeals so much of the former law as is repugnant thereto, without expressly repealing it; and the increased valuation of the taxable property may be considered as an aid to this interpretation. *Ibid.*

4. *Statutes—School Districts—Taxation—Local Laws—Repugnances—Repeal.*—The provisions of a public-local law, allowing a special school-tax district to tax itself, or issue bonds for school purposes, is not repealed for repugnance to the provisions of a general later law upon the subject (chapter 136, Public Laws), it being clearly manifest from a construction of the provisions of the two statutes that it was not the intent of the Legislature to do so, and the special local law is considered as an exception to the provisions of the later general one, and not affected by a general repealing clause therein. *Felmet v. Comrs.*, 251.

STATUTES—*Continued.*

5. *Statutes—Substantial Compliance—Elections—Municipal Corporations —Schools—Bonds—Taxation.*—Township bonds for public school purposes, authorized at an election held 9 May, 1923, under the provisions of C. S., ch. 95, are not invalid, when otherwise regular, on the ground that this section of the Consolidated Statutes was superseded by the prior enactment of chapter 136, Public Laws of 1923, there having been a substantial compliance with the requirements of the statutes on the subject. *Comrs. v. McNear*, 352.

6. *Statutes—Repeal—Conflicting Terms—Roads and Highways—Counties —Taxation.*—Where a later public-local law is in part conflict with a former one, it repeals by necessary implication the parts of the former statute that are in irreconcilable conflict; and where the Legislature has provided a general system of taxation of a county for the support and maintenance of the county highways, the repealing clause applies to conflicting parts of a former statute relating to each of the separate road districts therein. *S. v. Kelly*, 365.

7. *Statutes — Taxation — Exemptions—Special Privileges.*—An exemption of any particular class of persons from a public duty, in this case, from working on the roads for a certain number of days of a year, or paying a certain sum of money in lieu thereof, will not be allowed by the courts unless clearly granted by statute not in conflict with any constitutional provision. *Ibid.*

8. *Same—Counties—Roads and Highways.*—Where a general statute (C. S., 3750) makes a justice of the peace one of the road supervisors of the county, and by another general statute exempts him from road duty, and a later public-local law relating to a particular county repeals these special privileges by providing an entirely different method for the supervision and management of its highways, and requires all able-bodied men between certain ages to work the roads a designated number of days a year or pay a certain sum in lieu thereof, a justice of the peace or another—a mail carrier in this case—cannot claim to be exempt therefrom when he falls within the general class of persons required to do this public duty, without statutory expressions to that effect. *Ibid.*

9. *Statutes—Education—Schools—Repeal.*—Where the Legislature has appointed a board of education of a county of three members, later increases the number to five, and provides that it shall consist of three members, but that the present incumbents hold over for the terms as appointed, the intent of the Legislature is construed to be that until the expiration of the existing terms there should be five members of the board, reduced to three as the terms of the incumbents expire. *S. v. Long*, 516.

10. *Statutes—Repeal—Repugnancy.*—The law does not favor the repeal of a statute by implication, and only such parts that are irreconcilable with the later act will be construed as repealed. *Waters v. Comrs.*, 719.

11. *Same — Schools — Bonds—Taxation.*—A later statute authorizing the levy of a special tax for school purposes by a district does not repeal a former act providing for the issuance of bonds therefor; and the act of 1921, amendatory of the act of 1915, in relation to this matter, applicable to the school laws of Buncombe County, does not

STATUTES—*Continued.*

revive the act of 1913 so as to repeal the act of 1915, there being no conflict therein, and the Municipal Finance Act of 1921, relating to municipal corporations as cities and towns, etc., and not to school districts, is not in conflict with such matters relating to school districts. Chapter 136, Public Laws of 1923, has no application to this case. *Ibid.*

STATUTE OF FRAUDS. See Mortgages, 2; Appeal and Error, 13; Contracts, 1, 12; Trusts, 9.

Statute of Frauds—Debtor and Creditor—Debt of Another—Parol Promise—Consideration—Direct Obligation of Promissor.—Where the landlord receives of his tenant cotton the latter has raised on the lands, under the parol promise to store it until the price should go higher, and to pay his debts, and has also later promised a creditor to pay his tenant's debt to him, the promise so made is not one to pay the debts of another, but is a direct obligation of the landlord to pay the debt, founded upon a sufficient consideration, that he would pay it out of the proceeds of the sale of the cotton placed by his tenant in his hands, and does not fall within the provisions of the statute of frauds, C. S., 987, requiring the agreement to be in writing and signed by the party to be charged. *Mercantile Co. v. Bryant*, 551.

STATUTES OF LIMITATIONS. See Executors and Administrators, 3.

STIPULATIONS. See Carriers, 14.

STOCK, SHARES OF. See Corporations, 1; New Trials, 2; Taxation, 15.

STREETS. See Municipal Corporations, 6, 12; Constitutional Law, 14, 25; Government, 1.

SUBROGATION. See Insurance, 2.

SUBSCRIPTION. See Corporations, 11.

SUBSTITUTION. See Banks and Banking, 1.

SUPERSEDEAS. See Appeal and Error, 2.

SUNDAY.

1. *Sunday—Criminal Law—Railroads—Logging Roads.*—A lumber railroad, over which steam locomotives haul logs, comes within the provisions of C. S., 3480, making it a misdemeanor for railroads to permit the operation of trains, etc., on Sunday, whether it transports freight or passengers, for hire or otherwise, and it is immaterial whether it was for the sole purpose of supplying its extensive lumber manufacturing plants on Monday. *S. v. Lumber Co.*, 122.

2. *Same—Constitutional Law.*—The setting aside of Sunday as a day of rest and quiet is not a religious, but a police regulation, necessary to the health and welfare of the people, and it applies to railroads, including logging roads (C. S., 3480), to the employees therein engaged; and the provisions of our Constitution requiring religious liberty have no application. *Ibid.*

3. *Sunday — Municipal Corporations — Cities and Towns—Ordinances—Restaurants—Hotels—Criminal Law.*—A town ordinance that makes it a misdemeanor to keep places of business open on Sunday, or sell

SUNDAY—*Continued.*

goods therefrom, including hotels, restaurants, etc., without exception as to the necessity of serving meals within reasonable hours, is invalid so far as it affects the service of the meals to those having no other place to get them, and a conviction as to those under such circumstances cannot be upheld. *S. v. Blackwelder*, 561.

SUPREME COURT. See Appeal and Error, 2, 36.

1. *Supreme Court—Decisions—Stare Decisis—New Trials—New Evidence —Evidence.*—A decision of the Supreme Court on a former appeal in an action between the same parties upon the same cause will not be held as controlling when on a later trial in the Superior Court evidence has been introduced that would render the former opinion inapplicable upon the point therein passed upon. *Pettitt v. R. R.*, 9.

2. *Supreme Court—Decisions—New Trials—Second Appeal.*—The former decision of the Supreme Court, holding that the issue as to plaintiff's damage for overflow of water upon his land should have been submitted to the jury upon evidence tending to show that defendant had enlarged an established common drainage ditch to increase the flow of water upon plaintiff's lands, does not apply to the present appeal, wherein it appears that the defendant had not so enlarged the ditch or increased the flow of the waters, to plaintiff's damage. *Armstrong v. Spruill*, 18.

SURETY. See Clerks of Court, 8.

SURPLUSAGE. See Actions, 2; Criminal Law, 7.

SURVIVORSHIP. See Estates, 2.

TARIFF. See Railroads, 8.

TAXATION. See Constitutional Law, 2, 4, 5, 6, 7, 8, 9, 10, 14, 17, 20, 26; Injunction, 1; Statutes, 3, 4, 5, 6, 7, 11; Commerce, 2; Schools, 1, 3, 6, 7.

1. *Taxation—Payment Under Protest—Actions—Rights and Remedies.*— Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. C. S., 7979. *Carstarphen v. Plymouth*, 90.

2. *Taxation—Personal Property—Liens—Levy.*—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon (C. S., 7986, 2815), subject to certain exemptions specified in Const., Art. V, secs. 3 and 5. *Ibid.*

3. *Same—Vendor and Purchaser—Rights and Remedies—Statutes.*—Chapter 38, Public Laws of 1921, requires the owner, etc., to list his property for taxation in a manner prescribed, as of the first day of May, making his wilful failure to do so a misdemeanor, with provision for his punishment, the lists to be given in by him to the proper authorties in the months of May and June, giving power to the county board of commissioners or governing body of any municipal corporation, on his failure to have done so, to enter or list the same, with certain penalties added, for a period of five back years, etc.: *Held*, where a seller of a stock of merchandise had failed to list it, and, after the first of May, had sold it to the plaintiff, and the county commissioners or governing body of a municipality had

TAXATION—*Continued.*

failed to list the same as the statute requires, no lien attaches against the stock of merchandise in the purchaser's possession, and he holds the same free from any lien or demand for the payment of the taxes on the unlisted personalty, the remedy of the municipality being against the seller, constituting a lien on his other personal property from time of levy, and on his real property from 1 June. C. S., 7987, for the time prescribed. *Ibid.*

4. *Taxation — Automobiles — License Tax—Statutes—Interpretation.*—A manufacturer of both automobiles and auto trucks is required by the revenue laws of 1923 to pay a separate license tax for the manufacture and sale of each in this State, the intent of the Legislature appearing by this later act to amend the laws of 1921 in this respect, which required one tax of $500 only from such manufacturer of both, the later statute requiring the Commissioner of Revenue to collect $500 for the privilege of engaging in the business, either of selling automobiles or auto trucks, a separate tax on each, though both be manufactured by the same concern. *Automotive Trade Association v. Sheriff*, 159.

5. *Taxation — Municipal Corporations — Cities and Towns—Sewerage—Necessary Expense.*—A sewerage system, being necessarily used by a municipal corporation in connection with its water system, required for the health of its citizens, is a necessary expense within the intent and meaning of the Constitution, and does not require for the validity of bonds issued for that purpose an approval by the vote of the electors; and the statute of 1923, authorizing an alternate method of financing an installation of sewerage, does not take away the power conferred by the general municipal statute; and the amount of a bonded indebtedness for this purpose may be deducted from the gross debt of the municipality in computing its net indebtedness. *McNeill v. Whiteville*, 163.

6. *Taxation—Statutes—Municipal Corporations—Cities and Towns—Absentee Voters—Irregularities—Discretionary Powers.*—The absence of the registrar from the designated place of registration is an irregularity over which the electors have no control, and, such provisions being directory, it will not invalidate the result of the election when it appears that no elector was deprived of the right to register and vote, and each had full information of the place where he could register, and had been afforded reasonable opportunity to do so. A deviation in this respect is not encouraged by the court. *Davis v. Board of Education*, 227.

7. *Same—Conditions Precedent—Mandatory Laws.*—The amendment by Public Laws of 1919 of those of 1917, now C. S., 5960, allowing electors within the voting district, without being present at the polls, to vote in the prescribed manner, is upon the condition precedent that with their ballots so to be cast it shall be shown by a certificate of a physician or by affidavit that such persons were physically unable to attend, as was intended as a matter of public policy, to prevent fraud in elections; and its compliance being within the power of such electors, the statute in this respect is mandatory; and where a sufficient number of them have so voted as to result in less than a majority of the registered voters for the special tax or bonded debt a school district proposes to issue, the certified result in favor of the proposition will be declared invalid. *Ibid.*

TAXATION—*Continued.*

8. *Same.*—C. S., 5968, providing that election laws shall be literally construed in favor of the elector's right to vote, has no application when he desires to avail himself of a special privilege and does not, of his own volition, comply with the conditions precedent prescribed by the statute, which gives him the right to do so. C. S., 5960. *Ibid.*

9. *Taxation—Schools—Injunction—Statutes—Repealing Acts—Appeal and Error—Judgments.*—It is peculiarly within the legislative authority to levy or repeal a tax; and where an injunction has been issued by the courts against the levy of a special tax for public school purposes by a school district, affirmed by the Supreme Court on appeal, but before the order had been signed in the Superior Court in conformity with the opinion, the Legislature has abolished the school district and the levying of the tax, the plaintiff's right to the injunctive relief ceases, though the judge thereafter signs the order by inadvertence to the repealing statute. *Berrier v. Comrs.*, 564.

10. *Taxation—Payment—Protest—Statutes.*—To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of C. S., 7979. *Express Co. v. Charlotte*, 668.

11. *Taxation—Municipal Corporations—Cities and Towns—Express Companies—Statutes—Automobiles—Motor Trucks—Privilege Tax.*—The tax imposed upon express companies by the provisions of sections 79, 79a, chapter 34, Public Laws of 1921, being an act to raise revenue, payable to the State upon a percentage of their mileage, and in certain sums of money to municipal corporations according to population, and also a privilege tax to the latter, prohibiting municipalities from collecting additional taxes thereon, does not include within its intent and meaning the tax imposed by section 29, chapter 2, Laws of 1921, in favor of municipal corporations for the privilege of operating a motor vehicle therein and in transporting property for hire. *Ibid.*

12. *Same.*—Where an express company delivers goods to the consignee in cities, this service is in addition to that in smaller places, where deliveries are not so made, for which additional service compensation is included in its general express charges, and comes within the intent and meaning of chapter 2, section 29, Public Laws 1921, authorizing a tax of not exceeding $50 for each motor truck operated within the municipality. *Ibid.*

13. *Same—Courts—Judicial Knowledge.*—The courts will take judicial notice that express companies do not deliver freight to the consignees in small places as they do in larger cities, and that in the latter the large express trucks employed in this service are damaging to the streets, which the municipality is obliged by statute to keep in proper repair for the benefit of its citizens. *Ibid.*

14. *Taxation—Constitutional Law—Commerce—Discrimination.*—A statute permitting a municipal corporation to impose a tax on all express companies alike for delivering goods by trucks to consignees in a city, is uniform in its application, comes within the police powers of the State, and is not contrary to the Constitution in relation to either intrastate or interstate commerce, and the imposition of a tax therefor not to exceed $50 on each motor truck, is held to be reasonable. *Ibid.*

TAXATION—*Continued.*

15. *Taxation — Mandamus — Corporations — Shares of Stock—Pleadings—Demurrer—Courts—Jurisdiction—Commissioner of Revenue.*—On this appeal from sustaining a demurrer of the Superior Court for a writ of *mandamus* to compel the State Commissioner of Revenue to have listed for taxation as personal property shares of stock in foreign corporations held by resident stockholders in this case, *it is held* that the opinion in *Person v. Watts*, 184 N. C., 499, controls, and that the complaint failed to state facts sufficient to constitute a cause of action, and that the court had no authority or jurisdiction to grant the relief demanded. *Person v. Doughton*, 723.

16. *Same—Constitutional Law.*—The provisions of section 4, Revenue Act of 1923, excepting from taxation shares of stock held in this State when the situs of the corporation is in another State where it has its principal place of business and conducts the same, are not in contravention of Article V, section 3, of the State Constitution: *Held further*, the remedy by *mandamus* is not ordinarily applicable when the constitutionality of a statute is involved in the controversy. *Ibid.*

TENANT BY THE CURTESY. See Trusts, 3.

TENDER. See Trusts, 12.

TERM. See Statutes, 6; Appeal and Error, 32.

TESTIMONY. See Husband and Wife, 4; Evidence.

TIMBER. See Deeds and Conveyances, 11.

TIME. See Bills and Notes, 2; Pleadings, 12; Appeal and Error, 31.

TITLE. See Vendor and Purchaser, 2; Corporations, 3; Evidence, 19, 24; Estates, 11; Mortgages, 3; Trespass, 2; Municipal Corporations, 1; Husband and Wife, 2; Constitutional Law, 12; Wills, 13.

TOOLS. See Negligence, 4.

TORTS. See Carriers, 3, 5, 7.

TORT-FEASOR. See Insurance, 2.

TRADE. See Evidence, 10.

TRANSACTIONS WITH DECEDENT. See Evidence, 39, 43.

TRANSFER OF CAUSES. See Corporations, 1, 2; Divorce, 5. Removal of Causes; Venue.

TRANSFER OF STOCK. See Corporations, 1, 2.

TRESPASS. See Evidence, 19.

1. *Trespass — Possession—Landlord and Tenant—Actions.*—The plaintiff in rightful possession of land may maintain an action against a trespasser thereon, though claiming the right to such possession under the title of another. *Tripp v. Little*, 215.

2. *Same—Title—Parties.*—The owner of the title to lands is proper and at times a necessary party to an action of trespass brought by his tenant, or one who is in possession under him, when the wrongful invasion of the property involves an injury both to the possession and the inheritance. *Ibid.*

TRESPASS—*Continued.*

3. *Same—Courts—Statutes.*—Under the provisions of our statute, the court has the power to order the owner of the title to be made a party in his tenant's action of trespass involving an injury both to the possession and to the inheritance. C. S., 446, 456, 460. *Ibid.*

4. *Same—Abatement.*—The owner of the legal title conveyed the lands to his son, and thereafter, while continuing in peaceful possession, instituted an action for trespass involving injury both to the possession and the inheritance; and after his death, pending this action, the court substituted the son as party plaintiff, under defendant's objection, who moved in abatement of the action on the ground that the original plaintiff did not own the legal title at the time of action commenced: *Held*, the motion was properly denied. *Ibid.*

TRIALS. See Criminal Law, 1; Contracts, 9; Pleadings, 11; Vendor and Purchaser, 5; Evidence, 15, 29, 32, 33, 46; Appeal and Error, 22; Insurance, 8; Negligence, 5; Murder, 1; Injunction, 3; Municipal Corporations, 11.

Trials—Court's Discretion—Evidence—Nonsuit.—Exception that the trial judge did not rule upon appellant's motion as of nonsuit upon the evidence, took a recess for dinner, and before ruling thereon permitted testimony of appellee's witness, is a matter within the sound discretion of the court, and is not reviewable on appeal. *S. v. Hopper*, 405.

TRUSTS. See actions, 2; Venue, 1; Wills, 13.

1. *Trusts—Resulting Trusts—Husband and Wife—Purchase-Money—Evidence.*—Where the wife has furnished the purchase-money for lands, and the husband has taken a deed conveying the legal title to himself, without valid agreement between themselves that he should acquire it, the law raises a resulting trust in the lands in favor of the wife, the husband holding the mere legal title under the general equitable principles applying, which she may enforce as the beneficial owner. The rule admitting parol evidence to rebut a resulting trust has no application to the facts of this case. *Tyndall v. Tyndall*, 272.

2. *Same — Descent and Distribution — Statutes.*—The resulting trust in favor of the wife in lands the legal title to which has been acquired by her husband by deed is now descendible to her heirs under our canons of descent, defining seizin to be any right, title or interest in the inheritance, under the definition of seizin, for the purpose, being any right, title or interest in the inheritance (C. S., 1654, Rule 12), though she may not have been in separate possession thereof during her life. *Barrett v. Brewer*, 153 N. C., 547, cited and distinguished. *Ibid.*

3. *Same—Tenant by the Curtesy.*—Where the husband had the legal title to lands conveyed to him, in which the wife had a trust resulting in her favor, she having furnished the purchase-money, after her death her husband is entitled to an estate therein as tenant by the curtesy (C. S., 1654, Rule 12), there being children of the marriage born alive and capable of inheriting. The old common-law rule, and changes therein made by statute, discussed by ADAMS, J. *Ibid.*

4. *Trusts — Parol Trusts — Deeds and Conveyances—Grantor.*—A parol trust in lands, where a fee-simple title has been conveyed, cannot be engrafted in favor of the grantor in the deed. *Blue v. Wilmington*, 321.

TRUSTS—*Continued.*

5. *Trusts—Wills—Devises—Active Trust—Corpus of Fund.*—A devise to another of the interest on a certain sum of money to be collected and paid over to the testator's son during his life, and at his death the designated sum to be paid in certain proportions to certain persons designated, is not construed as the intent of the testator of a gift of the *corpus* of the fund to the first taker, but only that it be invested and the income thereof paid to him for his life. *Cole v. Bank*, 514.

6. *Same.*—Where there is a special duty to invest funds and pay the interest to another during his life, an active trust is created for the collection and application of the income, it being required that the trustee hold the legal title for the performance of his duties. *Ibid.*

7. *Same—Contracts—Beneficiaries.*—Where the testator creates an active trust for the investment of a fund and the payment of the interest thereon to the son for life, directing a distribution after his death in certain proportions to designated beneficiaries, an agreement among the beneficiaries that the son shall have the *corpus* of the fund will not affect the trust created by the original owner of the funds. *Ibid.*

8. *Same—Residuary Clauses.*—Where an active trust is created in a certain item of a will for the payment of interest on a certain fund by the trustee to the testator's named son for life, and at his death to certain beneficiaries, and by a residuary clause the undisposed of property shall be divided among these beneficiaries in the same proportion as designated in the former item, specifically referring to it, the testator's intent is construed as giving to his son his part of the residue upon the same condition or with the same status as the specified sum therein—*i. e.*, the income for his life, etc. *Ibid.*

9. *Trusts—Parol Trusts—Statute of Frauds.*—At common law, a trust in favor of a mortgagor of land may be engrafted upon the legal title acquired by the purchaser at the foreclosure sale by a parol agreement between them, that the latter should convey the legal title upon repayment by the mortgagor of the price such purchaser had paid, with the interest thereon to date of payment, and the seventh section of the statute of frauds, requiring that a writing to that effect be signed by the parties, etc., being omitted from the statute in this State, is not in effect here, and such writing is not required, the matter standing as at common law. *Cunningham v. Long*, 526.

10. *Same—Evidence.*—Evidence that before and after the foreclosure sale, under mortgage, the purchaser agreed with the mortgagor, a close personal friend of his, that he would bid in the property and hold the title for his benefit until he could repay the purchase price with interest thereon; that the price so paid was much less than the value of the lands; that the purchaser was wealthy and had declared that he had all the lands he wanted, and did not desire the lands for himself or family, is sufficient of facts and circumstances *de hors* the deed inconsistent with the idea of an absolute purchase to take the case to the jury upon the issue as to whether a parol trust had been established in the mortgagor's favor. *Ibid.*

11. *Same—Questions for Jury.*—In order to establish a parol trust in lands, the question whether the evidence, if sufficient, is clear, cogent and convincing, is one for the jury. *Ibid.*

TRUSTS—*Continued.*

12. *Same—Tender.*—In order to enforce a parol trust upon the title to lands, it is not necessary that an actual tender of the consideration should have been made, when it is made to appear that the holder of the legal title had refused to recognize the trust and would have refused to accept the tender had it been made. *Ibid.*

13. *Trusts—Parol Trusts—Laches.—Held*, in this case there was evidence tending to show an express trust with an indefinite period for the redemption of the land, the subject of the trust, and there was nothing shown of record that concluded the plaintiff, on the ground of laches or unreasonable delay, from enforcing it. *Ibid.*

14. *Trusts — Hospitals—Deeds and Conveyances—Mortgages.*—The owner of lands conveyed them to two trustees to be held for hospital purposes and to receive additional gifts from others for the same purpose, which was later incorporated by the Legislature to create a succession of trustees: *Held*, a later conveyance of adjoining lands by another owner to two other trustees for the purpose of another gift, with power to convey or mortgage the same at the request of the hospital trustees, created an active trust, and in the absence of any charter provision to the contrary, the trustees in the second deed, in accordance with its provisions, were authorized and required to make a mortgage thereon for money necessary to be used for hospital purposes. *Hospital v. Crow*, 741.

TURLINGTON ACT. See Intoxicating Liquors, 4.

ULTRA VIRES ACTS. See Municipal Corporations, 2.

USE. See Negligence, 1.

VENDOR AND PURCHASER. See Bills and Notes, 1; Principal and Agent, 1; Taxation, 3; Contracts, 3, 11; Evidence, 11, 29; New Trials, 2.

1. *Seller and Purchaser—Vendor and Purchaser—Warranty—Right of Inspection—Carriers—Railroads.*—Where one purchases goods upon the representation and warranty as to quality by the seller's agent, to be shipped from a distant point, without express agreement as to the time the purchaser may take for inspection, the law gives him a reasonable time after the goods have reached their destination for that purpose, and he may reject them without liability if they should not be as warranted. *Paint and Lead Works v. Spruill*, 68.

2. *Same—Title—Delivery to Carrier.*—Where the law gives the purchaser a reasonable time to inspect goods received by common carriage after they reach destination, delivery to the carrier is not constructive delivery to the consignee in the sense to deprive him of his right of inspection under the seller's warranty of quality. *Ibid.*

3. *Same — Instructions — Directing Verdict — Appeal and Error.* — The seller's agent warranted to the purchaser that the paint he was selling was fireproof and would be shipped in metal drums, and not in wooden barrels, which were improper for the purpose, the purchaser refused the shipment and payment therefor, and the action is to recover the purchase price: *Held*, a warranty of quality; and it was error for the trial judge to reject evidence offered to show that paint exactly similar and sold by the same agent to others

VENDOR AND PURCHASER—*Continued.*

failed to come up to the guarantee that the article was fireproof; and that a direction of a verdict for the plaintiff was reversible error. *Ibid.*

4. *Same—Fraud—Deceit—Evidence—Questions for Jury.*—And upon the evidence in this case tending to show that the agent's representations as to quality were knowingly false and fraudulent, and induced the defendant to purchase, the case in that respect should also have been submitted to the jury. *Ibid.*

5. *Seller and Purchaser—Vendor—Fraud—Deceit—Pleadings—Motions—Nonsuit—Questions for Jury—Trials.*—In an action to recover upon a note given for shares of stock, the defendant admitted the execution of the note and alleged and offered evidence tending to show that the plaintiff, while an officer of the corporation and having peculiar and superior knowledge of its financial affairs, had induced him to purchase, knowingly representing that the corporate indebtedness was much less than it actually was, and that otherwise he would not have made the transaction: *Held*, upon plaintiff's motion as of nonsuit, the issue of fraud and deceit was for the jury. *Sanders v. Mayo*, 108.

6. *Same.*—*Held*, upon the evidence in this action upon a note given for the purchase of shares of stock in a corporation, it was for the jury to determine whether the misrepresentations were of such character and were made under such circumstances as were calculated to impose upon or deceive the defendant, as a person of ordinary prudence, and whether he, as such, should have relied upon them. *Ibid.*

VENUE. See Criminal Law, 20; Divorce, 4.

1. *Venue—Interests in Land—Trusts—Statutes—Removal of Causes.*—An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue therefor is in the county in which the land is situate, C. S., 463 (1), though it may appear that the alleged trustee has conveyed a part thereof to innocent purchasers by proper deed; and upon motion made by him, the cause brought in another county should be transferred as a matter of right. *Williams v. McRackan*, 381.

2. *Same—Courts—Procedure—Appeal and Error.*—Under the provisions of chapter 92 (15), Public Laws of 1921, Extra Session, authority is conferred upon the clerk to hear motions for the transfer of a cause to the proper venue, subject to appeal to the judge at the next ensuing term of the Superior Court, from which appeal may be taken to the Supreme Court. *Ibid.*

VERDICT. See Pleadings, 2; Parties, 1; Burglary, 5; Appeal and Error, 16, 26; Taxation, 1; Courts, 1; New Trials, 2.

1. *Verdict—Inadvertence—Correction—Courts.*—It is proper for the judge to call to the attention of the jury, when they render their verdict, an inadvertence on their part in awarding a larger amount in their verdict than the plaintiff claimed in his action—in this case 95 cents. *Cohoon v. Cooper*, 26.

2. *Verdicts — Appeal and Error — Compromise—New Trials.*—The jury should arrive at their verdict upon the evidence, under their oaths, and upon discussion a juror should yield in his view only upon

VERDICT—*Continued.*

being convinced of its error, and not reach a unanimity otherwise; and a verdict clearly appearing to be a compromise, and so stated therein, is a compromise verdict, not allowed by law, and should be set aside after its rendition, and a new trial ordered. *Bartholomew v. Parrish*, 81.

3. *Verdict—Interpretation.*—The verdict of the jury should be considered on appeal, in the light of the evidence and the charge of the court. *Castelloe v. Jenkins*, 167.

VERIFICATION. See Pleadings, 8.

VESTED INTERESTS. See Estates, 8.

VOLUNTARY NONSUIT. See Pleadings, 1.

WAIVER. See Insurance, 1; Courts, 4; Appeal and Error, 25; Corporations, 11; Evidence, 40; Railroads, 10.

WAR. See Railroads, 8.

WARRANT. See Arrest, 1.

WARRANTY. See Vendor and Purchaser, 1.

WATERS.

1. *Waters—Drainage—Damages—Lower Proprietor.*—Where it is shown that a drainage ditch is common to several owners of land through which it runs, and that the owners and predecessors in title have cleared or maintained the ditch on their own lands for this purpose for a long term of years: *Held*, in an action for damages by overflow water by a lower proprietor against an upper one, that it is the duty of the former to cut and keep the ditch properly open on his own land without obligation of the upper proprietor to do so for him; and where the upper proprietor has not increased or changed the flow of the water upon the lands of the lower one, the latter may not recover damages in his action therefor. *Armstrong v. Spruill*, 18.

2. *Same—Contracts.*—And where the owners of land have afterwards entered into a written contract, whereby each one draining into the common canal has obligated himself to cut, clear out, and maintain it, each paying his proportionate part, an upper proprietor properly doing more than his share creates no cause of action against him thereby, or relieves the lower proprietor from sustaining the damages caused by the flow of water on his own land, occasioned by his breach of duty to perform his own agreement upon his own land. *Ibid.*

3. *Waters — Drainage — Discontinuance—Statutes.*—Where an owner of lands in connection with other adjacent owners is bound to the clearing out and cutting of a drainage canal on his land that has been used by them all and their predecessors in title in common for a long term of years, he must give notice of his wish to discontinue it, under the provisions of the statute, to relieve him of responsibility for not doing so. *Ibid.*

WIFE. See Habeas Corpus, 5.

WILLS. See Estates, 1; Trusts, 5. Husband and Wife.

1. *Wills — Clerks of Court — Courts — Executors and Administrators— Qualification of Executors—Statutes.*—It is required of the clerk of the court to require a nonresident named as executor in a will to give a bond in double the value of the personal property of the estate (C. S., 34) before he takes the oath (C. S., 39), the amount of the bond to be ascertained upon examination of such person, or some other competent person under oath (C. S., 33): *Held*, where such person has taken possession of the personalty and has peculiar knowledge of it, refused information to the widow and all others, and to be examined by the clerk while passing upon his fitness, it is proper for the clerk to refuse to issue the letters of administration to him. *In re Will of Gulley*, 78.

2. *Wills—Clerks of Court—Courts—Executors and Administrators—Refusal of Letters.*—Where the clerk of the court has refused to issue letters of administration to the one named as executor in the will, and has exercised his discretion in appointing another—in this case the widow—the letters issued to the widow are effective. *Ibid.*

3. *Wills — Clerks of Court — Courts — Executors and Administrators— Judgments—Appeal—Review.*—The adjudication by the clerk of the unfitness of one named in a will as executor is subject to review by the Superior Court judge, and as to matters of law, in the Supreme Court on appeal. *Ibid.*

4. *Wills—Clerks of Court—Courts—Disqualification of Executor—Caveat —Executors and Administrators.*—Where a will has been admitted to probate, reserving by mutual consent the question of the fitness of the person therein named as executor, upon the appointment of another by the clerk, the rights of interested parties to file a *caveat* to the will is not impaired. *Ibid.*

5. *Wills — Interpretation — Estates — Possession—Remainders.*—Unless a contrary intent appears from the construction of a will, a devise of real property to one for life, remainder over, gives to life tenant the right of possession and control during the continuance of his estate, subject to the debts against the estate: the same principle usually prevailing as to direct bequests of personal property, except where it is given as a residuary bequest, to be enjoyed by persons in succession, etc., when the property is converted into money and the interest paid to the legatees during the continuance of their respective estates. *Burwell v. Bank*, 117.

6. *Same—Powers—Deeds and Conveyances.*—A devise of testator's real and personal property to his wife, to have and to hold and to use as her own as her necessities may demand during her life, and no more, and with further limitation in trust of the property left on hand, the personalty having been exhausted to pay decedent's debts: *Held*, the will expressed the intent that the widow should have possession and enjoyment only of the land during her life estate, under the prevailing rule of law, without power to sell or convey in fee. *Ibid.*

7. *Wills — Caveat—Statutes—Limitation of Actions—Married Women.*— Since the enactment of later statutes fully emancipating a *feme covert* from her disabilities, the provisions of C. S., 4158, barring the

WILLS—*Continued.*

right to *caveat* a will after seven years, with certain exceptions, apply equally to her. C. S., 454, and chapter 13, Laws of 1913. *In re Will of Witherington*, 152.

8. *Wills — Caveat — Outstanding Life Estates—Limitation of Actions—Statutes.*—One who is authorized by law to *caveat* a will is not required to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a *caveat* to a will may be filed. C. S., 4158. *Ibid.*

9. *Wills — Interpretation—Intent—Presumptions—Statutes.*—In its interpretation, a will will be given effect in accordance with its intent as gathered from the entire instrument, unless in violation of law; and where the will is sufficiently ambiguous to permit of construction there is (1) a presumption against intestacy; (2) the first taker is to be considered as the primary object of the testator's bounty; and, by statute, a devise in this State of real property is to be construed in fee, unless in plain and express words it is shown or plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. C. S., 4162. *Smith v. Creech*, 187.

10. *Same—Deeds and Conveyances—Mortgages.*—Several sisters, tenants in common of land, devised their interest to each other without residuary clause, all to the effect that should the testatrix's sisters, or any one of them, marry, to those remaining unmarried, and so on to the last single sister; and should all of them marry, then the estate to be equally divided between the surviving sisters or their lawfully begotten heirs. All of them died without leaving issue, and the will of the last surviving sister devised the lands to her brother, with direction to pay certain specific bequests, who paid the same and mortgaged the land to the plaintiff in this action: *Held*, the intent of the wills was to convey the fee simple in the lands to the sisters, defeasible as to each upon her marriage, and so on to the last survivor, and her devise to her brother was of a fee-simple title and subject to his mortgage: *Ibid.*

11. *Wills—Interpretation—Extraneous Acts—Evidence.*—Acts of the parties in disposing of property as owner may, in proper instances, be received as evidence of their own concept of the meaning of his devise. *Ibid.*

12. *Wills—Interpretations—Interest—Rules of Construction.*—A contrary intent of the testator will not be presumed which is at variance with the obvious meaning of the language he has used in his will, construed in accordance with the established canons of construction. *Power Co. v. Haywood*, 314.

13. *Wills — Devises — Statutes — Title—Trusts—Indefinite Beneficiaries—Powers.*—A devise to the wife of all of the testator's property, real, personal or mixed, with full management and control thereof during her natural life; that she shall enjoy full benefits thereof with power to sell and dispose of it at her discretion, and that it was the testator's will and desire that she shall devise whatever property she has not thus disposed of during her natural life, or the proceeds thereof, to the person or persons who have been the "kindest to us in aiding and comforting us in our old age," whether kinsman or

WILLS—*Continued.*

stranger: *Held*, under the provisions of C. S., 4162, the wife acquired a fee-simple title, and there being no definite person or persons in whose favor a trust could be created, upon the death of the wife, intestate, the property or estate descends to her heirs at law, or legal representatives. *Weaver v. Kirby*, 387.

14. *Wills—Interpretation—Intent.*—The intent of the testator as gathered from terms employed by him in his will, will control in its interpretation, when not contrary to the settled rules of law. *Pratt v. Mills*, 396.

15. *Same—Deeds and Conveyances.*—An estate to certain named daughters of the testator, but upon their marriage or death to be divided equally among them, "and descendants": *Held*, construing the will to effectuate the testator's intent, the enjoyment of the ulterior devise and the right to take it was postponed until after the death or marriage of the last surviving daughter, and a purchaser from them before then could not acquire the absolute fee-simple title. *Ibid.*

16. *Wills—Devise—Estates—Rule in Shelley's Case.*—The rule in *Shelley's case* prevails in this State as a rule of property, overruling any particular intent of the grantor or devisor expressed in the instrument to the contrary, falling within its application. *Bank v. Dortch*, 510.

17. *Same—Fee Tail—Statutes—Fee Simple.*—A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in *Shelley's case*, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee-simple title. C. S., 1734. *Harrington v. Grimes*, 163 N. C., 76, cited and applied. *Ibid.*

18. *Wills—Revocation—Cancellations—Alterations—Statutes.*—In order to a revocation of a will, in whole or in part, under the provisions of C. S., 4133, there must not only exist the intent of the testator to cancel, but it must be accompanied by the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. *In re Will of William Love*, 714.

19. *Same.*—Where the primary or controlling clause of a will remains unaltered by the obliteration of the testator of words therein, and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of C. S., 4133; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. *Ibid.*

WITNESSES. See Evidence, 4, 5, 6, 33, 34, 35, 36, 37.

WORK. See Railroads, 3.

WRITTEN INSTRUMENTS. See Evidence, 9, 12; Contracts, 1, 9; Municipal Corporations, 17.